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NEW YORK SUPREME COURT - COUNTY OF BRONX

MAR 12 2012

PART 03

Case Disposed ☐
Settle Order ☐
Schedule Appearance ☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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COLESON,JANDY

Index №. **0026826/2004**

-against-

Hon..**LARRY S. SCHACHNER** ,

CITY OF NEW YORK

Justice.

----------X

The following papers numbered 1 to 3 Read on this motion, **SUMMARY JUDGEMENTDEFENDANT**
Noticed on **July 13 2011** and duly submitted as No. 11 on the Motion Calendar of November 10, 2011

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in accordance with the annexed memorandum decision.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 2/16/12

Hon. _____
LARRY S. SCHACHNER, J.S.C.

FILED Mar 12 2012 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-3

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JANDY COLESON, individually, and JANDY COLESON, as the mother & natural guardian of ROLFY SOTO, an infant,

Plaintiffs,

- against -

THE CITY OF NEW YORK and NEW YORK CITY POLICE DEPARTMENT,

Defendants.

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Index No. 26826/04

DECISION/ORDER

Present:
Hon. Larry S. Schachner
Justice, Supreme Court

Recitation, as required by CPLR 2219(a) of the papers considered in the review of this motion for summary judgment:

Papers	**Numbered**
Notice of Motion, Affirmation and 15 Exhibits Annexed	**1**
Affirmation in Opposition and 4 Exhibits Annexed	**2**
Reply Affirmation	**3**

Plaintiffs commenced this action to recover damages for personal injuries allegedly sustained on June 25, 2004 by plaintiffs Jandy Coleson and her son Rolfy Soto when her husband, Samuel Coleson, stabbed her in the chest and back at approximately 2:30 in the afternoon in front of a car wash located at 1499 Bruckner Boulevard in the Bronx. On June 23, 2004, Samuel Coleson had threatened to kill plaintiff and she called the police. Mr. Coleson was subsequently arrested on June 23, 2004. Samuel Coleson was released on his own recognizance after arraignment in criminal court on June 24, 2004. Rolfy Soto, the stepson of Samuel Coleson, alleges injuries due to witnessing the assault which resulted in the stabbing of his mother.

Defendant City of New York (City) now moves for summary judgment on the grounds

that: (1) the City is immune from liability because its actions were discretionary and (2) the City did not assume a special duty to protect the plaintiffs; and (3) Rolfy Soto was not in the zone of danger and did not witness the attack on his mother. Plaintiffs oppose the motion.

The City correctly asserts that infant plaintiff Rolfy Soto was not in the "zone-of-danger" as he was not in "imminent danger of physical harm at the time of the accident" and "did not witness the tragic event." *Gonzalez v New York City Hous. Auth.*, 181 AD2d 440 (1st Dept 1992). At his deposition, Rolfy Soto testified that a man put him inside a broom closet and locked it so that no one could come inside. Thus, at the time of the stabbing incident outside the car wash, Rolfy Soto was not in the "zone-of-danger" as he was locked in a closet and was not in imminent danger of physical harm and did not witness the stabbing of his mother.

Tort actions against a municipality may be upheld based upon a "special relationship" between a municipality and a claimant apart from any duty owed to the public in general. *See Cuffy v City of New York*, 69 NY2d 255, 260 (1987) (citations omitted).

In addition,

> "In asserting a special relationship exception to the general rule that a municipality cannot be held liable for injuries resulting from the failure to provide adequate police protection, the plaintiff has the burden of establishing such a relationship by showing that (1) the municipality assumed an affirmative duty, through promises or actions, to act on behalf of the injured party; (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) the party's justifiable reliance on the municipality's undertaking." *Valdez v City of New York*, 74 AD3d 76, 78-79 (1st Dept 2010) (citing *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]).

Notwithstanding, case law also indicates that "[a] public employee's discretionary acts -

meaning conduct involving the exercise of reasoned judgment - may not result in the municipality's liability even when the conduct is negligent." *Lauer v City of New York*, 95 NY2d 95, 99 (2000). In other words, "[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general." *McLean v City of New York*, 12 NY3d 194, 203 (2009). "[T]he rule to be derived from the cases is that *discretionary or quasi-judicial acts* involve the exercise of *reasoned judgment* which typically produce different acceptable results..." *Tango v Tulevech*, 61 NY2d 34, 41 (1983) (emphasis added). Moreover, "the starting point of any analysis as to governmental liability is whether a special relationship existed; and not whether the governmental action is ministerial or discretionary." *Valdez v City of New York*, 74 AD3d 76, 78 (1st Dept 2010).

In the instant matter, plaintiff has failed to establish the requirements for a special relationship. Plaintiff argues that a special relationship exists through the actions of the City through its employees, including the police officers that responded to Ms. Coleson's call to the police on June 23,2004 after Samuel Coleson threatened to kill her; those who canvassed the area with Ms. Coleson in a police car; the officers in the patrol car waiting for her as she picked her son up from school; another patrol car with two officers waiting for her at her home to take her to the precinct; and the officer at the precinct who informed Ms. Coleson that her husband had been arrested and that the police would provide her with protection; the individuals in the domestic violence unit who spoke with Ms. Coleson; and the officer who telephoned Ms. Coleson to inform her that Mr. Coleson was taken to court and that the matter was proceeding. However, all of this activity occurred before and including Samuel Coleson's arrest and processing which was

the culmination of the efforts of the police to find and arrest Mr. Coleson. Plaintiff fails to demonstrate that the verbal assurance of protection at the precinct was followed by any visible police protection. Plaintiff also fails to show any post arraignment promise of protection. "In the few cases where courts have found justifiable reliance and thus a special relationship exception, a verbal assurance invariably has been *followed* by visible police protection of the plaintiff." *Valdez v City of New York*, 74, 80 AD3d 76 (1st Dept 2010) (emphasis added). "Conversely, where the undertaking is based on a verbal assurance of protection but there is no visible police action thereafter, courts have followed *Cuffy* and found that no special relationship exists." *id.* at 81.

The court does not reach the City's argument that pursuant to *McLean v City of New York*, 12 NY3d 194, 203 (2009), the actions of the NYPD do not form the basis for liability because such acts were discretionary and entitled to governmental immunity, as it would be academic.

Accordingly, the City's motion for summary judgment is granted.

This constitutes the decision and order of the court.

LARRY S. SCHACHNER, J.S.C.

Dated: February 16, 2012