

**Washam v City of New York**

2021 NY Slip Op 31336(U)

April 21, 2021

Supreme Court, New York County

Docket Number: 151901/2018

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LYLE E. FRANK PART 52**

*Justice*

-----X

VERONICA WASHAM,  
  
Plaintiff,

- v -

THE CITY OF NEW YORK, JOHN DOE  
  
Defendant.

INDEX NO. 151901/2018  
MOTION DATE N/A  
MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for DISMISSAL.

This action arises to recover damages for personal injuries allegedly sustained by plaintiff when she was injured as she was being lifted from the ground by two Emergency Service Technicians (EMTs) employed by the Fire Department of New York (FDNY). Defendant the City of New York (City), moves for order pursuant to CPLR 3211(a)(7) dismissing the complaint for failure to state a cause of action or, in the alternative, for summary judgment pursuant to CPLR 3212. Plaintiff opposes the instant motion. For the reasons set forth below the City’s motion is granted and the complaint is dismissed.

On November 11, 2017, plaintiff was injured when she tripped on a bag and fell in her apartment. Plaintiff was unable to lift herself up, so she called building security to help her, when the security guard arrived at her apartment, he called 911. The EMTs arrived at plaintiff’s apartment and were told by plaintiff that she had a bad arm. Plaintiff testified that while being lifted by the EMTs she felt that her left humerus was broken, and she let out a scream. Plaintiff was placed back on the ground as the EMTs waited for another unit to arrive and plaintiff was transported to the hospital.

The City moves to dismiss the complaint on the grounds that plaintiff has failed to plead a special duty in her complaint. In opposition to this argument, plaintiff contends that the special duty doctrine is inapplicable, however, she attaches an affidavit to cure any alleged deficiency. Accordingly, the Court will deem this motion as one for summary judgment rather than a motion pursuant to CPLR 3211(a)(7).

When determining a motion for summary judgment, the issue is not whether the plaintiff can ultimately establish liability, but “whether there exists a substantial issue of fact in the case on the issue of liability which requires a plenary trial” (*Barr v County of Albany*, 50 NY2d 247, 254 [1980]). The court’s role “is limited to issue finding, not issue resolving” (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 531-532 [1991]; see *National Fin. Partners Corp. v USA Tax & Ins. Servs., Inc.*, 145 AD3d 440, 441 [1st Dept 2016]). The moving party has the burden to make prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The party opposing summary judgment must produce by admissible evidence the existence of a factual issue requiring a trial (*id.*).

A special duty may arise in three scenarios: (1) a statute exists for the benefit of plaintiff; (2) the municipality voluntarily assumed a duty greater than that which is owed to the public at large; or (3) where the municipality takes positive control over a known dangerous condition (see *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013], *Albino v New York City Hous. Auth.*, 78 A.D.3d 485, 488 [1st Dept 2011]).

When a negligence claim is asserted against a municipality, “the first issue . . . is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose” (*Applewhite v Accuhealth, Inc.*, 21 NY3d at 425). A municipality is

deemed to have engaged in a governmental function “when its acts are undertaken for the protection and safety of the public pursuant to the general police powers” (*id.* [internal quotation marks and citation omitted]). The Court of Appeals has held that “a municipal emergency response system—including the ambulance assistance rendered by first responders such as the FDNY EMTs. . .—should be viewed as a classic governmental [ ] function” (*id.* at 430 [internal quotation marks and citation omitted]).

If a municipality engaged in a governmental function, under the public duty rule, the municipality owes a general duty to the public at large but is not subject to claims of negligence by an injured person unless the facts demonstrate that a special duty was created between the injured plaintiff and the governmental entity. *See Valdez*, 18 NY3d at 75. “Without a [special] duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm.” *Lauer v City of New York*, 95 NY2d 95, 100 [2000].

To establish a voluntary assumption of a special duty the plaintiff must demonstrate: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking. *Cuffy v City of New York*, 69 NY2d 255, 260 [1987].

Plaintiff argues that defendants voluntarily assumed a special duty of care in responding and attending to plaintiff's emergency.

Here, the City has established that the underlying allegations set forth in the pleadings and subsequent affidavit, render the doctrine of special duty applicable. Moreover, the City has established that the EMTs were performing a discretionary governmental function. As to the

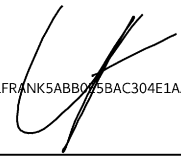
first and fourth factors of the *Cuffy* test, there is simply no evidence that defendants affirmatively promised through words or actions to act on behalf of plaintiff in a manner *above and beyond* their duty owed to any member of the public in need of medical help who calls 911, such that she was justified in her reliance. In opposition and during oral argument, plaintiff failed to articulate how the EMTs made any assurances and she detrimentally relied on the same.

Even if it could be found that plaintiff has sufficiently alleged that defendants made a promise that was personal to her, above and beyond what would normally be given to a member of the public at large seeking medical assistance, she does not explain the nature of her reliance or what she would have done differently but for the actions of the EMTs (*see, e.g. Holloway v City of New York*, 141 AD3d 688, 690 [2d Dept 2016] [even assuming that the assurance that an ambulance was on its way constituted an assumption by the defendant of an affirmative duty to act on behalf of the defendant, the plaintiffs did not show that they were lulled or relied to their detriment on that assurance]). She makes only conclusory statements that she “justifiably relied on” the EMTs to perform their duties (plaintiff’s aff in opp, ¶¶ 9, 19, 20, 26). “The burden upon a party opposing a motion for summary judgment is not met merely by a repetition or incorporation by reference of the allegations contained in pleadings or bills of particulars, verified or unverified” (*S.J. Capelin Assoc. v Globe Mfg Corp.*, 34 NY2d 338, 343 [1974] [internal quotation marks and citation omitted]). “Some evidentiary facts are required to be put forward” (*id.*).

Accordingly, it is hereby

ORDERED that defendants motion for summary judgment is granted and the complaint is dismissed in its entirety; and it if further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.



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4/21/2021

DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE