Preston v Singh
2024 NY Slip Op 35196(U)
February 13, 2024
Supreme Court, Queens County
Docket Number: Index No. 708485/23
Judge: Kevin J. Kerrigan
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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

Douglas Preston and Jane Preston,

Index Number: 708485/23

Motion Date: 2/5/24

Plaintiffs,

- against -

Motion Seq. No.: 1

Karanjit Singh, Multani Brothers Trans Corp., AJ6 trucking LLC, The City of New York, New York City Police Department, P.O. Scott T. Pamlese, P.O. Walter J. Feit, and John Does 1-5, et.al.,

Defendants.

----------X

The following papers numbered E21-E34 read on this motion by Defendants, The City of New York, New York City Police Department (NYPD), P.O. Scott T. Pamlese and P.O. Walter J. Feit, for an order to dismiss.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	E21-25
Affirmation in Opposition-Exhibits.....	E26-33
Reply.....	E34

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Defendants, The City of New York, New York City Police Department, P.O. Scott T. Pamlese and P.O. Walter J. Feit, for an order to dismiss is granted.

Plaintiff allegedly sustained injuries as a result of a motor vehicle accident which occurred on July 23, 2022 on the Clearview Expressway near its intersection with the Long Island Expressway in Queens County. At the forgoing time and place, Plaintiff's vehicle collided with a stopped or disabled privately-owned tractor trailer which was situated in the left most lane.

At Plaintiff's 50-h hearing he testified that he was driving in heavy traffic on the Clearview Expressway at the time of the accident. He moved from the right lane to the left lane as traffic got heavier. He stayed in the left lane for approximately one minute and was traveling at approximately 45 to 50 miles per hour. He observed a civilian vehicle and a police vehicle with its lights on the right shoulder. He did not observe the stopped trailer in the left lane situated under an overpass because it blended in with the concrete pillars under the bridge. Plaintiff subsequently collided directly into the rear of the trailer.

The municipal Defendants move to dismiss the complaint pursuant to CPLR §3211(a)(7) for failure to state a cause of action. With respect to the NYPD, the Movants argue that, as a department of the City of New York, the NYPD is not a suable entity. With respect to the remaining municipal Defendants, Movants aver that the Plaintiff failed to adequately plead and prove a special duty, entitling them to dismissal of the complaint.

It is well settled that a municipal agency cannot be held liable for acts of negligence committed in the performance of its governmental functions in the absence of a special relationship with the plaintiff (see Blanc v. City of New York, 223 A.D.2d 522 [2d Dept. 1996]). A plaintiff is required to "plead and prove" the existence of a special duty (see Bonner v. New York, 73 N.Y.2d 930 [1989]). Moreover, even where plaintiff demonstrates the existence of a special duty, plaintiff must also establish justifiable detrimental reliance upon such special duty (see Blanc, 223 A.D.2d at 522; Feinsilver v. City of New York, 277 A.D.2d 199 [2d Dept. 2000]).

Movants initially contend that the Plaintiff failed to adequately plead the existence of a special relationship. Indeed, a plaintiff must provide the factual predicate for the special duty theory in his pleadings (see Shatravka v. City of New York, 2020 N.Y. Misc.LEXIS 5684 [NY Sup. Ct. New York County 2020]). The notice of claim and summons and complaint both provide that a special duty existed in that the municipal Defendants took positive control of a known and dangerous safety condition by failing to secure the scene. Thus, the claims contained therein apprised the municipal Defendants that the Plaintiff would seek to impose liability based on the theory of a special duty, and specifically on the basis that the municipal Defendants assumed positive direction and control (see Turturro v. City of New York, 127 A.D.3d 732 [2d Dept. 2015]). Whether the facts alleged in the complaint, taken as true, adequately make out a cause of action on the theory of special duty is analyzed further infra.

"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" (Pelaez v. Seide, 2 N.Y.3d 186, 199-200 [2004]).

There is no issue presented as to the applicability of the first basis, or that the municipal Defendants violated any statutory duty. Moreover, it does not appear that Plaintiff opposes the instant motion on the applicability of this basis.

As to the second basis, Movants aver that the police did not voluntarily assume a duty which was unknown to the public generally. The test for this second basis for a special relationship requires all of the following elements: "(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 N.Y.2d 255, 260 [1987]; Pelaez, 2 N.Y.3d at 186.).

There is no evidence on this record to establish that the Movants assumed, through any promises or acts, an affirmative duty to act on behalf of the Plaintiff or any detrimental reliance of any affirmative undertaking by the Movants. There is no allegation of a promise made to the Plaintiff to undertake a duty on his behalf or engaged in any specific acts on behalf of Plaintiff that placed him in any greater position of danger than he would have been otherwise. The second prong of the test, knowledge on the part of the municipality that inaction could cause harm, is inapplicable as well, since it depends upon the first. The third prong of the test similarly fails, as there is no allegation of any contact between Plaintiff and any municipal agents prior to the incident. Finally, there is no allegation that Plaintiff specifically relied on any undertaking by the municipal agents. Moreover, it does not appear that Plaintiff opposes the instant motion on the applicability of this basis.

Movants aver that the third basis is similarly inapplicable, as there is no evidence that the NYPD directed the Plaintiff in any way. Indeed, Movants point to the pleadings, which essentially exclusively allege that the municipal Defendants *failed* to take

control of the accident scene. In opposition, Plaintiff argues that because the municipal agents were already on the scene of the prior accident, they assumed positive direction and control. Plaintiff likens the facts of this case to Ferreira. In that case, the Court found a special duty where the police executed a no-knock search warranty and shot a visitor of the premises (see Ferreira v. City of Binghamton, 38 N.Y.2d 298 [2022]). The Court ultimately found that, specifically with regard to no-knock search warrants, police take control of a premises due to the unpredictable and potentially dangerous nature of executing the warrant (see id.). The Court in Howell recently revisited the holding in Ferreira (see Howell v. City of New York, 39 N.Y.3d 1006 [2022]). The Court held that Ferreira articulated "two important innovations" (see id.). First, "when the government takes charge of a dangerous situation, the governmental defendant need not know of the existence of a person for the special duty to attach to that person" (see id.). Second, a categorical rule specifically applicable to no-knock warrants was created (see id.). To be clear, in the first instance, the Court must still find that the defendant(s) directed and controlled the dangerous condition before finding the existence of a special relationship (see id.). Thus, the Court fails to see how Ferreira is on point with the facts and circumstances of this case.

Generally, the alleged failure to act, or provide police protection, as alleged by Plaintiff here, cannot be the basis to form a special relationship (see Palaez, 2 N.Y.3d at 186; Bracci v. State, 9 Misc.3d 874 [Court of Claims 2005]). In Smullen, however, the Court found that the Defendants did assume positive direction and control notwithstanding (see Smullen v. City of New York, 28 N.Y.2d 66 [1971]). In that case, a worker was killed when a trench collapsed (see id.). Prior to entering the trench, the City inspector had assured the worker that it was "solid." (see id.). The Court sustained a verdict for the plaintiff specifically because the City had actual knowledge of the dangerous condition and subsequently failed to act (see id.). More akin to Smullen, Plaintiff argues that the City was in control of the prior accident on the roadway and subsequently failed to secure the scene (i.e., the trailer). The Court disagrees. The mere presence of the police officers on the scene is not tantamount to direction and control. There is no allegation in the pleadings that the officers gave Plaintiff any directions or orders. In fact, he testified that he never spoke with them. In Smullen, it was the "affirmative direction" that ultimately triggered the existence of a special relationship (see id.). No such similar circumstance is presented here. Indeed, liability founded upon the assumption of positive direction and control has been recognized only in rare circumstances (see Abraham v. City of New York, 39 A.D.3d 21 [2d Dept. 2007]). A failure to act, "even in the face of a hazard--even

a blatantly dangerous one, such as a disabled car stalled in the middle of a highway....is insufficient...to establish a special relationship" (see id.). There must be a showing that the municipality affirmatively acted to place Plaintiff in harm's way (see id.) (emphasis added). Based on the forgoing, there is no evidence that the municipal Defendants assumed positive direction and control in the face of a known, blatant and dangerous safety violation. Consequently, the facts contained in the complaint fail to state a cause of action pursuant to CPLR §3211(a)(7), in that the complaint fails to plead and prove the existence of a special duty.

With respect to the NYPD, it is not a distinct suable entity but merely a department of the City of New York (see Reohlehr v. New York City Police Dept., 151 A.D.3d 1093 [2d Dept. 2017]) Therefore, it is not a cognizable party (see id.). Accordingly, the complaint must be dismissed as against the NYPD.

Accordingly, the motion is granted in its entirety, and the complaint is hereby dismissed as against the City of New York, the New York City Police Department, P.O. Scott T. Pamlese, and P.O. Walter J. Feit.

Serve a copy of this order with notice of entry upon all parties without undue delay.

Dated: February 13, 2024

FILED
2/14/2024
COUNTY CLERK
QUEENS COUNTY

KEVIN J. KERRIGAN, J.S.C.