

**Kelsey v City of New York**

2012 NY Slip Op 31686(U)

May 22, 2012

Supreme Court, Queens County

Docket Number: 15818/09

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

-----X

Valerie Kelsey and Theodore Goddard,  
Individually and as Co-administrators  
of the Estate of Curtis Goddard,

Index  
Number: 15818/09

Plaintiffs,

- against -

Motion  
Date: 5/1/12

The City of New York, P.O. Thomas Marrone,  
shield #07784, P.O. Michael Sykora, Shield  
#18496, P.O. Cory Fink, Shield #14713, P.O.  
Martin Halligan, Shield #18367, P.O. Paul  
Bernal, Shield #10349, P.O. Matthew Linder,  
Shield #19417,

Motion  
Cal. Number: 10

Defendants.

Motion Seq. No.: 1

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The following papers numbered 1 to 10 read on this motion by  
defendants, for an order granting leave to amend their answer and  
for summary judgment.

Papers  
Numbered

Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply-Exhibit.....	8-10

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

That branch of the motion by defendants for leave to amend the  
complaint to interpose the affirmative defense of res judicata is  
denied. That branch of the motion for summary judgment dismissing  
the complaint is granted.

In this wrongful death action, plaintiffs allege that the New  
York City Police Department was negligent in its care of the  
deceased, Curtis Goddard, after taking him into custody by virtue  
of the inadequate measures of the apprehending police officers to  
insure that Goddard would not harm himself.

The undisputed facts are as follows: On August 15, 2002, NYPD Sgt George Kallas and Officers Thomas Marrone, Michael Sykora, Cory Fink, Martin Halligan and Paul Bernal responded to a call of a domestic dispute involving a firearm at 71-15 Beach Channel Drive, Apartment 10-L, in Queens County. Said apartment was the residence of one Maria Buffamante. Goddard, her ex-boyfriend, had entered her apartment and threatened Buffamante and her guests with a pistol. When the officers arrived at the apartment and entered, Goddard struggled with the officers, resisting arrest and refusing to be handcuffed. He was eventually subdued and placed in handcuffs. A search of his person yielded a sock filled with ammunition and a ski mask. His pistol, which had been hidden in the stairway by a female occupant of the apartment was also recovered. As he was being escorted out of the apartment with his hands cuffed behind his back, Goddard attempted to grab Officer Bernal's sidearm while shouting, "Shoot me, kill me!" Officer Marrone pinned Goddard against a wall in the apartment until he had ascertained that Officer Bernal had his firearm. Goddard was thereupon removed from the apartment, placed facing a wall in the hallway at some distance from the apartment and searched a second time, wherein a razor blade was recovered. Sgt Kallas directed Officer Sykora to hold onto Goddard while he, Kallas, decided to summon the Emergency Services Unit and an ambulance. Sykora, in compliance with Kallas' instruction, physically held onto Goddard as the latter stood facing the wall. Several minutes later, Goddard was turned around and Sykora began to question him to ascertain what happened prior to the NYPD's arrival. During the course of his questioning, Goddard became calm and compliant, at which point Sykora released his grip on him. Goddard then lunged suddenly at Sykora, who was pushed out of the way by Officer Fink, and ran to a stairwell. Officer Senior, who was standing next to the stairwell door, unsuccessfully attempted to grab Goddard as the latter ran into the stairwell. Goddard ran up the stairway out onto the roof of the building, with Sykora, Fink, Bernak, Hallgan, Marrone and Linder in pursuit. Sykora tripped and fell on the step leading out onto the roof as he saw Goddard lean over a fence on the roof and twist his body around allowing it to fall over the fence. Goddard died when he plummeted to the pavement below. It is conceded by plaintiffs that Goddard committed suicide

A notice of claim was filed on October 9, 2002 asserting a claim for wrongful death. Plaintiffs contend that defendants knew that Goddard was mentally disturbed and suicidal by virtue of the fact that he had tried to commit "suicide by cop" by attempting to grab Officer Bernal's gun while exclaiming, "Shoot me!" and by virtue of the fact that Kallas, in recognition that Goddard was mentally disturbed, decided to call ESU and an ambulance, and thus

Officer Sykora should not have released his grip on Goddard in contravention of Sgt Kallas' explicit instruction to him to hold onto Goddard until ESU arrived to handle him.

Plaintiffs thereafter commenced an action against the same defendants herein in Federal District Court for the Eastern District of New York on November 25, 2003 alleging causes of action for violation of Goddard's civil rights pursuant to 42 U.S.C. §1983 for deliberate indifference to Goddard's safety needs and for wrongful death under state law (No. 03-CV-05978-JFB-KAM).

Pursuant to the order issued by Judge Joseph F. Bianco on December 18, 2006, defendants' motion for summary judgment dismissing the complaint was granted to the extent that plaintiffs' §1983 cause of action was dismissed. The District Court declined jurisdiction over plaintiffs' negligence claim under state law sounding in wrongful death and dismissed said state claim without prejudice.

The District Court found that although defendants were aware of Goddard's suicidal tendencies, they did not act with deliberate indifference so as to support a cause of action under 42 U.S.C. §1983 and that the officers were entitled to qualified immunity. Stated the District Court, "Viewing the facts of this case in a light most favorable to plaintiffs, even though the steps taken by the police in hindsight were insufficient to prevent Goddard from committing suicide, there is no reasonable basis for a jury to find that the defendant officers exhibited deliberate indifference to Goddard's safety needs....The real focus of plaintiffs' deliberate indifference claim is the failure of Officer Sykora to physically hold Goddard, rather than merely surrounding him with officers. Although in hindsight it may have been more prudent for Sykora to maintain a physical hold on Goddard, despite the fact that he appeared to be calming down, a reasonable finder of fact could not conclude that the steps taken were obviously inadequate to the risk that Goddard would be able to extricate himself from custody and take his own life by running up the stairwell and jumping off the roof of the building" (id. at 9-10). The District Court also found that "the officers took substantial steps to ensure Goddard's safety" (id. at 13) and that Sykora's decision to release his grip on Goddard under the facts heretofore described was a "split-second judgment call" that constituted a "discretionary decision" (id.).

The order of the District Court was affirmed pursuant to the order issued by the Second Circuit Court of Appeals on January 16, 2009 (306 Fed. Appx. 700 [C.A. 2 NY]).

Plaintiffs thereafter commenced the instant action in Supreme

Court, Kings County, on February 3, 2009 (Index number 2603/09). Pursuant to the order issued by Justice Robert Miller on May 1, 2009, defendants' motion to transfer venue was granted and venue of the action was transferred to Queens County.

In their complaint, plaintiffs allege that defendant police officers individually were negligent in their response to Sgt Kallas' instruction to hold onto Goddard until the Emergency Services Unit arrived. Plaintiffs contend that it was the duty of the police, once Goddard was taken into protective custody, to protect him from himself and prevent him from committing suicide, and that the breach of that duty was a proximate cause of Goddard's death. Plaintiffs cause of action against the City is based upon vicarious liability.

Defendants move for summary judgment dismissing the complaint, inter alia, upon the ground that defendants are immune from liability since the acts of Sykora were discretionary acts involving the exercise of professional judgment. In this regard, defendants also move, pursuant to CPLR 3025(b), for leave to amend their answer to assert the affirmative defense of res judicata, in that the foregoing issue was determined in the Federal Court action and plaintiffs may not now seek to litigate that same issue in this action and deny that Sykora's actions were acts of reasoned judgment and that defendants took reasonable steps to protect Goddard.

In opposition, plaintiffs' counsel contends, inter alia, that the Federal District Court Order does not have res judicata effect on this action. This Court agrees.

The doctrine of res judicata is clearly inapplicable herein since the District Court did not determine plaintiffs' cause of action under New York law for wrongful death but only determined their civil rights claims under 42 U.S.C. §1983. Their wrongful death claim was dismissed without prejudice. The doctrine of collateral estoppel is also inapplicable since the issues determined therein were not determinative of the state wrongful death claim. The only germane issues on this motion, to wit, whether defendants are entitled to governmental immunity for discretionary acts, as opposed to ministerial acts, whether they violated established police practices so as to render the defense of governmental immunity for discretionary acts inapplicable, and whether the police owed Goddard a special duty were not determined in the District Court and no facts found therein necessarily determined these issues. To the extent that the District Court found that the actions of the police were discretionary split-second decisions, such fact is not disputed herein. Therefore, that

branch of the motion for leave to amend the complaint to assert the affirmative defense of res judicata or collateral estoppel must be denied.

With respect to the summary judgment motion, plaintiffs' counsel contends that immunity for discretionary acts of municipal employees does not apply where the defendant police officers violate acceptable police practices, citing Lubecki v City of New York (304 AD 2d 224 [1<sup>st</sup> Dept 2003]), and where the officers violated a special duty owed to plaintiff or, in this case, plaintiffs' decedent.

In this regard, he annexes an affirmation of an attorney, Walter Signorelli, who is a retired NYC Police Inspector, in which he opines that Sykora, by failing to maintain hold of Goddard, violated the NYPD Patrol Guide §210-01 which instructs an officer to hold a prisoner, if circumstances dictate, for better control of the prisoner and that Officer Fink violated proper police practices by pushing Sykora out of the way when Goddard lunged at him rather than grabbing, pushing or tackling Goddard.

Counsel also contends that pursuant to §216-05 of the Patrol Guide (which is not cited by Signorelli in his affirmation as having been violated), once a police officer reasonably believes that a person is mentally disturbed and that he is behaving in a manner likely to result in serious injury to himself or others, the police must take such person into protective custody and take all reasonable measures to prevent such behavior. Counsel further argues that once Sgt Kallas determined that Goddard was emotionally disturbed and tried to commit suicide by grabbing for an officer's gun in the hope that the police would shoot him, and consequently summoned ESU, Goddard's detention became one of protective custody and, therefore, a special relationship was created between the police and Goddard obligating the police to protect him against himself.

A discretionary act of a governmental entity may not form the basis of liability against it (see McLean v City of New York, 12 NY 3d 194 [2009]). Governmental immunity for discretionary acts applies where the municipality establishes that the actions resulted from discretionary decision-making, which is "the exercise of reasoned judgment which could typically produce different acceptable results" (Valdez v City of New York, 18 NY 3d 69, 79 [2011] [internal citation omitted]). Moreover, merely because a public employee's discretionary act, in retrospect, was a bad judgment call and was even negligent, such does not result in liability (see Kenavan v City of New York, 70 NY2d 558 [1987]; Artalyan, Inc. v. Kitredge Realty Co., Inc., 52 AD 3d 405 [1<sup>st</sup> Dept

2008])).

This Court agrees with the assessment of the District Court that the actions of Officer Sykora, as well as of Officer Fink, involved discretionary split-second decision-making. Indeed, plaintiffs do not argue that defendants' actions were not discretionary acts. Plaintiffs only contend that Sykora disobeyed Kallas' instruction to hold onto Goddard and, although not alleged in the complaint, contend for the first time in their opposition via their expert's affirmation, that Fink should have tackled or grabbed Goddard instead of push his partner out of the way of Goddard's lunge. Moreover, plaintiffs have failed to demonstrate that Sykora's and Fink's actions were inconsistent with acceptable police practice so as to render inapplicable the professional judgment rule that immunizes their acts of negligence.

The Court notes that the NYPD Patrol Guide §210-01 only concerns the safeguarding of prisoners while being transported to courts or other facilities or when detained in detention facilities and, thus, is inapplicable to the facts of this case. Moreover, even were this section applicable, it gives an officer the discretion to act in any variety of ways "as circumstances dictate" and thus did not per-se prohibit Officer Sykora from loosening his grip on Goddard as he questioned him after observing that he had calmed down and was compliant. Also, Fink's split-second reaction to push his partner out of harm's way instead of attacking and tackling Goddard was precisely the kind of discretionary decision-making that the rule was designed to protect against liability claims.

With respect to NYPD Patrol Guide §216-05, an apparently emotionally disturbed person (EDP) whom a police officer reasonably believes may cause serious injury to himself or others must be taken into protective custody. The procedure for doing so by police officers involves, in relevant portion, assessing the situation upon arrival at the scene to assess the threat and that if the EDP's actions constitute an immediate threat of serious physical injury or death, take "reasonable measures to terminate or prevent such behavior", request an ambulance, verify that ESU is responding, and, when the EDP has been restrained, remove property that is dangerous to life or will aid escape, use restraining equipment such as handcuffs if the EDP is violent or resists, and have the EDP removed to the hospital in an ambulance. No issue of fact is raised as to whether defendants failed to reasonably comply with all of these steps.

It is undisputed that defendants were apprised that Goddard was apparently emotionally disturbed when, in the process of being

arrested, he tried to seize an officer's weapon and told them to shoot him. He was restrained and put in handcuffs. They retrieved his gun and, after a second search of his person, seized a razor blade, cornered him against a wall in the hallway surrounded by four police officers and held him while Sgt Kallas summoned ESU and an ambulance. Thus, defendants clearly took reasonable measures to prevent Goddard from hurting himself or others, and plaintiffs have failed to show that defendants violated police protocols under this section so as to defeat the granting of summary judgment to defendants under the governmental immunity doctrine. That Officer Sykora may have disobeyed Sgt Kallas' instruction to hold onto Goddard and, as a result, may have incurred disciplinary action, and that Officer Fink, in the opinion of plaintiffs' expert, should not have pushed his partner Sykora out of the way of Goddard's lunge but should have tried to tackle or attack Goddard instead, do not constitute violations of established police procedures that would disqualify defendants from the immunity afforded to officers for discretionary acts involving professional judgment.

Without merit also is plaintiffs' counsel's argument that Goddard's restraint, being one of "protective custody" created a special relationship with the police that constituted an exception to governmental immunity from liability for the negligent performance of a discretionary act.

The Court notes that prior to McLean (supra), courts were guided by such cases as Pelaez v Seide (2 NY 23 186 [2004]) and Kovit v Estate of Hallums (4 NY 3d 499 [2005]) which, it was generally thought, articulated the rule that a special relationship between the plaintiff and the municipality was an exception to governmental immunity from liability for the negligent performance of a discretionary act. However, the Court of Appeals, in McLean, held explicitly that the special duty exception to a municipal entity's immunity for negligence in the performance of a governmental function applies only to ministerial acts, as opposed to discretionary acts. "[D]iscretionary municipal acts may never be a basis for liability, while ministerial acts may support liability only where a special duty is involved" (12 NY 3d at 202). The Court of Appeals further stated that "any contrary inference that may be drawn from the quoted language in Pelaez and Kovit is wrong" (id. at 203).

It is clear, and plaintiff does not dispute, that the alleged acts of the subject police officers in responding to the subject situation and in allegedly failing to protect plaintiff were acts involving their discretion, as opposed to mere ministerial acts, which are mechanical acts "requiring adherence to a governing rule, with a compulsory result" (Lauer v City of New York, 95 NY 2d 95,



99 [2000]).

In any event, even if, *arguendo*, defendants' actions were to be considered ministerial rather than discretionary acts, which they are not, the concept of special duty is inapplicable to the facts of this case. "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 NY 3d 186, 199-200 [2004]) (internal citation omitted). Plaintiff has failed to show that any of these three criteria are applicable to the facts of this case. The burden of establishing a special relationship rests upon the plaintiff, and said burden is a heavy one (see Pelaez v. Seide, 2 NY 3d 186, *supra*; Dixon v. Village of Spring Valley, 50 AD 3d 943 [2<sup>nd</sup> Dept 2008]). Plaintiffs have failed to proffer any evidence of a special relationship, even had they shown that the actions of the police officers constituted a ministerial act, so as to defeat the City's *prima facie* entitlement to summary judgment.

Accordingly, the motion is granted and the complaint is dismissed. The Court need not address, and will not decide, the remaining bases of the motion.

Dated: May 22, 2012

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KEVIN J. KERRIGAN, J.S.C.