

Yuen v Accurate Communication Inc.

2023 NY Slip Op 31690(U)

May 9, 2023

Supreme Court, Kings County

Docket Number: Index No. 502657/20

Judge: Karen B. Rothenberg

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At an IAS Term, Part 35, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of May, 2023.

P R E S E N T:

HON. KAREN B. ROTHENBERG,

Justice.

-----X
ANNA YUEN,

Plaintiff,

-against-

Index No. 502657/20

ACCURATE COMMUNICATION INC., CITY OF NEW YORK, ADMINISTRATION FOR CHILDREN’S SERVICES and LUCY NUNEZ,

Defendants.

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	<u>88, 101-102</u>
Opposing Affidavits (Affirmations)	<u>110</u>
Other Papers: <u>Affirmation in Support</u>	<u>90</u>

Upon the foregoing papers, defendants City of New York, Lucy Nunez and Administration for Children’s Services (ACS) (collectively, “City defendants”) move for an order, pursuant to CPLR 3211 (a) (7) and 3212, dismissing the complaint of plaintiff Anna Yuen. Plaintiff cross-moves for an order, pursuant to CPLR 3025 (b), permitting

plaintiff to amend her complaint to allege that the City defendants owed her a special duty of care.

Background

Plaintiff commenced this action to recover damages for personal injuries suffered from an assault by a third party while plaintiff was providing interpretation services to an ACS case worker, defendant Lucy Nunez, during an investigatory visit to a residence. At the time of the incident, which took place on November 8, 2018, plaintiff was retained as an independent contractor by defendant Accurate Communication Inc., which provided interpreters to the City of New York and ACS pursuant to a contract. In her verified complaint, plaintiff stated that she accepted an assignment from Accurate to accompany Nunez to an apartment in Brooklyn, where Nunez planned to interview a mother whose children were alleged to be in poor hygiene. Plaintiff met Nunez outside of the building and both were invited up to the apartment. In the apartment, plaintiff interpreted the communications between the non-English speaking mother and Nunez. Plaintiff alleges that after a short time, the mother became agitated and insisted that plaintiff and Nunez leave the apartment, but that Nunez refused to leave. Plaintiff states that she informed Nunez that she wanted to leave as she did not feel safe due to the mother's escalating anger. Nunez subsequently took out her cell phone to call 911, which plaintiff alleges escalated the mother's anger further. Plaintiff states that a relative then emerged from a bedroom and began yelling at Nunez and plaintiff in broken English. Plaintiff alleges that upon

plaintiff's urging, Nunez agreed to exit the apartment with plaintiff. After exiting the apartment, plaintiff was stabbed by the relative. Plaintiff maintains that her injuries were the result of negligence by the City defendants.

Following completion of the parties' examinations before trial [EBTs], at which plaintiff and Nunez provided sworn testimony regarding the incident, the City defendants moved for summary judgment arguing, among other things, that plaintiff has neither pleaded nor established that the City defendants owed her a "special duty," which is required to hold municipal defendants liable for negligence.

Discussion

"To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries" (*Fox v Marshall*, 88 AD3d 131, 135 [2d Dept 2011]; see *Ferreira v City of Binghamton*, 38 NY3d 298, 308 [2022]; *PNC Bank, N.A. v Steinhardt*, 159 AD3d 999, 1000 [2d Dept 2018]). "In the absence of duty, there is no breach and without a breach there is no liability" (*Pulka v Edelman*, 40 NY2d 781, 782 [1976]; see *Fox*, 88 AD3d at 135). Where it is determined that an agency of the government was exercising a governmental function at the time of the alleged negligence, a municipality may not be held liable unless it owed a special duty to the injured party (see *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]; *Estate of Gail Radvin v City of New York*, 119 AD3d 730, 732 [2d Dept 2014]). Such a special duty can arise where "the government

entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally” (*Applewhite*, 21 NY3d at 426). A municipality will be held to have voluntarily assumed a special duty where there is: “(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 NY2d 255, 260 [1987]; see *Halberstam v Port Auth. of N.Y. & N.J.*, 175 AD3d 1264, 1266 [2d Dept 2019]). Of the four factors, the “justifiable reliance” element is particularly “critical because it provides the essential causative link between the special duty assumed by the municipality and the alleged injury” (*Valdez v City of New York*, 18 NY3d 69, 81 [2011] [internal quotation marks omitted]).

Plaintiff has failed to allege facts in either her notice of claim or her verified complaint demonstrating that the City defendants owed her a special duty. Failure to allege a special duty or the factual predicate for finding a special duty in the notice of claim or the complaint is fatal to the maintenance of this action and may not be raised, as plaintiff attempts here, for the first time in opposition to summary judgment (see *Perez v City of New York*, 182 AD3d 425, 425 [1st Dept 2020]; *Blackstock v Board of Educ. of the City of N.Y.*, 84 AD3d 524 [1st Dept 2011]; *Rollins v New York City Bd. of Educ.*, 68 AD3d 540, 541 [1st Dept 2009]). Further, no proof has been elicited from plaintiff’s EBT testimony

or Nunez's EBT testimony to show that the City defendants assumed any affirmative duty, through promises or actions, to protect plaintiff against potential assault or violence from a third party while plaintiff was providing interpretation services to ACS case workers. In fact, plaintiff testified at both her General Municipal Law § 50-h hearing and her EBT that nobody at ACS made any promises to plaintiff that she would be protected by the case worker in a volatile situation such as what transpired prior to the assault (EBT transcript plaintiff, NYSCEF Doc No 92, at 32; 50-h transcript plaintiff, NYSCEF Doc No 94, at 101).

In response to the City defendants' summary judgment motion, plaintiff cross-moved to amend the complaint to allege a special duty. "Although leave to amend should be freely given in the absence of prejudice or surprise to the opposing party (*see* CPLR 3025 [b]), the motion should be denied where the proposed amendment is palpably insufficient or patently devoid of merit" (*Silverman v Potruch & Daab, LLC*, 142 AD3d 660, 661 [2d Dept 2016]). The proposed amendment simply adds a conclusory statement that the City defendants breached a special duty to plaintiff. However, there are no additional facts alleged upon which the special duty claim may be based. Thus, the proposed amendment is palpably insufficient (*see Mashinsky v Drescher*, 188 AD3d 465, 466 [1st Dept 2020]).

Moreover, even if plaintiff's motion to amend the complaint were granted, this action would still be subject to dismissal on the ground of governmental function

immunity, since the alleged negligence occurred while ACS and Nunez were engaged in a discretionary governmental action (*see Hines v City of New York*, 142 AD3d 586, 586-587 [2d Dept 2016]).

Conclusion

Accordingly, the motion of the City defendants for summary judgment dismissing the verified complaint is granted. Plaintiff's cross motion to amend the complaint is denied. The verified complaint is hereby dismissed as against the City defendants.

The foregoing constitutes the decision and order of the court.

ENTER,



J. S. C.