

**Yisrael v City of New York**

2023 NY Slip Op 32413(U)

July 17, 2023

Supreme Court, Kings County

Docket Number: Index No. 510290/2017

Judge: Katherine A. Levine

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SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF KINGS

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SHIMSHON YISRAEL,*Plaintiff,**-against-*

THE CITY OF NEW YORK,

*Defendant.*

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DECISION/ORDER

Index No. 510290/2017

Motion Seq. 3

The City of New York (the “City” or “defendant”) moves for an order dismissing the complaint pursuant to CPLR § 3211(a)(7) and/or granting summary judgment dismissing the complaint pursuant to CPLR § 3212.

Plaintiff Shimshon Yisrael (“Yisrael” or “plaintiff”), a resident of the Bedford Atlantic Men’s Shelter (“Bedford”), which is a homeless shelter owned, operated and maintained by the City, was injured when Mark Holt, another resident of Bedford, assaulted him with a metal pole as he was sleeping in his bed on April 20, 2016. Brandon Davis, a peace officer for the Department of Homeless Services Police, testified at an EBT that he was the only officer on the floor when the incident occurred, and that there were approximately 200 beds, and about half were occupied. Davis did not carry a gun or taser. He was patrolling the bathroom at the time of the incident. When he exited, he saw Mark Holt carrying a pipe. When backup officers arrived, the officers removed the pipe from Holt’s hands. It is undisputed that plaintiff did not have previous contacts with the assailant and that he did not provoke the assault.

Plaintiff alleges that the City was negligent in allowing a fellow resident to attack him to the extent that it failed to: 1) provide proper security; 2) properly supervise, monitor and train its security staff and perform background checks on them; and 3) notify plaintiff of the dangerous condition. Furthermore, plaintiff contends that under *Miller v New York*, 62 N.Y.2d 506 (1984), the City, as owner of the subject premises, was acting in a proprietary capacity, and was subject to the same standard of negligence as private landlords.

The City argues that it is immune from liability because providing security in a municipal homeless shelter is a governmental function, and plaintiff failed to specifically plead a special duty or facts in the notice of claim and complaint supporting the existence of a special duty. The City further argues that even assuming the plaintiff pleaded and established a special duty, the City remains entitled to summary judgment on its defense

of governmental function immunity because the conduct complained of involves discretionary governmental functions, and the record shows that the City exercised discretion in the performance of those functions.

To prevail on his negligence claim, plaintiff must demonstrate that defendant owed him a duty and breached it, and that his injury proximately resulted from that breach. *Ferreira v. City of Binghamton*, 38 N.Y.3d 298, 308 (2022); *Solomon v. New York*, 66 N.Y.2d 1026, 1027 (1985). In a negligence action against a municipality, the threshold issue in determining the extent of its duty is “whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose.” *Ferreira, supra*, 38 N.Y.3d at 308; *Turturro v City of New York*, 28 N.Y.3d 469, 477 (2016); *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 (2013). When a governmental entity acts in a proprietary capacity, it is subject to liability pursuant to ordinary rules of negligence applicable to non-governmental parties. *Wittorf v City of New York*, 23 N.Y.3d 473, 479 (2014); *Applewhite, supra*, 21 N.Y.3d at 425.

Where the alleged negligent acts or omissions involve a governmental function, a plaintiff must prove that the governmental entity owed him a special duty of care, and where the plaintiff fails to meet this burden, liability may not be imputed to the municipality. *Ferreira, supra*, 38 N.Y.3d at 10; *Miller, supra*, 62 N.Y.2d at 510. Even if a plaintiff proves that there was a special duty, a governmental entity may rely on the governmental function immunity defense, which provides immunity for the performance of a governmental function, when the challenged actions were discretionary in nature and discretion was, in fact, exercised. *Connolly v Long Is. Power Auth.*, 30 N.Y.3d 719, 728 (2018); *Turturro, supra*, 28 N.Y.3d at 478-479.

The court’s determination as to the primary capacity in which a governmental agency was acting must be based solely on the acts or omissions claimed to have caused the injury. *Ferreira, supra*, 38 N.Y.3d at 308; *P.R.B. v. State of New York*, 201 A.D.3d 1237, 1238 (3d Dept. 2022); *Perlov v Port Auth. of N.Y. & N.J.*, 189 A.D.3d 1624, 1626-1627 (2d Dept. 2020). A governmental function will envelop acts taken by a municipality for the protection and safety of the public pursuant to its general police powers. *Ferreira, supra*, 38 N.Y.3d at 309; *Turturro, supra*, 28 N.Y.3d at 478. A government entity performs a proprietary role when its activities substitute for or supplement traditionally private enterprises. *Turturro, supra*, 28 N.Y.3d at 477; *Canberg v. County of Nassau*, 214 A.D.3d 943, 944 (2d Dept. 2023). When a governmental entity acts as a landlord, it is deemed to perform a proprietary role. *Miller, supra*, 62 N.Y.2d at 511; *French v Long Is. Children's Museum*, 163 A.D.3d 778, 778 (2d Dept. 2018); *Dick v. Town of Wappinger*, 63 A.D.3d 661, 662 (2d Dept. 2009).

The gravamen of plaintiff's complaint is that the City failed to provide proper security at Bedford, which allowed another resident to beat him and cause him injuries. The issue is whether the failure to provide adequate security at a homeless shelter involves a governmental or proprietary function. The court must assess the City's duty to protect the public on its property along "a continuum of responsibility." *Miller, supra*, 62 NY2d at 511-512. At one end of the spectrum are "the simplest matters directly concerning a piece of property for which the entity acting as landlord has a certain duty of care, [such as] the repair of steps or the maintenance of doors." *Id.* These matters fall within the governmental entity's proprietary function. *Id. See also, Mtr. of World Trade Ctr. Bombing Litig.*, 17 N.Y.3d 428, 446-447 (2011).

As the spectrum gradually moves out to more complex measures of safety and security for a greater area and populace, the actions at a certain point become governmental functions, for example, the maintenance of general police and fire protection. *Mtr. of World Trade Ctr., supra* 17 NY 3d at 446-47. *See, Heeran v Long Is. Power Auth.* (LIPA), 141 A.D.3d 561, 573 (2d Dept. 2016); *Lemery v. Vill. of Cambridge*, 290 A.D.2d 765, 766 (3d Dept. 2002); *Crosland v. New York City Transit Auth.*, 110 A.D.2d 148, 155 (2d Dept. 1985); *Wagstaffe v. State of New York*, 2014 NY Slip Op 50658(U), 43 Misc. 3d 1216(A), 1216A (Ct. of Claims 2014). Consequently, "any issue relating to the safety or security of an individual claimant must be carefully scrutinized to determine the point along the continuum that the alleged negligent action falls into, either a proprietary or governmental capacity." *Mtr. of World Trade Ctr. Bombing Litig., supra*, 17 N.Y.3d at 446-447; *P.R.B., supra*, 201 A.D.3d at 1238, *citing to Miller, supra*, 62 N.Y.2d at 511-512. If the failure to provide security involves the discretionary allocation of police resources, then a governmental function is deemed to have been performed. *Mtr. of World Trade Ctr. Bombing Litig., supra*, 17 N.Y.3d at 455; *Granata v City of White Plains*, 120 A.D.3d 1187, 1188 (2d Dept. 2014).

This case does not involve the discretionary allocation of police resources. Peace Officer Davis testified at his EBT that neither he nor the other peace officers who removed the metal pole from Mark Holt's hands carried guns or tasers, and that they are not "police officers." The "designation of 'peace officer' is given to a narrowly defined group of individuals who are not necessarily working in general law enforcement but who, when working pursuant to their 'special duties' or 'geographical area of employment,' have a need for limited police power." *People v Page*, 35 N.Y.3d 199, 205 (2020).

Nor does this case involve complex measures of safety and security for a greater area and populace, but rather is based on the failure to take rudimentary security measures to prevent Mark Holt or any other occupant of the shelter from possessing a metal pole

which obviously could be used as a weapon. This court finds that requiring residents at a homeless shelter to be examined with a metal detector does not involve complex measures. *See, Wiggins v. Bledsoe*, 2017 U.S. Dist. LEXIS 197071, \*32-34 (Pa. Mid. Dist. Ct. 2017) (requiring inmates who leave their cells to be pat searched and examined with a hand held metal detector does not involve an element of choice, and as such “discretionary function exception” was not applicable with respect to negligence claim). *See also, Woodruff v. United States*, 2020 U.S. Dist. LEXIS 107761, \*14-15 (D.C. Dist. Ct. 2020).

Accordingly, this court finds that the City, as the owner and operator of the homeless shelter, acted in a propriety capacity as a landlord. As such, it had a common-law duty to take minimal precautions to protect tenants from foreseeable harm, which included “the most rudimentary security.” *Scurry v. New York City Hour. Auth.*, 2023 NY Slip Op 02752, 2023 N.Y. LEXIS 901, \*7 (2023). *See, Miller, supra*, 62 N.Y.2d at 513-514 (where student at State university was raped by an intruder in the laundry room in her dorm, court found State’s duty to guard the laundry room well within its proprietary capacity as a landlord, and allowed claim of negligence against the State for its failure to lock the entrance doors to the dorm, to go to forward). *See also, P.R.B., supra*, 201 A.D.3d at 1238-1239 (plaintiff’s allegations that NY State’s failure to install proper security devices, including locks, implicated State’s proprietary function as a landlord, and rejected claim of governmental immunity).

Plaintiff testified that he was regularly searched with a metal detector wand prior to entering the homeless shelter. This raises a triable issue of fact as to whether there were adequate security personnel at the entrance who had metal detector wands to properly search all those entering the shelter, to prevent the assault. This precludes both the motions to dismiss and for summary judgment and permits plaintiff’s claim for negligent failure to provide adequate security to move forward.

The “governmental function immunity defense” does not afford immunity to the City in this case. It shields a municipality from liability for discretionary actions, meaning those involving the “exercise of reasoned judgment” which could typically produce different acceptable results. *Valdez v City of New York*, 18 N.Y.3d 69, 76 (2011). It insulates a municipality from liability for the negligence of its employees in the performance of their duties where the conduct involves the exercise of professional judgment such as making tactical decisions. *Calved v. Estate of Hallums*, 4 N.Y.3d 499, 506 (2005); *Arias v. City of New York*, 22 A.D.3d 436, 437 (2d Dept. 2005); *James v City of New York*, 2019 NY Slip Op 30324(U), 2019 N.Y. Misc. LEXIS 551, \*3 (Sup. Ct. N.Y. Co. 2019). However, this immunity only extends to the municipality where the actions of its employees resulted from the exercise of sound judgment which would

normally produce acceptable results, and where they acted in compliance with its established rules, policies and procedures. *Johnson v City of New York*, 15 N.Y.3d 676, 681 (2010); *Relf v City of Troy*, 169 A.D.3d 1223, 1227 (3d Dept. 2019); *Santaiti v Town of Ramapo*, 162 A.D.3d 921, 928 (2d Dept. 2018). Defendant has not demonstrated that its actions prior to the assault involved the exercise of professional judgment in making tactical decisions, or that its employees complied with established rules, policies and procedures in utilizing the metal detector wands.

However, the City's motion for summary judgment dismissing plaintiff negligence claims based on its failure to warn plaintiff of known risks and dangers and its failure to properly supervise, monitor and train its security staff and perform background checks on them, is granted. Plaintiff has failed to show, and it is up to mere conjecture as to how any changes in the City's training program might have altered the course of events in this case. Nor did he demonstrate how the City could have warned him about Mark Holt in view of the undisputed fact that there were no prior interactions between them.

Accordingly, this case shall proceed to trial on whether the assault was reasonably foreseeable, whether defendant discharged its duty to provide reasonable security measures, and whether defendant's negligence was the proximate cause of plaintiff's injuries.

DATED: July 17, 2023



Hon. Katherine A. Levine, J.S.C.

**HON. KATHERINE A. LEVINE**  
**JUSTICE SUPREME COURT**

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