

Soto v City of New York
2024 NY Slip Op 35354(U)
July 15, 2024
Supreme Court, Richmond County
Docket Number: Index No. 151911/2020
Judge: Orlando Marrazzo, Jr.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
LASUN SOTO,

Plaintiff,

v

THE CITY OF NEW YORK, POLICE OFFICER
LOPEZ TAX ID# 943498, JANE/JOHN DOE POLICE
OFFICERS #1-10,

Defendants.
-----X

Present:

Hon. Orlando Marrazzo, Jr.

DECISION & ORDER

Index No. 151911/2020

Motion Seq. No. 001

The Court considered the following papers associated with Motion Seq. No. 001, submitted
on May 8, 2024:

NYSCEF Document Nos.:

**Notice of Motion, Affirmation in Support, and Statement of
Material Facts** 18-31

By Defendants The City of New York and Detective Steven
Lopez s/h/a Police Officer Lopez Tax ID# 943498, with exhibits,
dated January 31, 2024

**Affirmation in Opposition and Response to Statement of
Material Facts** 33-36

By Plaintiff Lasun Soto, with exhibits, dated February 27, 2024

Upon the foregoing papers, the motion by defendants The City of New York (hereinafter the "City") and Detective Steven Lopez s/h/a Police Officer Lopez Tax ID# 943498 (hereinafter "Det. Lopez") (together "Defendants") to dismiss the Complaint against JANE/JOHN DOE POLICE OFFICERS #1-10 is GRANTED, the motion by Defendants to dismiss the third cause of action is GRANTED, the motion by Det. Lopez for summary judgment dismissing the Complaint as asserted against him is GRANTED, and the City's motion for summary judgment dismissing the Complaint as asserted against it is DENIED.

Factual and Procedural History

This is an action to recover for personal injuries allegedly suffered by Lasun Soto (hereinafter "Plaintiff") during the execution of a search warrant. The record, including the deposition testimony and video footage submitted by both parties, support the following facts. In the early morning of May 29, 2020, Det. Lopez and other members of the New York City Police Department executed a "no-knock" search warrant of the first-floor apartment of 19 Osgood Avenue, Staten Island, New York. Police officers forced entry into the apartment using a battering ram and handcuffed three of the occupants, one of whom was Plaintiff. When Det. Lopez entered the apartment, he observed Plaintiff handcuffed on the floor, lying on broken glass and bleeding from his foot.

At the scene, Plaintiff told officers the blood was from the glass and was "old." At deposition, Plaintiff provided a different explanation. Plaintiff testified he was sleeping in the apartment when he heard police banging at the front door, so he got up to open the door for the officers. As Plaintiff opened the door, an officer dropped the battering ram, which shattered a glass television stand next to the door and struck the top of Plaintiff's foot, allegedly causing his injury. Including in the record is an operative report demonstrating Plaintiff underwent surgery on May 29, 2020, for a laceration and crush fracture to his left foot.

Plaintiff commenced this action by filing a Summons and Complaint on October 26, 2020. The City joined issued by filing an Answer on January 15, 2021, and Det. Lopez joined issue by filing an Amended Answer with the City on February 22, 2021. The John and Jane Doe defendants have not joined issued. Defendants now move, *inter alia*, for an Order granting summary judgment against Plaintiff and dismissing the Complaint.

Decision & Order

To obtain the drastic remedy of summary judgment, the moving party 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Stillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court must accord the non-moving party the benefit of every favorable inference that may be drawn from the pleadings and submissions (*Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014], quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]; *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385, 386 [2d Dept 2003], citing *Myers v Fir Cab Corp.*, 64 NY2d 806 [1985]).

If the moving party fails to meet its initial burden, the court must deny the motion "regardless of the sufficiency of the opposing papers" (*Alvarez*, 68 NY2d at 324, citing *Winegrad*, 64 NY2d at 853; see *Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). However, if the moving party does meet its burden, the burden shifts to the non-moving party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*id.*, citing *Zuckerman*, 49 NY2d at 562; *Vega*, 18 NY3d at 503). Thus, summary judgment is appropriate only when no material and triable issues of fact remain (*Paulin v Needham*, 28 AD3d 531, 531 [2d Dept 2006], quoting *Stretch v Tedesco*, 263 AD2d 538, 538 [1999]).

Essential to any negligence claim is proof that the defendant breached a duty of care to the plaintiff. "Absent a duty of care, there is no breach, and without breach, there can be no liability" (*Cadet v James B. Nutter & Co.*, 133 AD3d 561, 562 [2d Dept 2015], quoting *MVB Collision, Inc.*

v Allstate Ins. Co., 129 AD3d 1041, 1042 [2015], *quoting Fox v Marshall*, 88 AD3d 131, 135 [2011]; *see Ferreira v City of Binghamton*, 38 NY3d 298, 308 [2022]). The first step in determining whether a municipal defendant owed a duty to a plaintiff is determining "whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose" (*Canberg v County of Nassau*, 214 AD3d 943, 944 [2d Dept 2023], *quoting Turturro v City of New York*, 28 NY3d 469, 477 [2016], *quoting Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]; *see Trenholm-Owens v City of Yonkers*, 197 AD3d 521, 522 [2d Dept 2021]).

Where the municipality was acting in a governmental capacity—which the instant Defendants concede they were—the court must then determine whether the plaintiff proved the existence of a special duty as an element of his negligence claim (*id.*, citing *Ferreira v City of Binghamton*, 38 NY3d 298 [2022]; *Turturro*, 28 NY3d at 478; *Trenholm-Owens*, 197 AD3d at 523). To meet that burden, the pleadings must simply allege "facts and circumstances from which the existence of a special duty could reasonably be inferred" (*id.* at 946, *quoting Applewhite*, 27 NY3d at 426; *see Estate of M.D. v State of New York*, 199 AD3d 754 [2d Dept 2021] [internal quotation marks omitted]). Here, according Plaintiff the benefit of every favorable inference, Plaintiff met his burden of proving the existence of a special duty by alleging he was injured while police executed a search warrant for the apartment in which Plaintiff was staying (*see Ferreira*, 38 NY3d at 318 [holding a "special duty... arises when the police plan and execute a no-knock search warrant at an identified residence, running to the individuals within the targeted premises at the time the warrant is executed"]).

Nonetheless, "even if a plaintiff establishes all the elements of a negligence claim, a state or municipal defendant engaging in a governmental function can avoid liability if it timely raises the defense and proves that the alleged negligent act or omission involved the exercise of

discretionary authority" (*Valdez v City of New York*, 18 NY3d 69, 76 [2011]). But a municipal defendant cannot rely on this defense unless it "establishes that the discretion possessed by its employees was in fact exercised in relation to the conduct on which liability is predicated" (*id.*).

Here, the City failed to establish *prima facie* its entitlement to summary judgment. Based on Defendants' submissions, material questions of fact remain regarding the proximate cause of Plaintiff's injuries, whether the police officers were exercising discretionary authority at the time Plaintiff's claims arose, and whether the police officers failed to use even slight care or acted so careless as to show a complete disregard for the rights and safety of others at the time Plaintiff's claims arose. Thus, the City's motion for summary judgment is DENIED.

However, Det. Lopez established his entitlement to summary judgment. Plaintiff alleged, and Defendants admitted, Det. Lopez was the City's employee and was acting within the scope of his employment at the time Plaintiff's claims arose (*see* PJI 2:10A). Plaintiff failed to raise a material question of fact in opposition. Thus, Det. Lopez's motion for summary judgment is GRANTED.

Defendants' motion to dismiss the third cause of action pursuant to state law is GRANTED, as the doctrine of *respondeat superior* is a theory of liability and not an independent cause of action (*see Alexander v Westbury Union Free School Dist.*, 829 FSupp2d 89, 112 [E.D.N.Y. 2011]).

Defendants' motion to dismiss the Complaint against defendants John/Jane Doe #1-10 as abandoned pursuant to CPLR 3215(c) is GRANTED, based on Plaintiff's failure to take proceedings to enter judgment within one year of those defendants' defaults.

Accordingly, it is

ORDERED that Defendants' motion to dismiss the Complaint as to defendants John/Jane Doe #1-10 pursuant to CPLR 3215(c) is GRANTED, and it is further

ORDERED that Defendants' motion to dismiss Plaintiff's third cause of action pursuant to CPLR 3211(a)(7) is GRANTED, and it is further

ORDERED that Det. Lopez's motion for summary judgment dismissing the Complaint as asserted against him is GRANTED, and it is further

ORDERED that the City's motion for summary judgment dismissing the Complaint as asserted against it is DENIED, and it is further

ORDERED that Plaintiff's third cause of action is dismissed as to all defendants, and it is further

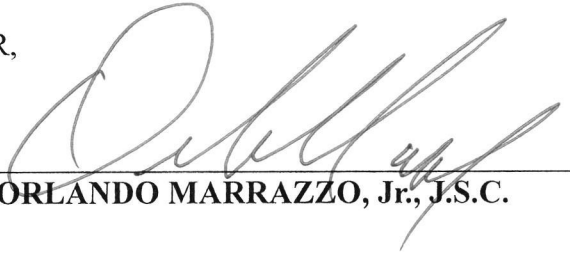
ORDERED that the first and second causes of action are dismissed as to Det. Lopez only, and it is further

ORDERED that the Clerk shall mark its records accordingly.

DATED:

7/15/2024.

ENTER,


HON. ORLANDO MARRAZZO, Jr., J.S.C.