

McMullin v Village of Spring Val.
2022 NY Slip Op 35048(U)
September 12, 2022
Supreme Court, Rockland County
Docket Number: Index No. 036896/2021
Judge: Sherri L. Eisenpress
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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DERRICK T. McMULLIN II, as Administrator of the
Estate of TINA MARIE DAVIS, and on his own behalf,

Plaintiff,

DECISION & ORDER

Index No.: 036896/2021
Motion Seq.: 1

- against -

VILLAGE OF SPRING VALLEY,

Defendant.

-----X
EISENPRESS, A.J.S.C.

The papers filed electronically as NYSCEF 5-16 were read on this Notice of Motion by defendant for an Order pursuant to CPLR 3211(a)(7) dismissing this action.

Upon the foregoing papers, the motion is determined as follows:

Tina Marie Davis died on January 5, 2020, one day after Village of Spring Valley police officers responding to her violent conduct used a taser to subdue her while she resisted arrest. Plaintiff's complaint alleges that according to the medical examiner, "four factors contributed to decedent's passing: her recent intake of cocaine and alcohol, a grand mal seizure she suffered moments before the police arrived, her agitated behavior and the use of physical force by police officers in restraining her" (Compl [NYSCEF 1], at ¶ 47). This wrongful death action alleges that responding police officers (1) used excessive force to subdue Davis; (2) knew from Davis' past conduct that she suffered from mental illness and thus assumed a special duty that obliged the Village to send personnel versed in mental health and de-escalatory practices; and (3) acted negligently in the arrest and subsequent medical response. The Village moves to dismiss under CPLR 3211(a)(7), principally arguing that it acted reasonably, owed no special duty and did not own or control the responding ambulance entity.

While most of plaintiff's claims fail as a matter of law, this pre-answer posture leaves open the possibility that any delay by responding officers in administering emergency medical care, and particularly administering naloxone, proximately caused decedent's pain, suffering and ultimate death. Because this posture requires this Court to assume the truth of such allegations, defendant's motion must be denied to that limited extent, and defendant will be required to answer the complaint as limited herein.

Background

Plaintiff is decedent's adult son and the administrator of her estate. His complaint alleges that the Spring Valley Police Department ("SVPD"), which was "very familiar with decedent [from] numerous encounters since the 1980s" (Compl, at ¶ 9), responded to pre-dawn 911 calls on January 4, 2020, that Davis was outdoors breaking car windows. The SVPD officer first arriving on the scene moments later, who was not wearing a bodycam, alleges that he saw Davis chasing another woman toward his police vehicle. The complaint alleges that the officer gained control of Davis by her upper arm and walked her away from his police vehicle, but that Davis resisted the officer's effort to handcuff her. Plaintiff continues that a second officer arrived on the scene and tried to grab Davis' arms, but that Davis continued to resist (*see* Compl, at ¶¶ 14-18). Davis then fell to the ground where, plaintiff alleges, Davis grabbed the first officer's body vest, causing him to yell, "Tina, get off my vest" (*id.*, at ¶ 21). The second officer then allegedly ordered Davis to release the vest and, when she did not do so, engaged a stun gun against Davis' left forearm for a five-second shock cycle (*see id.*, at ¶¶ 22-23). Only then, plaintiff alleges, did Davis let go of the vest; officers then handcuffed her – though Davis "was still very upset" (*id.*, at ¶ 28) and allegedly continued to kick her legs while trying to stand (*see id.*, at 29). A third officer then restrained Davis' legs. According to plaintiff, however, at least one civilian witness denies that SVPD instructed Davis to release the vest; plaintiff asserts that instead, an officer was "fighting" Davis with a knee on her back.

Within approximately one minute of Davis falling to the ground, SVPD called for a medic: her breathing became shallow and she went motionless. During the eight minutes before medics arrived, "there is no evidence that the three responding police officers took any steps to provide medical assistance" (*id.*, at ¶ 37). Within approximately 10 minutes, Davis lost a pulse; officers

removed the handcuffs, rolled her onto her back and began chest compressions. In rapid succession, an officer administered naloxone (Narcan), paramedics and an ambulance separately arrived, Davis was moved to an ambulance, a breathing tube and medication were administered and Davis regained her pulse – but never consciousness (*see id.*, at ¶¶ 38-43). Davis was transferred to nonparty Good Samaritan Hospital, where she was declared brain dead the next day and removed from life support (*see id.*, at 46).

Plaintiff alleges that from the 911 calls and SVPD’s “knowledge of [Davis’] longstanding substance abuse issues,” SVPD “had sufficient information to conclude that [Davis] would require medical and mental health care at the scene,” but that “Spring Valley dispatch was not trained to activate a medical response in situations like this, significantly delaying medical response” (Compl, at ¶¶ 49-50). The complaint alleges that SVPD proximately caused Davis’ death by failing to train dispatchers and officers; failing to send proper assistance to Davis whom SVPD knew or reasonably should have known to be “a person suffering from a mental illness and a person with a history of substance abuse,” who were trained to de-escalate conflict and “deal with the consequences of the use of police force against her”; negligently escalating rather than de-escalating conflict; needlessly using a stun gun that further aggravated Davis’ mental and medical stress; using excessive force; failing to respond timely with proper urgency after Davis lapsed into unconsciousness; and failing to administer medically proper treatment in a timely manner. In addition to the foregoing wrongful death claim (First Cause of Action), plaintiff brings an ordinary negligence claim for Davis’ pain and suffering (Second Cause of Action) and a derivative claim for loss of consortium (Third Cause of Action).

Defendant’s dismissal motion pursuant to CPLR 3211(a)(7) alleges that the Village cannot be held liable for the alleged negligence of the responding ambulance because the Village did not own, operate, control or manage it. As to the alleged negligence of the 911 dispatcher, the Village argues that the police owed Davis no duty of care much less a special duty at the time of dispatch. The Village also invokes qualified immunity as to dispatching police rather than an ambulance at the time of the 911 calls, using force when Davis resisted arrest, and administering emergency medical care in the approximately 10-15 minutes between the start of Davis’ physical distress and the paramedics’ arrival. Defendant concludes that the wrongful death and negligence claims

therefore fail, and accordingly, so too does his derivative claim. Defendant offers an affidavit from the police chief attesting that the responding volunteer ambulance service, Spring Hill Community Ambulance Corps (“Spring Hill”) is a privately owned nonprofit entity providing regional service entirely outside defendant’s control, and that the surrounding Town of Ramapo dispatches ambulance and paramedic services on the Village’s behalf.

In opposition, plaintiff argues that SVPD assumed a special duty to Davis by taking “positive control of a known and dangerous safety condition” (Pl’s Mem in Opp [NYSCEF 11], at 8, quoting *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013]), asserting that the SVPD choice to use force while detaining Davis triggered the resulting situation. Plaintiff argues that it did not need to sue the dispatcher to claim this special duty at the time of dispatch because the duty attached to the Village. Even if the special duty did not attach at the time of dispatch, it did attach at the time SVPD took her into custody, which required officers to act reasonably to protect Davis from harm (see Pl’s Mem in Opp, at 10, citing *Sanchez v State*, 99 NY2d 247, 252 [2002]). As to immunity, plaintiff argues that because SVPD “arguably created the medical emergency the decedent faced and inarguably held her captive, they had a duty to afford her non-negligent medical care” (*id.*, at 12). Plaintiff concludes that SVPD violated the foregoing duty by delaying administration of Narcan for 14 minutes after she lost consciousness and by a 16-minute delay before medical professionals arrived on-scene – inaction that, plaintiff implies, violated SVPD’s own procedures.

In reply, defendant asserts that decedent’s mental health history was far from sufficient under the *Abraham v City of New York* (39 AD3d 21, 28 [2d Dept 2007]) line of cases because plaintiff fails to allege any *affirmative act* by which defendant launched plaintiff into risk that plaintiff “would otherwise have avoided” (see *id.*). Defendant also underscores that its qualified immunity is so clear that discovery is unnecessary to determine and apply it.

Analysis

On a CPLR 3211(a)(7) pre-answer motion to dismiss, “the [complaint] is to be afforded a liberal construction (see CPLR 3026). 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, 88-89 [1994]; quoting *Morone v Morone*, 50 NY2d 481, 484 [1980]; see *511 West 323 Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018], quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Dismissal of the complaint, and of any particular cause of action asserted therein, must be denied if within the four corners of plaintiff’s papers there reasonably can be conceived any cognizable claim upon which relief can be granted (see *Jennifer Realty Co.*, 98 NY2d at 152). In this posture, “the court merely examines the adequacy of the pleadings” (*Davis v Boeheim*, 24 NY3d 262, 268 [2014]). The essential question is whether plaintiff “has a cause of action, not whether it has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

A municipality dispatching law enforcement and emergency medical services for the protection of the public thereby fulfills quintessential governmental functions that are not subject to challenge under ordinary negligence principles (see e.g. *Applewhite*, 21 NY3d at 425-426 [collecting cases]). Rather, a municipality acting under color of such authority cannot be held liable for negligently exercising a government function absent a “special duty to the injured person, in contract to a general duty owed to the public” (*Coleson v City of New York*, 24 NY3d 476, 481 [2014], quoting *Garrett v Holiday Inns*, 58 NY2d 253, 261 [1983]). “A duty to exercise reasonable care toward [a] plaintiff” is “born of a special relationship between the plaintiff and the governmental entity” (*id.*, at 481, quoting *Pelaez v Seide*, 2 NY3d 186, 198-199 [2004]). Such a special relationship can be formed in three ways: “(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation” (*Palaez*, at 199-200).

The pleadings allege only the second and third of these special-relationship categories. Even construing the pleadings in the light most favorable to plaintiff, however, there is no sufficient allegation that defendant assumed a pre-detention duty that reasonably generated

plaintiff's justifiable reliance: indeed, there is no allegation that decedent then undertook reliance on defendant at all. Moreover, defendant is correct that plaintiff's conclusory allegations that his mother suffered from a known mental illness, and the Village knew it, do not suffice to allege the factual predicate to allege a special relationship (*see generally In re Kenneth Cole Prods., Inc.*, 27 NY3d 268, 278 [2016] [collecting cases]). On these authorities, defendant is correct that it owed plaintiff no special duty to send police personnel versed in mental health and de-escalatory practices.¹ Accordingly, the branch of defendant's motion to dismiss that claim must be granted.

Turning next to plaintiff's allegation that SVPD officers negligently used excessive force in arresting Davis, "no cause of action to recover damages for negligent assault exists in New York" for such alleged police conduct (*see Oteri v Village of Pelham*, 100 AD3d 725, 725 [2d Dept 2012], *quoting Wertzberger v City of New York*, 254 AD2d 352 [2d Dept 1998]). Rather, such claim sounds in intentional assault. On that implicit claim, and even construing the papers in the light most favorable to plaintiff, plaintiff fails to allege that SVPD officers had "positive direction and control *in the face of a known, blatant and dangerous safety violation*" (*Palaez*, 2 NY3d at 198-199 [emphasis added]). Plaintiff's retort that SVPD violated an unspecified policy in connection with detaining and using force to control Davis is not sufficient in this posture: plaintiff does not minimally allege what such policy might be, or how SVPD might have violated it, or how such alleged violation might have proximately caused Davis' injuries and death. Thus, defendant is correct that this claim must be dismissed.

As to the claim that responding paramedics and ambulance personnel negligently failed to provide proper medical care, even assuming that they were subject to defendant's ownership,

¹ Ongoing general policy and political debates about the sufficiency of law enforcement training on mental health and de-escalatory protocols, as well as whether 911 dispatchers should send mental health professionals either with responding police officers or instead of them in certain circumstances are for the executive and legislative branches, not the Judiciary deciding tort claims. Moreover, especially in this action's context of a decedent smashing car windshields and chasing people with a stick, there is no allegation that the Village should not have dispatched law enforcement officers able to arrest decedent and use appropriate force to do so.

operation or control, their actions were discretionary governmental functions immunized against liability (*see Dion v City of New York*, 120 AD3d 751, 753 [2d Dept 2014], *lv denied* 26 NY3d 913 [2015]).² Therefore, that claim also must be dismissed.

Plaintiff's remaining claim is that SVPD officers unduly delayed in failing to provide necessary emergency medical care, administering Narcan and calling for medical assistance. Once SVPD arrested and cuffed Davis, they thereby assumed positive control and assumed a special duty to Davis precisely because she then could not protect herself (*see e.g. Sanchez*, 99 NY2d at 252-253). Like a municipal paramedic's provision of onsite emergency medical services, police "determinations of whether and when to dispatch an ambulance," and provide on-scene medical care pending arrival of medical services, are discretionary in nature" and thus subject to the same governmental immunity standards (*Xenias v City of New York*, 191 AD3d 453, at *2 [1st Dept 2021]; *Dixon*, 120 AD3d at 753, *lv denied* 26 NY3d at 913; *Sherpa v New York City Health & Hosps. Corp.*, 90 AD3d 738, 740 [2d Dept 2011]).

To the extent that plaintiff's complaint alleges only a one-minute gap between SVPD officers cuffing Davis and calling for medical assistance, plaintiff fails to state a claim on which relief can be granted. However, in this pre-answer posture in which plaintiff is entitled to every favorable inference from the pleadings in opposition to dismissal, it is not clear that any SVPD delay in providing medical care and particularly administering Narcan pending arrival of medical professionals "was due to an affirmative exercise of [governmental] discretion, rather than an unintentional failure" (*Xenias*, 191 AD3d at 453 *2, *following Valdez v City of New York*, 18 NY3d 69, 79-80 [2011]). Thus, that limited claim must survive CPLR 3211(a)(7) dismissal – whether or not plaintiff ultimately can prove liability on those limited grounds (*see Bonderman*, 31 NY3d at 38). It follows that plaintiff's derivative claim predicated on this alleged liability to decedent also must survive dismissal on that same basis.

² As such, the Court need not reach plaintiff's retort that the SVPD chief's affidavit disclaiming ownership, operation and control of responding medical personnel. Were the Court to reach that issue, the Court would agree with plaintiff that in this CPLR 3211(a)(7) posture, evidence such as the police chief's summary affidavit would not be cognizable unless on conversion to a CPLR 3212 dismissal motion, on proper notice to plaintiff.

The Court has considered the parties' remaining contentions and deems them to lack merit or to be moot in light of the foregoing.

Accordingly it is hereby

ORDERED that defendant's motion is granted except as to plaintiff's allegations that defendant – once decedent was under its officers' positive control – proximately caused decedent's pain, suffering and death by delaying provision of emergency medical care and particularly administration of naloxone pending arrival of paramedics and/or an ambulance, as to which claim and the corresponding derivative claim such motion is denied; and it is further

ORDERED that defendant shall answer the complaint, as limited hereunder, within 30 days after plaintiff shall serve on it this Decision and Order consistent herewith; and it is further

ORDERED that within five days hereof, counsel for plaintiff shall serve this Decision and Order, with Notice of Entry, on defendant via NYSCEF; and it is further

ORDERED that all counsel shall appear for a preliminary conference via Microsoft Teams on **October 27, 2022 at 9:50 a.m.**

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
September 12, 2022



HON. SHERRI L. EISENPRESS, A.J.S.C.

cc: All counsel via NYSCEF