

Cuomo v Calabrese
2024 NY Slip Op 35498(U)
August 8, 2024
Supreme Court, Westchester County
Docket Number: Index No. 58427/2021
Judge: Thomas Quiñones
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER – I.A.S. PART

PRESENT: HON. THOMAS QUIÑONES, J.S.C.

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CHRISTOPHER R. CUOMO,
Public Administrator of the County of Westchester,
as Administrator of the Estate of
JEFRY VLADIMIR SANTANA-BLANCO, Deceased,
and GLENNY SANTANA, Individually,

Plaintiff(s)

-against-

DINA CALABRESE, AZIZ M. ABOUSHI,
THE CITY OF YONKERS and
THE CITY OF YONKERS POLICE DEPARTMENT,

Defendant(s).

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The following papers filed to the New York State Court Electronic Filing System (NYSCEF) as NYSCEF Doc. 28-49 were read and considered on the motion filed by the City of Yonkers and Yonkers Police Department (collectively, “City Defendants”) for a court order pursuant to CPLR §3212, granting summary judgment in favor of the City Defendants and dismissing all claims asserted by Plaintiff(s) against the City Defendants with prejudice, and any such other relief as the Court may deem just and proper.

Upon the foregoing papers, the motion is determined as follows:

This wrongful death action arises from an incident that occurred on July 13, 2019 at approximately 4:38 A.M. JEFRY VLADIMIR SANTANA-BLANCO, decedent, was the subject of a traffic stop by the City Defendants, at which time he surrendered his vehicle and became a pedestrian on Yonkers Avenue. While a pedestrian on Yonkers Avenue, JEFRY VLADIMIR SANTANA-BLANCO was fatally struck by a vehicle driven by AZIZ ABOUSHI.

The following factual account is asserted in Plaintiff(s)' Notice of Claim:

"The Claims arose commencing on July 13, 2019 at approximately 4AM of that morning. Upon information and belief, the Decedent had been operating his vehicle in the vicinity of Yonkers Avenue and Elm Street. Upon information and belief, the Decedent was stopped by Police Officers from the Yonkers Police Department, and removed from his vehicle for being intoxicated, at which time the Officers parked the Decedent's vehicle, but did not submit the Decedent to any type of arrest, sobriety test, or tend to the Decedent in any manner. Instead, the Police Officers left the Decedent at the scene in an extreme and obvious intoxicated condition. The Decedent was then walking on the sidewalk in front of 125 Yonkers Avenue in Yonkers, and attempted to cross Yonkers Avenue. As he was in the process of crossing, he was struck and killed by a 2006 Audi motor vehicle. According to a Police Report, a copy of which is marked Exhibit A, that vehicle was owned by Dina Calabrese, and operated by Aziz M. Aboushi. The Decedent died at the scene, or shortly after." (NYSCEF Doc. 30).

As to the procedural posture of this case, a Trial Readiness Order and Note of Issue were filed, thus this matter is ripe for dispositive motions. Of note, Plaintiff(s)' claims against co-defendants were settled, thus the City Defendants are the remaining defendants in this case.

The City Defendants' Motion:

The City Defendants filed the instant motion pursuant to CPLR §3212, for a court order granting summary judgment in favor of the City Defendants and dismissing all claims asserted by Plaintiff against the City Defendants with prejudice and any such other relief as the Court may deem just and proper. It is their position that the City Defendants were not present at the time of the motor vehicle accident nor otherwise involved in the accident.

First, as to Plaintiff GLENNY SANTANA, defense counsel contends that Santana did not file a Notice of Claim within 90 days of the appointment of the decedent's representative, did not move for permission to file a late Notice of Claim, nor did the Notice of Claim filed in this matter include any claims for Santana individually. Therefore, the individual claims of Santana must be dismissed as a matter of law. (Kravitz Aff. ¶27, citing Gen. Mun. L. § 50-i (1); *see also Bonanno v. City of Rye*, 280 A.D.2d 630 [2d Dept. 2001]). Counsel notes that the Notice of Claim only indicates that Santana is the administratrix of the decedent's estate and does not contain any claims asserted by Sanatana, individually. Insofar as it has been more than two years since the Decedent's death, Santana is unable to seek leave of the court to file a Notice of Claim. (Kravitz Aff. ¶29, citing *Bonanno v City of Rye*, 280 A.D.2d at 630; *Nicholas v. City of New York*, 130 A.D.2d 470 [2d Dept. 1987]).

Second, counsel contends that the doctrine of governmental immunity shields public entities, including the City Defendants, from liability for discretionary actions taken during the performance of governmental functions. (Kravitz Aff. ¶31, citing *Valdez v City of New York*, 18 N.Y.3d 69, 75-76 [2011]). Both officers who were involved in the traffic stop, Retired Detective Michael Kostewich and Retired Detective Dennine Smiddy, provided corroborating testimony that they had no reason to believe that the Decedent was intoxicated. (See, EBT transcripts filed in Defendants' motion exhibits E and F, respectively). Even assuming arguendo, that said officers believed the Decedent was intoxicated, defense counsel states that police officers are under no duty to detain and watch over intoxicated persons. (Kravitz Aff. ¶34-35, citing *Selletti v. Port Washington Police*, 215 A.D.2d 642, 643 [2d Dept. 1995]; *Barnes v. State of New York*, 156 A.D. 3d 975 [3rd Dept. 2017]). Even assuming arguendo that the officers owed a special duty, the officers' actions in this case were not the proximate cause of Decedent's fatal motor vehicle accident. Rather, the fatality was caused by the vehicle driven by Mr. Aboushi at approximately 4:38 A.M, more than 10 minutes after the Detectives left the scene of the traffic stop.

Plaintiff's Opposition:

Plaintiff filed opposition to the instant motion. First, Plaintiff alleges that the City Defendants' motion is procedurally defective insofar as the City Defendants failed to submit a Statement of Material Facts as required under 22 NYCRR 202.8-g, which failure constitutes a substantive defect requiring denial of Defendants' motion.

Second, Plaintiff contends that the City Defendants failed to meet its initial burden to establish entitlement to summary judgment. In that regard, Plaintiff's counsel argues that the City Defendants "merely attached the deposition transcripts of the two responding police detectives and they, in fact, admit that they violated several protocols...[and] thereafter make conclusory statements that they were, if anything, mere errors in judgment". (Overzat Aff. in Opposition, at page 4 of 13). Counsel further contends that the video submitted to this Court via a thumb-drive, and testimony they rely upon shows the exact opposite version of the occurrences.

Third, Plaintiff contends that there are issues of fact to be resolved by a trier of fact. In that regard, counsel cites to Plaintiff's expert affidavits, the analysis of the timeline of the occurrences as shown in the video submitted to chambers via a thumb-drive, the officers' deposition testimony, and the autopsy report which show the exact opposition version of the occurrence, thereby raising issues of fact as to "whether the City Defendants' actions and level of conduct herein is actinal as being beyond mere judgment or error in judgment" (Overzat Aff. in Opposition, at page 6 of 13). Counsel contends that a video confirms the entire event from the time the officers come upon JEFY VYADIMIR SANTANA-BLANCO's vehicle and stop and approach it at the right lane at 04:20:15AM to the time the detectives leave the scene at 04:26:41AM to be a total of 6 minutes and 26 seconds and, thereafter, 11 minutes and 31 seconds until JEFY VYADIMIR SANTANA-BLANCO is struck and killed by eastbound vehicle on Yonkers Avenue. (Overzat Aff. in Opposition

page 7 of 13). Counsel further contends that the video shows that from the time the two detectives get out of their vehicle (stopping behind JEFY VYADIMIR SANTANA-BLANCO's vehicle and approaching its doors at 4:20:33AM) until Detective Smiddy takes such vehicle and commences "U"-turn to park it on the other side of the street is 3 minutes and 27 seconds, and both detectives then leave the scene at 4:26:41AM (2 minutes and 41 seconds later). It is within this period of time that these detectives assert that they knew JEFY VYADIMIR SANTANA-BLANCO had been drinking, admittedly observed sufficiently to come to the conclusion that it was inappropriate for him to drive and then fail to properly determine their full and correct condition before leaving him and his passenger on the roadside. (Overzat Aff. in Opposition page 7 of 13).

Counsel also submits that expert affidavit of Dr. Richard Stripp, a forensic toxicologist. (NYSCF Doc. 43). Dr. Stripp relied, in part, on the autopsy report of JEFY VYADIMIR SANTANA-BLANCO, the "BAC" Blood Alcohol Content at autopsy was 0.30 g/100ml. Stripp opined that such BAC clearly states that the manifestation of this amount of alcohol in the blood at autopsy would be the same at this time of Plaintiff's deceased's fatal injury and thus, the detectives, under standard "field sobriety" assessment, would have had sufficient evidence to confirm intoxication and detain the driver. Counsel states that such opinion is corroborated by the officers' deposition testimony that it was "inappropriate" to permit JEFY VYADIMIR SANTANA-BLANCO to continue to operate his vehicle.

The expert affidavit of Robert A. Verry further opined that, based upon the application of "standard police procedure, that the actions of these police detectives exceeded a mere lapse in judgment and constituted a breach of established law enforcement practices and protocols. Upon encountering a vehicle stopped in the left lane of a four-lane highway, they relocated it to the roadside. Subsequently, upon the admission of the occupants to having consumed alcohol before driving, the detectives swiftly concluded, within a mere three minutes (as per the video timeline), that it was unsafe ("inappropriate") for the driver to operate the vehicle. However, proper police protocols dictate a thorough series of field sobriety tests, the involvement of additional law enforcement personnel for accurate field testing, or the detainment of the driver for further processing, including the administration of said tests, preferably at the precinct, as acknowledged by the detectives themselves." (NYSCF Doc. 40 at page 11 of 13).

Decision:

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

“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, 324 [1986]; see *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (see *Zuckerman v New York*, 49 NY2d at 562).

It is well-settled that “when official action involves the exercise of discretion, the officer is not liable for the injurious consequences of that action even if resulting from negligence or malice.” (*Tango v. Tulevech*, 61 N.Y.2d 34, 40 [1983]; see also, *Lauer v. City of New York*, 95 N.Y.2d 95, 99 [2000]; *McLean v. City of New York*, 12 N.Y.3d 194, 202 [2009] [“discretionary municipal acts may never be a basis for liability”]; *Shea v Town of Fishkill*, 121 A.D.2d 375 [2d Dept. 1986][municipality could not be held liable for injuries resulting from failure of police officers to detain intoxicated driver or otherwise prevent him from driving in his intoxicated state]. A police officer's determination regarding whether and under what circumstances to detain or otherwise hold someone is a discretionary act. (See, *Keselman v. City of New York*, 95 A.D.3d 1278, 1279-1280 [2d Dept. 2012], citing *Rodriguez v. City of New York*, 189 A.D.2d 166, 177-178 [1st Dept. 1993] (“decision to arrest an individual involves the exercise of discretion or expert judgment in a policy matter and thus is cloaked with governmental immunity). Police officers are under no duty to detain and watch over intoxicated persons. (See, *Selletti v. Port Washington Police*, 215 A.D.2d 642, 643 [2d Dept. 1995]; *Maldonado v County of Suffolk*, 10 A.D.3d 387 [2d Dept. 2004]).

The governmental entity is immune from liability for the negligent performance of that governmental function, unless it owed a special duty to the injured party. (*Barnes v State of New York*, 156 A.D.3d 97 [2d Dept. 2017]). Contrary to Plaintiff's contention that the City Defendants owed a special duty to the Decedent, “the special duty exception does not apply to discretionary acts shielded by governmental immunity.” (*Kralkin v. City of New York*, 204 A.D.3d 772, 772 [2d Dept. 2022]). The law does not impose any duty upon the City Defendants (more specifically, upon the officers engaged in a routine traffic stop) to “detain” or “watch over” JEFYRY VLADIMIR SANTANA-BLANCO until someone arrived. (*Maldonado v. County of Suffolk*, 10 A.D.3d 387, 388 [2d Dept. 2004]).

As to Plaintiff's allegation of a procedural defect, the undersigned justice's I.A.S. Part Rules do not require a separate Statement of Material Facts annexed to summary judgment motions as per NYCRR 202.8-g. This Part permits counsel to include a statement of facts within an attorney affirmation. (See, NYSCEF Doc. 49, Quinones Part Rules, Article III).

Moreover, Plaintiff failed to proffer evidence in admissible form to raise issues of material fact to warrant denial of the City Defendants' dispositive motion. The Plaintiff, by his purported expert on policing, Robert A. Verry, failed to cite any specific provision(s) of the City Police Department policy allegedly violated by the responding police officers, Retired Detectives Kostewich and Smiddy. Plaintiff's submission of the entire City of Yonkers police protocols filed as

NYSCEF Docs. 45-47, without any specific citation(s) to any particular provision(s) allegedly violated, is insufficient to raise any triable issue of fact. Notably, as the police officers testified and as noted in defense expert Verry's affidavit, JEFERY VLADIMIR SANTANA-BLANCO's vehicle was stopped in the left lane at the time of the traffic stop (Verry Aff. at page 3) and the officers did not observe JEFERY VLADIMIR SANTANA-BLANCO operating the vehicle until the Detective directed him to move over. (Kostewich EBT p. 17:10-12).

There is no dispute that decedent had a blood level that was over the legal limit for driving. However, the City Defendants have demonstrated that the decedent's vehicle was not moving immediately prior to the traffic stop; rather, the vehicle was parked at the time of the traffic stop. Furthermore, contrary to Plaintiff's contentions, the responding officers both testified that there were no visible signs of intoxication. Kostewich testified that he did not observe the Decedent to be intoxicated, there being no observable signs of intoxication and no slurring or difficulty speaking. (Kostewich EBT p. 22; 38: 8-13; p. 38: 17-20.). Smiddy similarly did not witness any slurring, did not smell any alcohol, and did not otherwise observe any behaviors that indicated the decedent or his companion had been excessively drinking. (Smiddy EBT p. 24: 14-16, p. 25: 10-13).

Lastly, as it relates to the City Defendant's motion for summary judgment related to any claims asserted by GLENNY SANTANA (individually), the City Defendants demonstrated that GLENNY SANTANA did not file a notice of claim within 90 days of the appointment of the decedent's representative, did not move for permission to file a late notice of claim, nor did the Notice of Claim filed in this matter include any claims for Mrs. Santana individually. (*See*, Gen. Mun. L. § 50-i (1); *see also Bonanno v. City of Rye*, 280 A.D.2d 630 [2d Dept. 2001]). Plaintiff failed to oppose that branch of the City Defendants' motion.

Accordingly, the City Defendants made a prima facie showing of entitlement to summary judgment and dismissal of Plaintiff's complaint allegations against such defendants. Plaintiff failed to raise any triable issues of fact for the reasons herein stated. Based on the foregoing, it is hereby

ORDERED that the City Defendants' motion, pursuant to C.P.L.R. §3212, for summary judgment in favor of the City Defendants and dismissing all claims asserted by Plaintiff(s) against the City Defendants with prejudice is GRANTED IN ITS ENTIRETY.

The foregoing constitutes the Decision and Order of this Court.

Dated: August 8, 2024
White Plains, New York

ENTER:



HON. THOMAS QUIÑONES, J.S.C.

TO: Filed to NYSCEF