

<b>Tishman v Himmel &amp; Meringoff Props., LLC</b>
2022 NY Slip Op 33766(U)
November 3, 2022
Supreme Court, New York County
Docket Number: Index No. 156708/2020
Judge: Judy H. Kim
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

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STEVEN TISHMAN AS EXECUTOR OF THE ESTATE OF ERICA TISHMAN and STEVEN TISHMAN INDIVIDUALLY,

Plaintiffs,

INDEX NO. 156708/2020

MOTION DATE N/A

MOTION SEQ. NO. 002

- v -

HIMMEL & MERINGOFF PROPERTIES, LLC, 729 ACQUISITION LLC, MERINGOFF PROPERTIES INC, and THE CITY OF NEW YORK

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion for DISMISSAL.

Upon the foregoing documents, the motion by defendant the City of New York to dismiss this action as against it is granted for the reasons set forth below.

On August 24, 2020, Steven Tishman, individually and in his capacity as executor of the estate of his wife Erica Tishman, commenced this action for negligence and wrongful death. Plaintiffs' complaint alleges that on December 17, 2019, Erica Tishman was walking near 729 Seventh Avenue, New York, New York (the "Building")—a commercial property owned, operated, maintained, and managed by defendants Himmel + Meringoff Properties, 729 Acquisition, LLC, and Meringoff Properties, Inc.—when a piece of debris fell from the Building facade and struck her in the head, causing injuries resulting in her death (NYSCEF Doc. No. 1 [Complaint at ¶¶43-47]). Plaintiffs allege that defendants Himmel + Meringoff Properties, 729 Acquisition, LLC, and Meringoff Properties, Inc. were negligent in failing to maintain or repair

the Building's facade and that defendant the City of New York (the "City") was negligent in failing to: properly inspect the Building's exterior, ensure that the building owners repaired the facade, and ensure that protective measures were put in place to protect the public from reasonably foreseeable falling hazards (Id. at ¶¶6-20, 22 63-101)

Plaintiffs allege that on April 29, 2019, the New York City Department of Buildings ("DOB") inspected the Building and issued a Class 1 violation to defendant 729 Acquisitions, LLC based upon its "failure to maintain exterior building facade and appurtenances" noting that there was "damaged terra cotta at areas above 15th floor in several locations which poses a falling hazard for pedestrians" (NYSCEF Doc. No. 53). On July 24, 2019, the City issued another violation to 729 Acquisitions, LLC based on its failure to correct the violations noted in the April 29, 2019 citation (NYSCEF Doc. No. 54). At a hearing before the Office of Administrative Trials and Hearings ("OATH") on September 12, 2019, the April 29, 2021 violation was reduced, at the City's request, from a Class 1 to a Class 2 violation and 729 Acquisition was required to pay a fine of \$1,250.00 (Id. at ¶¶32-33). The Building's facade was not repaired prior to December 17, 2019 (Id. at ¶¶ 34-36).

The City now moves, pursuant to CPLR §3211(a)(7), to dismiss this action as against it, arguing that the complaint does not allege facts establishing that the City owed Erica Tishman a special duty such that it may be held liable in negligence. Plaintiffs oppose the motion.

### DISCUSSION

On a motion to dismiss under CPLR §3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (See Leon v Martinez, 84 NY2d 83 [1994]).

To state a negligence claim, plaintiffs' complaint must allege: "(1) a duty owed by the defendant to the plaintiff[s], (2) a breach thereof, and (3) injury proximately resulting therefrom" (Ferreira v City of Binghamton, 38 NY3d 298, 308 [2022] [internal citations and quotations omitted]). Where, as here, plaintiffs seek to hold a municipality liable in negligence for acts concededly taken by the City in the exercise of its governmental function, they must allege that the municipality owed plaintiff a "special duty," i.e., a duty greater than "that owed the public generally" (Ferreira v City of Binghamton, 38 NY3d 298, 309-10 [2022] [internal citations and quotations omitted]). This "special duty" is created when a municipality either: (1) violates a statute enacted for the benefit of a particular class of people, which class included plaintiff; (2) voluntarily assumes a duty to the plaintiff beyond that owed to the public generally; or (3) takes positive direction and control of a known and dangerous safety condition (Id. at 304 [internal citations omitted]; see also McLean v City of New York, 12 NY3d 194, 200 [2009]). Plaintiffs contend that the complaint alleges the creation of a special duty to Erica Tishman through the first and third of these avenues. Neither of these arguments succeed.

Plaintiffs first argue that a special duty was created by the City's breach of its obligations under Title 28 of the Administrative Code in failing to reinspect the Building or ensure that the hazardous condition it identified on April 29, 2019 was fixed (as required by Administrative Code §§ 28-219.2 and 28-216.1.1, respectively). But, as no provision within Title 28 of the New York City Administrative Code expressly creates a private right of action against the City, any violation of these provisions will create a special duty only if such a private right of action may fairly be implied from the statute.

A private right of action "may be fairly implied when (1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action

would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme” (McLean v City of New York, 12 NY3d 194, 200 [2009] quoting Pelaez v Seide, 2 NY3d 186 [2004]; see also Konkur v Utica Academy of Science Charter School, 38 NY3d 38, 40-41 [2022], rearg denied, 38 NY3d 1002 [2022]). None of these conditions are present here. Contrary to plaintiffs’ contention, the Administrative Code provisions cited were not enacted for a class to which decedent belonged except in “the broad sense of protecting all members of the general public similarly situated,” i.e., all pedestrians in New York City, and are therefore “insufficient to form a basis for municipal liability” here (O’Connor v City of New York, 58 NY2d 184, 190-91 [1983]; see also Metz v State, 20 NY3d 175, 180 [2012]). Neither would reading an implied right of action into this statute be consistent with the legislative scheme where, as here, the legislature included criminal penalties for private actors’ violations of its provisions but did not expressly provide for a private right of action against municipalities (See e.g., Metz v State, 20 NY3d 175, 180-81 [2012]; McLean v City of New York, 12 NY3d 194, 200-01 [2009]).

While plaintiffs maintain that the circumstances here are exceptional insofar as the City not only failed to comply with its statutory duties but, by reducing the Building’s violation from Class 1 to Class 2, took affirmative steps impeding necessary repairs, this distinction is immaterial—when conducting a special duty analysis, courts do not “differentiate between misfeasance and nonfeasance ... [S]uch a distinction is irrelevant to the special duty analysis” (Ferreira v City of Binghamton, 38 NY3d 298, 315-16 [2022] quoting Applewhite v Accuhealth, Inc., 21 NY3d 420 [2013]). In any event, the reduction of the April 29, 2019 violation from a Class 1 to Class 2 violation was an exercise of discretion in the performance of a governmental function, for which no liability may attach (See 1766-68 Assoc., LP v City of New York, 91 AD3d 519, 520 [1st Dept 2012] [internal citations omitted] [motion court properly dismissed claim based upon

City's alleged failure to order Metropolitan Transit Authority defendants to perform work required to stabilize or otherwise protect plaintiff's building]; see also California Suites, Inc. v Russo Demolition Inc., 98 AD3d 144, 155 [1st Dept 2012] ["defendants' determination that the situation constituted an emergency condition either under Administrative Code § 28-215.1 or § 28-215.4 is a discretionary act immune from liability"]).

Plaintiffs also argue that a special duty exists because the City assumed positive direction and control of the Building façade when it reduced the April 29, 2019 violation from a Class 1 to a Class 2 violation. However, a municipality only assumes positive direction and control where, "having actual knowledge of a blatant violation of safety laws, [it] nevertheless provides affirmative assurances of safety on which the injured plaintiff relies" (Abraham v City of New York, 39 AD3d 21, 28 [2d Dept 2007] [emphasis added] [internal citations omitted]) and the reduction of the violation from a Class 1 to Class 2 violation cannot be construed as such an affirmative assurance or "reasonably be said to have lulled ... [decedent] into a false sense of security ... inducing her either to relax her own vigilance ..." (Albino v New York City Hous. Auth., 78 AD3d 485, 489 [1st Dept 2010] [internal citations and quotations omitted]).

In short, plaintiffs have failed to allege facts establishing that the City owed Erica Tishman a special duty of care such that the City may be held liable in this negligence action. Accordingly, it is

**ORDERED** that the motion by defendant the City of New York to dismiss this action as against it is granted and this action is hereby dismissed as against it; and it is further

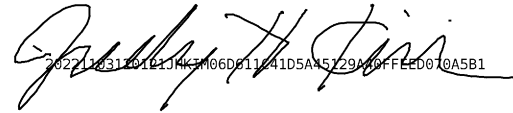
**ORDERED** that within fifteen days from the date of this decision and order, counsel for the City of New York shall serve a copy of this order with notice of entry on plaintiffs and all remaining defendants as well as the Clerk of the Court (60 Centre St., Room 141B), and the Clerk

of the General Clerk’s Office (60 Centre St., Rm. 119) who are directed to mark their records accordingly; and it is further

**ORDERED** that since the City of New York is no longer a party to this action, the Clerk of the Court shall reassign this action to the inventory of a non-City Part; and it is further

**ORDERED** that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on this court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.



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11/3/2022

DATE

HON. JUDY H. KIM, 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