

Lomtevas v City of New York
2021 NY Slip Op 31766(U)
May 24, 2021
Supreme Court, New York County
Docket Number: 450869/2018
Judge: J. Machelle Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART IAS MOTION 62

Justice

-----X

INDEX NO. 450869/2018

VERA A. LOMTEVAS, individually and as the Administrator
of the Estate of D.Lomtevas

MOTION DATE 03/08/2021

Plaintiff,

MOTION SEQ. NO. 003

- v -

THE CITY OF NEW YORK, NEW YORK CITY
TRANSPORTATION AUTHORITY

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53,
54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for DISMISSAL.

Pending before the court is a motion filed by defendant NEW YORK CITY TRANSIT
AUTHORITY (“NYCTA”) seeking an order pursuant to CPLR §3211(a)(7) and/or §3212 for
summary judgment/dismissal of the complaint and all cross-claims by co-defendant, the City of
New York, on the grounds that: (1) the complaint fails to state a cause of action against NYCTA;
and (2) NYCTA is not liable for the subject incident because, as a matter of law, it owed no duty
to plaintiff. Also pending before the court is a cross-motion filed by plaintiff¹ seeking an order
staying this action, pending an appeal of an earlier decision in this action. Upon the foregoing
documents, the motion is GRANTED and the cross-motion is DENIED.

¹ Plaintiff is *pro se* in this action.

Relevant Procedural History and Facts

Plaintiff had initially filed this action against NYCTA, The City of New York (the “City”) and The Port Authority of New York and New Jersey (the “Port Authority”). In Motion Sequence #001, the court (Hon. Lisa A. Sokoloff) issued an order dated October 15, 2019 (the “Port Authority Order”) that granted the Port Authority’s motion for summary judgment; dismissed plaintiff’s complaint and all cross-claims against the Port Authority; and severed plaintiff’s claims against the remaining defendants. In Motion Sequence #002, the court (Hon. Lisa A. Sokoloff) issued an order dated December 19, 2019 that denied plaintiff’s motion to reargue motion #001. According to plaintiff, there is an appeal pending with respect to these earlier decision(s) (further discussed below).

With respect to the underlying action, the court made substantive findings of fact in the Port Authority Order, which are worth repeating here:

According to the complaint, on October 5, 2016, at about 4:00 a.m., DL, a college student, placed clothing under his blanket to give the appearance he was still in bed, left his house in Bensonhurst, Brooklyn, took an Uber to a subway station, boarded a D train and traveled to Manhattan. Before leaving his house, DL posted a suicide note to Reddit.com. Shortly after DL left home, his sister, EL, woke and discovered his absence. At 4:13 am, EL began texting him asking where he was and demanding that he return home. She then alerted DL’s parents that DL was no longer home.

At 5:19 am, DL’s sister contacted the New York City Police Department (“NYPD”) via a call to 911 to report DL missing. The operator told EL that they could do nothing beside filing a missing person report until EL knew DL’s precise whereabouts. E further told NYPD authorities that D was suffering from severe depression and suicidal thoughts and had previously attempted suicide on the Verrazano Narrows Bridge a few weeks earlier, in August 2016.

At her mother’s suggestion, EL was able to locate DL’s cell phone through the Apple “Find My iPhone” feature and thereafter tracked his movements. EL learned that DL was at the Macombs Dam Park near Yankee Stadium moving toward the Macombs Bridge. At 5:42 am, EL called NYPD authorities again through 911 to report that DL was near the Macombs Dam Park and requested that the NYPD go to the park immediately as DL was in a suicidal state. The 911 operator told EL that police were dispatched to DL’s cross-streets that E gave the 911 operator. However, because D’s location kept changing, the

operator told EL that officers would immediately report to the family residence to verify DL's location.

At 6:00 am, several NYPD police officers from the 68th Precinct arrived at the Lomtevas family residence in Brooklyn, New York. One of the officers who identified himself as "Joe" watched the Find My iPhone application track DL's whereabouts in real time. This information was relayed by "Joe" to his fellow NYPD officers. The NYPD officers who arrived at the Lomtevas home were informed by family members that DL had previously attempted suicide on August 22, 2016 at the Verrazano Narrows Bridge and that the incident resulted in the NYPD having to rescue him from the engineering walkway of the bridge.

Based on the GPS tracking of the Find My iPhone application, DL moved north quickly as if on a subway train to Kingsbridge. Officer "Joe" commented to his fellow officers that it appeared that DL was traveling through the Bronx. Meanwhile, EL was on the phone again with a 911 operator describing in real time DL's exact location and movements.

Subsequently, DL's location changed more rapidly as if he was on a train heading in a straight line toward Manhattan, allegedly on the D subway line rapidly heading southbound. At approximately 6:15 am, the application indicated that DL had moved to 145th street on the subway train and remained there for approximately twenty minutes.

One of the six NYPD officers outside the Lomtevas residence called D's cellphone at approximately 6:47 am. DL answered the call and kept the line open for about six minutes. According to the complaint, DL apparently told the NYPD police officer that he would return in an hour to the R train station at the intersection of 4 Avenue and 86th Street in southern Brooklyn. After DL hung up the phone, the NYPD officer attempted to call DL again, but DL refused to answer. The police officer entered the Lomtevas residence and announced that DL was coming home.

At approximately 6:55 am., the application showed that DL took the A train from 145th Street to 175th. He then proceeded north on foot to the south-side pedestrian walkway of the George Washington Bridge ["GWB"] where the phone application indicated DL was located just over the Fort Washington Park. The NYPD officers in the Lomtevas home made no attempt to alert Port Authority police department ("PAPD") officials or patrol of DL's location or that he was suicidal and needed to be rescued from the bridge.

According to PAPD Lieutenant Daniel McCabe, Shield #192, no one alerted Port Authority police that there was an active jumper approaching the bridge. Instead, Lieutenant McCabe said that members on that morning's shift 'overheard' NYPD radio traffic describing DL as he headed to the bridge. Lieutenant McCabe said they had twenty minutes of lead time to respond to DL's approach. According to Lieutenant McCabe, PAPD officers who were in their police car on their patrol spotted DL on the bridge's southern walkway. According to PAPD accounts, a Port Authority police officer stopped in the far lane of opposing traffic and ran across the roadway to the southern pedestrian walkway. The Port Authority officer apparently grabbed DL, who had climbed over the guardrail, and as Lieutenant McCabe asserted to DL's parents, "nearly went over the guardrail with DL."

DL's body was recovered from the water shortly after the fall, unconscious and exhibiting no vital signs. Ambulances had apparently been waiting for him and arrived at the emergency room at 7:38 am., but DL was pronounced dead 57 minutes after his arrival at the hospital.

In the complaint, plaintiff alleges that NYCTA was negligent in that the City's 911 operator placed NYCTA "on notice" that it needed to stop a subway train so that NYPD could intercept DL as he roamed New York City prior to reaching the GWB. Plaintiff alleged that NYCTA had an affirmative duty to "rescue" DL.

NYCTA's Motion

In the instant motion, NYCTA argues, first, that the subject incident did not occur on NYCTA property, but instead on the GWB, which was under the admitted operation and control of prior co-defendant Port Authority.

NYCTA also argues that the Port Authority had direct contact with DL when DL was on the GWB, but in the Port Authority Order the court found that even under those circumstances, the Port Authority was performing its governmental function in managing the GWB, and granted summary judgment to the Port Authority. NYCTA argues that NYCTA is "even further removed from the happening of the subject incident than the Port Authority was" and therefore owed no duty, special or otherwise, to the plaintiff or to DL.

NYCTA further argues that even if plaintiff is given the benefit of the doubt, the complaint does not allege that there was any direct contact or communication between plaintiff, DL, and NYCTA. Therefore, NYCTA argues, plaintiff has not even plead, much less proven, any of the necessary elements to maintain a claim that a special duty existed on the part of NYCTA.

In opposition, plaintiff argues that NYCTA's motion should be denied for two reasons. First, because the motion "lacks a statement of undisputed facts." Second, because the motion is premature, as "the Transit Authority produced objections to discovery but no discovery."

Specifically, plaintiff contends that DL's sister, EL, called 911 and notified the 911 operator that DL was on a train heading from the Bronx to Manhattan. EL asked if the subway could be stopped, and if a search for DL could happen, and the operator replied in the affirmative. However, the subway never did stop because NYCTA "was negligent in ignoring calls to stop its train." Further, plaintiff argues that NYCTA "has information about my son's travels through their system. They had a video of his entry into the Brooklyn 20th Street Station which they failed to safeguard, and they have records of calls to stop their train, that the decedent was riding on his way to Manhattan."

With respect to plaintiff's first argument, the court notes that annexed to NYCTA's motion as NYSCEF Document #51 is a "STATEMENT OF FACTS TO WHICH THERE IS NO GENUINE ISSUE PURSUANT TO UNIFORM CIVIL RULE 202.8-g(a)."

With regard to plaintiff's other claims, in the Port Authority Order, the court held:

It is fundamental that to recover in a negligence action a plaintiff must establish that the defendant owed him a duty to use reasonable care, and that it breached that duty (*Turcotte v Fell*, 68 NY2d 432 [1986]). When a negligence claim is asserted against a municipality, the first issue for a court to decide 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 420 [1st Dept 2013]). If a municipality's actions are considered proprietary, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties (*Id.* at 425). A government entity performs a purely proprietary role when its "activities essentially substitute for or supplement traditionally private enterprises" (*Id.* at 425, quoting *Sebastian v State of New York*, 93 NY2d 790, 793 [1999] [internal quotation marks omitted]).

In contrast, acts "undertaken for the protection and safety of the public pursuant to the general police powers" are governmental in nature (*Id.* at 425, quoting *Sebastian v State of New York*, 93 NY2d 790, 793 [1999]). It is undisputed that this case involves the provision of police protection, which is a classic governmental, rather than proprietary, function (*Valdez v City of New York*, 18 NY3d 69 [2011]). A municipality cannot be held liable for

negligence in the performance of a governmental function, unless it owed a “special duty” to the injured party; “the duty breached must be more than that owed the public generally” (*Applewhite*, 21 NY3d at 426).

[...]

A special duty, in contrast to a general duty owed to the public, arises from a special relationship between the plaintiff and the governmental entity (*McLean v City of New York*, 12 NY3d 194 [2009]). To establish a special relationship, a plaintiff is required to show: (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 “ (*Applewhite*, 21 NY3d at 430-431, quoting *Cuffy v City of New York*, 69 NY2d 255 [1987]).

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction [...] We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83 [NY Ct. of Appeals 1994]). Here, giving plaintiff every possible favorable inference, it is undisputed that the GWB, where the subject incident occurred, is not operated, managed or controlled by NYCTA.

Further, it is undisputed that plaintiff does not allege any direct contact or communication between plaintiffs and NYCTA. Plaintiff’s central allegation with respect to NYCTA is that the City’s 911 operator was going to contact NYCTA about stopping a train. Notably absent are any allegations that the plaintiff or DL communicated directly with NYCTA in any way. Accordingly, this court finds that no special duty existed between NYCTA and plaintiff or DL.

Finally, with respect to plaintiff’s argument that NYCTA had videotaped information about DL’s travels through the system, as well as records of call(s) telling NYCTA that DL’s subway train must be stopped, the court finds that such discovery, if it even existed, would nevertheless fail to give rise to a special relationship in this case. Giving plaintiff every favorable inference,

this court finds that this motion is not premature, as such discovery would fail to raise any issue of fact, since plaintiff has not pled a viable claim as against NYCTA.

Accordingly, NYCTA's motion is GRANTED.

Plaintiff's Cross-Motion

Plaintiff's cross-motion seeks an order "staying this action pending the appeal before the First Department." Plaintiff argues that the First Department had initially dismissed her appeal due to a procedural technicality, but subsequently "accepted my motion to restore the appeal to the court's calendar."

In opposition, NYCTA argues first, that plaintiff's application is moot because there is neither an appeal pending, nor any pending motion to restore an appeal. Accordingly, NYCTA argues, there is no basis for a stay. NYCTA further argues that although plaintiff claims to have a motion pending before the Appellate Division, First Department, to re-instate the appeal, the record in NYSCEF shows that the Notice of Motion uploaded in August of 2020 (NYSCEF Document # 48) was "Returned for Correction" seven months ago and that no further action was taken by plaintiff with respect to the same. As a result, NYCTA argues, there is no pending appeal, or motion seeking to re-instate an appeal.


Further, NYCTA argues that even if an appeal were pending with respect to the Port Authority Order, NYCTA is not similarly situated to the Port Authority from a factual perspective. As such, the ultimate outcome, had there been an appeal pending, is irrelevant to NYCTA's motion for summary judgment because the two parties are in entirely different positions as reflected by the different allegations.

For all of the aforementioned reasons, as aptly argued by NYCTA, plaintiff's cross-motion is DENIED.

Conclusion

In sum, NYCTA's motion is GRANTED and plaintiff's complaint and all cross-claims against NYCTA, are DISMISSED with prejudice and plaintiff's cross-motion seeking a stay of this action is DENIED.

This is the order of the court.

5/24/2021		
DATE		J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE