

Lomtevas v City of New York
2022 NY Slip Op 31771(U)
June 2, 2022
Supreme Court, New York County
Docket Number: Index No. 450869/2018
Judge: J. Machelles Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

VERA LOMTEVAS,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE PORT AUTHORITY OF
NEW YORK AND NEW JERSEY

Defendants.

-----X

INDEX NO. 450869/2018

MOTION DATE 01/03/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 105, 108, 109, 110, 111, 112, 113

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Pending before the court is an order to show cause (“OTSC”) filed by plaintiff, who is *pro se*, seeking summary judgment as against defendants Port Authority of New York and New Jersey (the “Port Authority”) and The City of New York (the “City”) as to all claims. Oral argument on the motion was heard before the undersigned on May 12, 2022.

Relevant Procedural History and Facts

Plaintiff had initially filed this action against the City, the Port Authority, and the New York City Transportation Authority (“NYCTA”).

In Motion Sequence #001, the court (Hon. Lisa A. Sokoloff) issued an order dated October 15, 2019 (the “Port Authority Order,” NYSCEF Document #26) 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 (NYSCEF Document #45) that denied plaintiff's motion to reargue motion #001. On December 14, 2021, the Appellate Division, First Department, issued an order (the "Appellate Order," NYSCEF Document #79) that modified the Port Authority Order, on the law, and reinstated the Complaint as against the Port Authority to the extent that the Complaint alleges that the Port Authority breached its duty to maintain the George Washington Bridge ("GWB") in a reasonably safe condition. The Port Authority Order was otherwise affirmed.

In Motion Sequence #003, the undersigned issued an order (NYSCEF Document #66) that granted NYCTA's motion for summary judgment, and dismissed plaintiff's complaint and all cross-claims against NYCTA.¹ With respect to the underlying action, the Appellate Division modified the Port Authority Order insofar as reinstating the complaint against the Port Authority to the extent that the complaint alleges that the Port Authority breached its duty to maintain the GWB in a reasonably safe condition. The Port Authority Order was otherwise affirmed.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]).

¹ There is no indication that this Order was appealed.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Summary Judgment With Respect to the Port Authority

Plaintiff argues that there are no questions of material fact with respect to the wrongful death and negligence claims against the Port Authority.

In opposition, the Port Authority argues, first, that the OTSC is procedurally deficient in that 22 NYCRR § 202.8-g.3 requires that any motion for summary judgment contain a statement of material facts and that each statement be followed by reference to evidence. The Port Authority argues that the statement of undisputed facts submitted in support of the OTSC, (NYSCEF Document #71), does not refer the court to any evidence whatsoever and hence is deficient.

The Port Authority also argues that this motion is premature, as the Port Authority has never been deposed. Therefore, there is no reliable information on this record as to whether the GWB was maintained in a reasonably safe condition.

Uniform Rule 19-a provides, in relevant part:

Section 202.8-g Motions for Summary Judgment; Statement of Material Facts.

(a) Upon any motion for summary judgment, other than a motion made pursuant to CPLR 3213, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.

[...]

(d) Each statement of material fact by the movant or opponent pursuant to subdivision (a) or (b), including each statement controverting any statement of material fact, must be followed by citation to evidence submitted in support of or in opposition to the motion.

Here, as the Port Authority correctly argues, the Statement of Material Facts submitted by plaintiff does not include citations to the evidence and does not therefore comply with 22 NYCRR § 202.8-g.3.

More importantly, the heart of plaintiff's allegations as against the Port Authority is that the Port Authority was negligent in failing to prevent the decedent from committing suicide, and negligent in failing to maintain the GWB in a reasonably safe condition. As discussed above, the Appellate Division reinstated the Complaint as against the Port Authority only to the extent that the complaint alleges that the Port Authority breached its duty to maintain the GWB in a reasonably safe condition. To prevail on her negligence claim, plaintiff must prove that the GWB was not reasonably safe; that the Port Authority was negligent in not keeping the GWB in a reasonably safe condition; and that the Port Authority's negligence in allowing an unsafe condition to exist was a substantial factor in causing the decedent's suicide.

Here, it is undisputed that no witness from the Port Authority has been deposed, and there has been no discovery whatsoever about the Port Authority's maintenance of the GWB. Accordingly, this court finds that plaintiff's motion is premature.

Summary Judgment With Respect to the City

Plaintiff argues "there are no facts to try and the law is one of negligence as properly pled and shown after the deposition of the NYPD police officer involved in this action," and "A special duty was assumed and breached, including that plaintiff or Daniel acted in reasonable reliance upon a specific promise of assistance by the police."

In opposition, the City argues, first, that the OTSC is procedurally improper and in violation of NY CLS Unif Rules, Civil Cts 202.8-d, in that no urgency exists that justifies proceeding by order to show cause, and this application should be denied on that ground alone.²

² Part 202 of the Uniform Civil Rules for the Supreme Court and the County Court (§ 202.8-d. Orders to Show Cause) provides, in part, "Motions shall be brought on by order to show cause only when there is genuine urgency (e.g., applications for provisional relief), a stay is required or a statute mandates so proceeding." Here, plaintiff argues that this motion was urgent because, "The subject death occurred in 2016 and this case is now four

The City also argues that it cannot be found liable for decedent's death because at all relevant times, the City acted in a governmental function through its police department by responding to the family's 911 call and missing person report about decedent's absence from the family home. Further, the City argues that no special duty existed, as advising the police that the decedent had made a recent previous suicide attempt did not create a special duty. The City maintains that plaintiff fails to assert any facts that establish that any direct contact with police officers led her or Daniel to reasonably and objectively rely on a promise to their detriment.

In *Applewhite v Accuhealth, Inc.*, 21 NY3d 420 (2013), the New York State Court of Appeals held:

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. If the municipality's actions fall in the proprietary realm, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties. A government entity performs a purely proprietary role when its "activities essentially substitute for or supplement traditionally private enterprises." In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are "undertaken for the protection and safety of the public pursuant to the general police powers."

Because this dichotomy is easier to state than to apply in some factual scenarios, the determination categorizing the conduct of a municipality may present a close question for the courts to decide. Police and fire protection are examples of long-recognized, quintessential governmental functions. Additional examples include security operations at the World Trade Center; oversight of juvenile delinquents; issuance of building permits or certificates of occupancy; certifying compliance with fire safety codes; teacher supervision of a public school playground; boat inspections; and garbage collection [...]. As a general rule, the distinction is that the government will be subject to ordinary tort liability if it negligently provides "services that traditionally have been supplied by the private sector."

If it is determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a "special duty" to the injured party. The core principle is that to "sustain liability against a municipality, the duty breached must be more than that owed the public generally." We have recognized that a special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the

years old." Nevertheless, the court finds that this motion should not have been made via OTSC, and the court reminds all parties, including plaintiff, that proper procedure must be followed when making court filings.

plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition. It is the plaintiff's obligation to prove that the government defendant owed a special duty of care to the injured party because duty is an essential element of the negligence claim itself. In situations where the plaintiff fails to meet this burden, the analysis ends and liability may not be imputed to the municipality that acted in a governmental capacity. [internal citations omitted]

Further, the elements of this special relationship are: (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 N.Y.2d 255 [NY Ct. of Appeals 1987]).

With respect to whether the City was acting in a proprietary versus governmental capacity, the City maintains that there is no question that at all relevant times, the City acted in a governmental function through its police department. Plaintiff seems to argue in her motion that municipal actions were taken in a proprietary capacity, but it is unclear if plaintiff intended for those arguments to apply to the City or only to the Port Authority. In any case, as stated above, police protection has long been recognized as a quintessential governmental function. *See also Valdez v City of New York*, 18 NY3d 69 (NY Ct. of Appeals 2011) (“We begin with the observation that it is undisputed that this case involves the provision of police protection, which is a classic governmental, rather than proprietary, function.”) Here, the crux of plaintiff's claim against the City was that the officers and emergency responders, acting in their official capacities, failed to prevent the decedent's suicide. Accordingly, for plaintiff to prevail, she must establish that the City owed a special duty of care in this case.

With respect to said duty, plaintiff argues, *inter alia*, in her Affirmation in Support [NYSCEF Document #70] and in her Reply, that the police formed a special relationship with the family by assuring them that everything was alright, that decedent would be brought home and that there was no need for them [decedent's family] to do anything. In support, plaintiff submits the deposition transcript of Officer Joseph Gravino ("Officer Gravino") (NYSCEF Document #78). A review of the transcript shows that Officer Gravino either disputed or failed to corroborate a number of the arguments made by plaintiff. For example, plaintiff alleged that "Officer Joe said he was contacting units closest to the child," and "at the home on October 5th 2016, Officer Joe said he contacted units near the decedent and these units would intercept him." But, at his deposition, Officer Gravino consistently maintained that the only contact he had was with the central dispatch for the entire city, not with any individual police units located near the decedent. Plaintiff also alleged that the police "stop[ped] the family from pursuing decedent," whereas Officer Gravino testified that the family was free to leave the residence. Further, plaintiff alleged, "One officer reported that he spoke with the decedent securing from him a promise to return home in an hour to 86th Street on the R Train," and "NYPD Police said they will recover the decedent, they can ping his phone, they will intercept him." But when Officer Gravino was asked about these statements in his deposition, he was not able to corroborate that they were made:

Transcript pp. 60-61

Q. Do you remember that Daniel told the officer that he will be back home in one hour or so?

A. I don't know. I'm not sure.

Transcript pp. 58-59

Q. Did any one of the police officers make any promises to the families, like pinging Daniel's phone, we know his location, we know what he looked like, don't worry we will get him?

A. I am not sure.

Importantly, even assuming *arguendo* that the facts as alleged by plaintiff were not in dispute, plaintiff fails to establish on this record, that she or anyone in her family would have been able to prevent decedent's death had they not relied on the actions or statements of the police. See Badillo v City of New York, 35 AD3d 307 (Sup. Ct. App. Div. 1st Dept 2006) ("In addition, plaintiffs must show that the decedents acted on that reliance to their detriment, such that as a result of the call, they were put in a worse position than they would have been in had the call not been made"); Hancock v City of New York, 230 AD2d 603 (Sup. Ct. App. Div. 1st Dept 1996) "Such a relationship can only be established on proof that the injured party had direct contact with the municipality's agents, and relied to her detriment on the latter's assurance of action on her behalf").

For all the aforementioned reasons, it is hereby:

ORDERED that plaintiff's motion with respect to the Port Authority is DENIED as premature with leave to refile upon the completion of discovery; and it is further

ORDERED that parties must contact SFC-CITY-DCM@nycourts.gov to schedule a discovery conference forthwith; and it is further

ORDERED that plaintiff's motion with respect to the City is DENIED and it is further

ORDERED that all parties must comply with all applicable rules, including Part 202 of the Uniform Civil Rules § 202.8-d.

This is the Decision and Order of this court.

<u>6/2/2022</u>			
DATE		J. MACHELLE SWEENEY, 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