

Raven v Fee
2022 NY Slip Op 35211(U)
August 1, 2022
Supreme Court, Orange County
Docket Number: Index No. EF005515-2019
Judge: James L. Hyer
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To commence the 30 day statutory time period for appeals as of right (CPLR 5512 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

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

-----X
CASSANDRA RAVEN, as Administrator of the
Estate of NATHAN RAVEN, Deceased,

Plaintiff,

-against -

BRENDEN G. FEE, DONNA M. FEE,
MAUREEN DEGROAT, JAMES V. BRIENZA
and "JOHN DOE" (the latter name being fictitious
and used to connote an unidentified person or persons
Responsible for this occurrence).

Defendants,

-----X
HYER, J.S.C.

DECISION AND ORDER

Index No. EF005515-2019

Motion Date: 6/3/2022
Sequence Nos. 1 & 2

The following papers numbered 1 - 18 were read and considered in Defendant James V. Brienza's Motion to Dismiss the Amended Complaint and all Cross Claims as against him and on the Cross Motion of Defendants Brendan G. Fee and Donna M. Fee for leave to amend their answer to include a defense of "special duty".

PAPERS

NUMBERED

Notice of Motion/Affirmation (Ryan)/Statement of Material Facts/ Exhibits 1-7	1-10
Notice of Cross Motion/Affirmation (Liao)/Exhibits A-C	11-15
Affirmation in Opposition to Motion and in Support of Cross Motion/ Exhibit 1	16-17
Reply Affirmation (Ryan)	18

On October 26, 2018, at approximately 7:10 p.m., Plaintiff decedent, Nathan Raven, was a passenger a vehicle being operated by Co-Defendant, Maureen DeGroat, that came into contact with a vehicle owned by Co-Defendant, Donna M. Fee and operated by her son, Co-Defendant, Brendan G. Fee. The Complaint filed on July 17, 2019 alleges that both vehicle operators were

negligent and contributed to the happening of the accident. On January 22, 2020, Plaintiff filed a Supplemental Summons and Amended Complaint naming two additional party Defendants, James V. Brienza and a NYS Trooper, "John Doe" who were engaged in their employment as Troopers with the New York State Police when the accident occurred. Fee was being stopped by Trooper Brienza for a vehicle and traffic violation on State Route 17 in Sullivan County. Fee stopped his vehicle in the left travel lane and narrow median. Brienza directed Fee to move his vehicle to the right shoulder for safety purposes and while attempting to move over to the right shoulder, Fee failed to yield to DeGroat's vehicle and struck DeGroat's vehicle. The Amended Complaint alleges that all Defendants are responsible for the happening of the accident but fails to state how Defendant Brienza or "John Doe" were negligent and contributed to the happening of the accident or Plaintiff's injury except that the accident occurred during a State Police traffic stop of the Fee vehicle.

Brienza moves to dismiss the Amended Complaint contending that it fails to state a cause of action against Brienza. On a motion to dismiss a complaint for failure to state a cause of action (CPLR § 3211[a][7]), a court must take all the complaint's allegations as true and resolve all inferences that reasonably flow therefrom in favor of the plaintiff (*Cron v Hargro Fabrics, Inc.*, 91 NY2d 362 [1998]). Here, the scope of review is narrow and limited to determining whether the pleading states any cause of action, and not whether there is evidentiary support for the complaint (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 634 [1976]). The complaint must be liberally construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (*Morone v Morone*, 50 NY2d 481 [1980]).

The court must assume the complaint's allegations are true and must deem the complaint to allege whatever can be reasonably inferred therefrom, however imperfectly or informally its facts may be stated (*Barrows v Rozansky*, 111 AD2d 105 [1st Dept 1985]; *see also McGill v Parker*, 179 AD2d 98 [1st Dept 1992]). Accordingly, a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211 is available only where the dispute pertains to law, not facts. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss for failure to state a cause of action; rather, a court must determine only whether the facts as alleged fit within any cognizable legal theory. Moreover, affidavits may be received for the limited purpose of remedying defects in the complaint and, thus, to preserve inartfully pleaded, but potentially meritorious, claims (*Rotanelli v Madden* 172 AD2d 815 [2d Dept 1991]).

However, even when viewed in this manner, Plaintiff's Amended Complaint together with Plaintiff's proposed Supplemental Bill of Particulars are insufficient to withstand dismissal pursuant to CPLR § 3211(a)(7).

It is undisputed that Brienza pulled Fee over for a traffic stop. Fee pulled over to the left and Brienza instructed him to pull over to the right shoulder. Fee testified at his deposition that Brienza told him he would guide him across to the right and to "follow him". Fee further testified that he could not see anything behind him except for the police lights. He could not see whether any cars were coming but started to inch out because he thought he heard the officer yell "go". He also testified that the passenger in his vehicle, who was looking out the window for traffic, said he was good. Rather than wait to follow Brienza as directed, Fee decided to pull out onto the highway without being able to see if any cars were coming and struck DeGroat's vehicle.

Assuming arguendo that Brienza did direct Plaintiff into oncoming traffic, the Court of Appeals has clarified the relationship between the special duty rule – necessary to establish a duty of care with respect to certain governmental acts – and the availability of absolute immunity for such acts. “In *Tango v Tulevech*, 61 NY2d 34, 40 [1983], the Court made clear that discretionary acts may not be a basis of liability: [W]hen official action involves the exercise of discretion, the officer is not liable for the injurious consequences of that action even if resulting from negligence or malice” (*McLean v City of New York*, 12 NY3d 194 [2009]). For liability to arise, the action of the State employee complained of must violate some separate and independent duty owed to the injured plaintiff.

The Court of Appeals explained that establishing the existence of a duty is a necessary element of a negligence claim. Where negligence is alleged in the performance of either ministerial or quasi-judicial discretionary functions, a plaintiff must show that an agency of the government owed him or her a special duty beyond that owed to the public at large, and that one means of doing so is to establish the existence of a special relationship between the injured person and the governmental entity (*see Valdez v City of New York*, 18 NY3d 69, 75 [2011]; *McLean v City of New York*, 12 NY3d at 199). The same immunity that bars liability for governmental entities bars claims made against the public officers through which the government acts (*Tango v Tulevech*, 61 NY2d at 40-41).

In negligence cases premised on a special relationship between municipality and plaintiff, “the injured party's reliance is as critical ... as is the municipality's voluntary affirmative undertaking of a duty to act.... Indeed, at the heart of most of these ‘special duty’ cases is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced him

either to relax his own vigilance” (*Cuffy v City of New York*, 69 NY2d 255, 261 [1987]). Here, the record clearly establishes that there was no justifiable reliance of the injured party, Plaintiff’s decedent, on Breinza’s offer to guide Fee to the right shoulder. There was no direct contact and, thus, no special duty.

Affording Plaintiff every inference that may properly be drawn from the evidence presented and considering the evidence in a light most favorable to Plaintiff, there is no rational basis to find that Plaintiff justifiably relied on any assurances by Brienza as there was absolutely no interaction between Plaintiff’s decedent and Brienza. Here, Plaintiff’s pleaded cause of action seeks to impose liability on Brienza merely for the discretionary governmental action he took in making a traffic stop in the scope of his employment undertaken for the protection and safety of the public pursuant to the State’s general police powers. There was no independent duty personally owed by Brienza to Plaintiff, thus the pleading fails to state a cause of action. Although the affirmation in opposition by Plaintiff’s counsel makes reference to Plaintiff’s cross-motion to supplement his Bill of Particulars to include allegations of negligent instruction and direction against Brienza individually, there is no such motion pending before this Court.

Here, Brienza met his burden of establishing his prima facie entitlement to judgment as a matter of law by demonstrating that his allegedly negligent act during the traffic stop was discretionary and not ministerial (*see Kovit v Estate of Hallums*, 4 NY3d 499, 506 [2005]; *Santos v County of Westchester*, 81 AD3d 710 [2011]; *Kadymir v New York City Tr. Auth.*, 55 AD3d 549, 552 [2008]; *Shands v Escalona*, 44 AD3d 524 [2007]). Even if the guidance that Brienza was to provide were deemed ministerial, liability does not arise since neither Plaintiff nor Co-Defendants allege, or can show, the existence of a special relationship. In opposition, Plaintiff and Co-Defendants failed to raise a triable issue of fact.

The parties' remaining contentions either are without merit or need not be reached in light of this determination.

Accordingly, it is hereby

ORDERED that motion to dismiss by Defendant James V. Brienza (seq. #1) is granted; and it is further

ORDERED that the Amended Complaint and all Cross Claims as against Defendant James V. Brienza are dismissed; and it is further

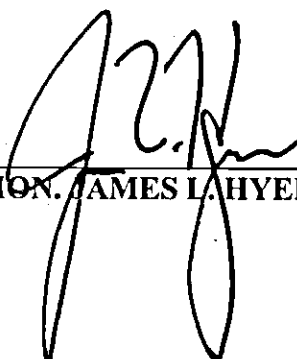
ORDERED that the Cross Motion of Co-Defendants Brenden G. Fee and Donna M. Fee to amend their Answer (seq. #2) is denied as moot; and it is further

ORDERED that the parties and counsel are to appear before the undersigned on Wednesday, August 24, 2022 at 9:30 a.m. in person for a settlement conference. The parties shall appear, and the adjusters shall be available by telephone.

The foregoing constitutes the Decision and Order of this Court.

Dated: Goshen, New York
August 1, 2022

ENTER:



HON. JAMES L. HYER, J.S.C.

TO: Counsel of Record Via NYSCEF