

Marcantoni v City of New York

2023 NY Slip Op 33871(U)

October 27, 2023

Supreme Court, New York County

Docket Number: Index No. 159897/2017

Judge: J. Machelles Sweeting

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

MARIA MARCANTONI

Plaintiff,

- v -

CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 159897/2017

MOTION DATE 06/27/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 were read on this motion to/for DISMISSAL.

In the underlying action, plaintiff alleges that she sustained personal injuries on June 11, 2017 when she tripped and fell over a New York Police Department (“NYPD”) barrier located on the sidewalk at 5th Avenue and East 51st Street, New York, New York (*see photo* at NYSCEF Doc. No. 32).

Now pending before the court is a motion where defendant City of New York (the “City”) seeks an order dismissing the complaint: (1) pursuant to Civil Practice Law and Rules (“CPLR”) 3211(a)(7) for failure to state a cause of action or, in the alternative, (2) pursuant to CPLR 3212(b), granting summary judgment and dismissing the Complaint against the City.

Also pending before the court is a cross-motion where plaintiff seeks an order, pursuant to CPLR 3042 and/or 3043, granting plaintiff permission to either supplement or amend her Bill of Particulars (“BOP”); and/or deeming plaintiff’s Second Supplemental BOP as a Supplemental Pleading.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Per the New York Court of Appeals, “On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction [...] 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 [NY Ct. of Appeals 1994]).

Arguments Made by the Parties

The City argues that its placement of the barriers for a parade is a quintessential governmental function of management of vehicular and pedestrian traffic, and in this instance, such barriers were erected on the sidewalk in furtherance of public safety along the parade route. Accordingly, the City argues, plaintiff was required to both plead and prove that the City owed a special duty of care to her, which plaintiff fails to do.

Alternatively, the City argues that even if, *arguendo* plaintiff had both pled and proved a special duty, the City would still be entitled to dismissal under the defense of governmental function immunity, which shields governmental entities from liability for discretionary actions taken during the performance of governmental functions.

Lastly, the City argues that it is entitled to summary judgment because the barrier over which plaintiff tripped was open and obvious, and not inherently dangerous.

Plaintiff argues that there is no dispute that at the time plaintiff fell, the parade was already over and the barriers had already been broken down and were nested (i.e. stacked) together for removal. Therefore, plaintiff argues, the City cannot argue that such barriers were performing a governmental function at the time of the accident, as the barriers were no longer directing traffic or crowds. Accordingly, the City may not shield itself behind governmental function immunity, nor was plaintiff required to plead or prove any special duty.

Plaintiff also argues that there are triable issues of fact as to whether the barriers were open and obvious, or were stacked in such a way as to be inherently dangerous.

Finally, with respect to the cross-motion, plaintiff argues that even assuming, *arguendo*, that the City was involved in a governmental function, then plaintiff should be allowed to amend her BOP, as leave to amend pleadings should be freely granted in the absence of prejudice or surprise. Plaintiff argues that her only addition to the proposed amended BOP is her claim that the defendant owed her a special duty. Plaintiff argues that this claim is predicated upon the same facts alleged in the NOC, Complaint and BOP, and that there is no prejudice to the City because no new theories of liability or new factual allegations are raised. Further, plaintiff argues:

[...] the City voluntarily assumed a special relationship with the plaintiff. First, the City voluntarily assumed the duty of the placement and removal of barriers on Fifth Avenue on the date of accident. Second, The City knew that inaction or improper placement could lead to harm [...] Third, the duty is casually related to the harm as the improper placement was the proximate cause of the plaintiff's accident and injuries. Fourth, the plaintiff-pedestrian justifiably relied on the City's placement of barriers to not obstruct pedestrian traffic and not tuck barriers behind corners that constitute not only an obstruction but an inherently dangerous tripping hazard and trap [...] Therefore, the foregoing creates contact between plaintiff and the City for liability purposes.

In Reply, the City argues that alleging a special duty constitutes a new theory of liability against the City, and that plaintiff can not be allowed to assert any new theories now, many months after plaintiff filed the Note of Issue and Certificate of Readiness. Further, the City argues, even if plaintiff were able to amend her BOP, the theory of special duty must also be pled in both the NOC and the Complaint, which it was not. Lastly, the City argue that the court does not have the discretion to allow plaintiff to amend her NOC, as the statute of limitations (“SOL”) has already run.

In Reply of her cross-motion, plaintiff argues that a triable issue of fact exists as to whether the City was negligent in its placement of the barricades after the parade ended, and whether the City was negligent in not placing caution tape or reflective tape on the stacked barricades that were to remain on the sidewalk overnight. Further, plaintiff argues, there were multiple storefront windows for pedestrians to view upon walking, and that the placement of these stacked barriers constitutes a trap and nuisance, and an inherently dangerous condition.

Conclusions of Law

Pursuant to the New York of Appeals in Applewhite v Accuhealth, Inc., 21 NY3d 420

(2013):

When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose. If the municipality's actions fall in the proprietary realm, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties [...]. In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are “undertaken for the protection and safety of the public pursuant to the general police powers.”

If it is determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a “special duty” to the injured party. The core principle is that to “sustain liability against a municipality, the duty breached must be more than that owed the public generally”. We have recognized that a special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition. It is the plaintiffs obligation to prove that the government defendant owed a special duty of care to the injured party because duty is an essential element of the negligence claim itself. In situations where the plaintiff fails to meet this burden, the analysis ends and liability may not be imputed to the municipality that acted in a governmental capacity.

A central question here is whether the City was performing a governmental function at the time of plaintiff’s accident. It is undisputed that the barriers were initially placed for the purpose of regulating the flow of traffic and people during the Puerto Rican Day Parade. The caselaw is well settled that police actions taken to regulate people or vehicles is considered a “quintessential governmental function.” *See, e.g. Donovan v W. Indian Am. Day Carnival Ass'n, Inc.*, 6 Misc 3d 1016(A) [Kings Cnty. Sup Ct 2005][finding that the City has *prima facie* demonstrated that the *parade-related duties in question, including permit issuance, traffic regulation and crowd control, are governmental duties* designed to protect all parade spectators and not any person in particular and within the NYPD's discretion] [internal citations omitted] [emphasis added]; *Lewis v City of New York*, 19 Misc 3d 1109(A) [Bronx Cnty. Sup Ct 2008][concluding that the regulation of the

use of streets for parades and processions is a traditional exercise of control by local government]
[internal citations omitted];

Plaintiff also argues that even if the barriers were initially placed in service of a governmental function, such governmental function had ended by the time plaintiff fell, because the parade had ended. The court finds this argument to be without merit, as the caselaw (see above) makes clear that when the government is engaged in a governmental function, it has the discretion to carry out such functions. Here, the decisions about when to dismantle the barriers and how to stack such barriers for removal fell under the discretion of the City. *See Ross v. City of New York*, Index No. 450320/2019 [Sup. Ct., N.Y. Cty., May 19, 2021] [Lyle E. Frank, J.]:

Plaintiff does not dispute that a special duty was not pled, rather argues that special duty is not applicable. The plaintiff's main contention is that the metal barricades were not performing a governmental function at the time of plaintiff's accident. Plaintiff argument relies on the fact that the barricades were placed 4 days before the Thanksgiving Day Parade, the event where the barricades would be used for crowd/traffic control.

The Court, however, does not find this argument persuasive. The fact that the City placed these barricades for the purposes of traffic/crowd control describe a quintessential government function, *to analyze whether the barricades were placed prematurely would be an analysis of the discretionary function*. Even if plaintiff properly pled the theory of a special duty, the facts of this case would nevertheless fail to impose liability on the City. The Court has reviewed plaintiff's remaining contentions and finds them unavailing [internal citations omitted] [emphasis added];

Veksler v. City of New York, Index No. 158713/2017 [Sup. Ct., N.Y. Cty., March 31, 2022] [Judy H. Kim, J.]:

The dispositive question, then, is whether the NYPD's placement of metal barriers was an exercise of the City's governmental function or a proprietary function. As a rule, the NYPD's placement of metal barriers in connection with managing pedestrian and vehicular traffic is a governmental function. Plaintiff argues that the NYPD's failure to immediately remove the metal barriers after the Women and Allies March was a proprietary act. This argument is without merit. *The City's exercise of discretion in carrying out a governmental function – the timing of the placement of barricades for traffic control – does not turn a governmental function into a proprietary one, even if that exercise of discretion is negligent* [internal citations omitted] [emphasis added].

Because the City was performing a governmental function at the time of plaintiff's accident, plaintiff needed to both plead and prove that a special duty existed between plaintiff and defendant City. It is undisputed that the NOC, the Complaint and the BOP all failed to plead that such special duty existed. There is no application before the court to amend the Complaint or the NOC, and in any event, the court cannot allow plaintiff to amend her NOC because the SOL has expired.

In any event, even if, *assuming arguendo*, plaintiff were allowed to amend all her pleadings, it is clear on the undisputed facts of this case that the City did not owe plaintiff any special duty beyond that which was "owed to the public generally." Indeed, nowhere in the papers does plaintiff even attempt to argue this, nor does plaintiff claim that she had any individual contact whatsoever with any member of the NYPD. To the extent that plaintiff argues that the City voluntarily assumed the duty of the placement and removal of barriers on the date of accident; that the improper placement was the proximate cause of the plaintiff's accident; and that plaintiff justifiably relied on the City's placement of barriers to not obstruct pedestrian traffic, none of these arguments, even if true, would give rise to a special duty between plaintiff and the City.

Conclusion


For the reasons cited above, it is hereby:

ORDERED that the City’s motion is **GRANTED**; and it is further

ORDERED that plaintiff’s cross-motion is **DENIED**; and it is further

ORDERED that the Complaint is dismissed, with prejudice; and it is further

ORDERED that this action is closed.

10/27/2023			
DATE			J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE