Rosenblatt v City of New York
2017 NY Slip Op 30646(U)
March 24, 2017
Supreme Court, Queens County
Docket Number: 5798/13
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

LOIS M. ROSENBLATT, As Public Administrator of Queens County for the Estate of MARGARET COMO, Plaintiff,	Index Number 5798/13
-against-	Motion Date November 29, 2016
THE CITY OF NEW YORK, et al., Defendants.	Motion Cal. Nos. 153 & 152
	Motion Seq. Nos. 2 & 3

The following papers numbered 1 to 32 read on this (1) motion by Social Concern Vendor Agency, Inc. (SCVA, Inc.), for summary judgment in its favor, and for costs and reasonable attorneys' fees; and (2) motion by The City of New York, New York City Police Department, New York City Fire Department and the City of New York Department of Health and Mental Hygiene (herein collectively referred to as "the City"), for summary judgment in their favor dismissing the complaint and all cross claims against it pursuant to CPLR 3212.

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Upon the foregoing papers it is ordered that the motions are combined herein for disposition, and determined as follows:

This wrongful-death action involves plaintiff's decedent, Margaret Como, a then 96-year old woman, who was under the care of a home attendant employed by defendant Social Concern Community Development Corporation. On January 22, 2012, plaintiff's decedent choked on a piece of food that had been cut by her home health aide, defendant Susan Joseph. After Susan Joseph called 911, two (2) ambulances were dispatched and

arrived in six (6) and seven (7) minutes, respectively. Following this incident, plaintiff's decedent fell into a coma as a result of anoxia and went into a persistent vegetative state. She ultimately died on April 14, 2012.

SCVA, Inc, moves for summary judgment in its favor on the ground that it did not provide the home-health aide services to plaintiff's decedent. It only provides housekeeping services and did not provide the same to plaintiff's decedent. The claims against the City sound in the failure to give the home attendant appropriate instructions, failing to properly dispatch an ambulance and erroneously characterizing the 911 call as "DOA" (dead on arrival). Plaintiff also alleges a variety of other broad claims of negligence and malpractice. The City, in moving for summary judgment argues that it was engaged in a governmental function when it provided ambulance services by emergency medical technicians in response to the 911 calls for assistance and thus, cannot be held liable unless it owed a special duty to the injured party. The City further contends that it did not voluntarily assume a special relationship with plaintiff's decedent beyond the duty that is owed to the public generally. Plaintiff opposes both motions.

Facts

Susan Joseph was deposed and testified as follows: she was employed as a home attendant by SCCD Corporation. She received her certificate as a home attendant after her employer SCCD Corporation sent her for training. SCCD Corporation also provided in-service training every three (3) months. She was supervised by Vivian Tate, the nurse coordinator at SCCD Corporation. As a home attendant, Ms. Joseph's responsibilities included helping the patient in and out of bed, cleaning the patient's bed pan, checking the patient's vital signs and providing miscellaneous care. Ms. Joseph assisted plaintiff's decedent for less than two (2) months. Como was a "live-in" case, which meant that Ms. Joseph remained in the home of plaintiff's decedent around the clock. Ms. Joseph described plaintiff's decedent as a peaceful woman who was unable to do much more than smile. She was unable to walk, clean herself or convey her needs to Ms. Joseph. According to Ms. Joseph, plaintiff's decedent never spoke. Ms. Joseph did not cook the decedent's meals. Mary Como, the decedent's daughter, would bring her mother food every night. Ms. Como would often bring chicken, beef, escarole, potatoes, pasta or Brussel sprouts for her mother. Ms. Joseph believed that plaintiff's decedent should have been eating soft food based on her observation that she ate and drank very slowly. Ms. Joseph would accompany plaintiff's decedent at the dinner table while she ate. She did not feed her, however, she did cut her food. A care plan dated January 12, 2012, indicated that Ms. Joseph was supposed to cut the food for plaintiff's decedent, supervise plaintiff's decedent and encourage fluids.

On the day of the alleged accident, Ms. Joseph moved plaintiff's decedent from the

couch to the table so that she could eat dinner. Ms. Joseph sat at the table facing plaintiff's decedent. Ms. Joseph first noticed that something was wrong with plaintiff's decedent when she noticed that plaintiff's decedent was not eating. She testified that plaintiff's decedent was staring and was completely unresponsive to any of Ms. Joseph's questions. Ms. Joseph touched plaintiff's decedent and noticed that she was stiff and that she merely sat in her chair with her tongue exposed from her mouth. Ms. Joseph called 911 twice. She testified that she told the operator that plaintiff's decedent was very stiff and that she was not moving, and that she told the operator that plaintiff's decedent was choking. She also told the operator that plaintiff's decedent was breathing. However, when the initial operator transferred Ms. Joseph to an EMS operator, Ms. Joseph admitted that she did not tell the EMS operator that plaintiff's decedent was choking. The EMS operator instructed Ms. Joseph to perform CPR. Ms. Joseph did not know how to perform it. The operator told Ms. Joseph that an ambulance would arrive soon. Ms. Joseph placed a second call to 911 to confirm an ambulance was on they way. According to Ms. Joseph, the ambulance arrived "very soon." She estimated that they arrived within seven (7) to ten (10) minutes. Ms. Joseph testified that the physical condition of plaintiff's decedent did not change in the seven (7) to ten (10) minutes it took the ambulance to arrive. Plaintiff's decedent remained seated in her chair until the first ambulance arrived. EMS then placed plaintiff's decedent on the floor. After the ambulance arrived, the EMS technicians asked Ms. Joseph for the phone number of plaintiff's decedent's relative. Ms. Joseph did not have the number; however, one of the neighbors provided the EMS technicians with Mary Como's phone number. Ms. Joseph did not accompany plaintiff's decedent to the hospital.

Vivian Tate, a coordinator at the SCCD Corporation was deposed and testified as follows: her responsibilities included the supervision of home attendants and the clients. She did this by performing field visits once each week. She testified that home attendants are required to obtain a certificate from the State of New York to obtain employment. She also testified that a nurse employed by SCCD Corporation provided training to its home attendants. During the three (3) to four (4)hour training sessions, the nurse instructed home attendants on how to properly use a Hoyer lift and how to properly take care of their clients.

Mary Como, the decedent's daughter, testified upon an examination before trial, as follows: she first hired home attendants employed by SCCD Corporation for her mother's care in 2007 or 2008. The home attendants provided live-in care for her mother seven (7) days a week. Prior to the alleged incident, plaintiff's decedent was under the care of many SCCD Corporation home attendants. She testified that defendant Susan Joseph was with plaintiff's decedent on the date of the alleged accident. Prior to the subject accident, her mother was in poor condition. Ms. Como testified that in December 2011, a few months

before the alleged accident, her mother could hardly speak, was unable to walk without assistance and was unable to feed herself. Plaintiff's decedent required assistance getting out of her wheelchair and going to the bathroom. She also needed someone to change her adult diaper. Furthermore, her mother could not eat solid food. Each weekend, Ms. Como would prepare enough soft food to feed plaintiff's decedent for seven (7) days. The home attendants were instructed to mush the food prior to feeding it to her mother. These meals often included brussels sprouts that were prepared by Ms. Como. The alleged accident occurred on January 22, 2012. While under the care of Susan Joseph, plaintiff's decedent choked while eating a brussels sprout. Como first learned of the incident from her mother's neighbor who called her and stated that her mother was being taken to the hospital. As pertinent to the City motion, there was no direct contact between plaintiff's decedent, Como or any of plaintiff's decedent's family members and the City. Como first learned what happened to her mother when she arrived at the hospital. The ambulance driver told her that they had extracted "cabbage" from her mother's throat.

Plaintiff's decedent died approximately three (3) months after being admitted to the hospital, Como stated. During the time that she was in the hospital, she remained in a persistent vegetative state. She did not regain consciousness from the time that she went into the hospital until the time that she died. Ms. Como testified that the cause of her death was esophageal encephalopathy caused by chocking on a brussels sprout.

Juliana Liburd, a 911 call taker and dispatcher for the NYC Police Department, was deposed as testified as follows: As a call taker, her responsibilities included answering emergency calls, obtaining locations, verifying locations and ascertaining the type of emergency. She would input the information into "the system." After a caller informs Liburd of their emergency, she then calls the EMS call center to inform them of the emergency. Liburd testified that the EMS code indicated that the subject emergency was for "difficulty breathing" and that the situation was serious. Liburd testified that there was not a specific code for choking as opposed to difficulty breathing. The emergency was marked priority level "3". Liburd believed that priority level 1 was the most serious emergency and priority level 6 was the least serious. She did not give the caller instructions on what to do with plaintiff's decedent.

Lashunn Knight, a dispatch and call taker for the NYC Fire Department and also an EMT in January 2012, testified upon an examination before trial, as follows: she received medical training through the NYC Fire Department. She earned a NYS EMT Certificate. On the date of the alleged accident, Knight's responsibilities as a dispatch and call taker included receiving calls and providing over-the-phone pre-hospital care. She testified that the appropriate pre-hospital treatment for someone who was choking would include the Heimlich maneuver. However, if someone was unconscious, she

would always advise the caller to perform CPR. After listening to the EMS call, she recalled that she was not told that the patient was choking. Knight entered the call type as "difficulty breathing" and called two (2)ambulances to the scene because it was a "high priority" call. High priority calls required a basic life support unit and an advanced life support unit. A "difficulty breathing" categorization and a "choking" categorization were the same priority. Based on Knight's reading of the call log, she determined that the basic life support unit arrived at 6:31 p.m., and the advanced life support unit arrived one (1) minute later.

Mary Lobur, a police communications technician (a 911 operator), with the NYC Police Department, testified upon an examination before trial as follows: she underwent training that involved learning numerical codes to convey information to either EMS or the police. After a six (6) week training period, Lobur became a certified NYPD police communications technician. Lobur was trained to receive a caller's information and then transfer the call to the proper party. Lobur was working on January 22, 2012, and received the call that came in as "difficulty breathing." Lobur testified that the initial call came in at 6:25 p.m., and EMS personnel were at the decedent's home at 6:31 p.m. Finally, a second call was received from a female caller from the decedent's home at 6:31 pm. When the EMS technicians arrived at the location, their initial determination was that the decedent was "DOA." EMS personnel then requested a police unit. This is standard protocol if there is a DOA.

The FDNY Pre-hospital care report indicates that plaintiff's decedent was found unresponsive and seated in a wheelchair when EMS arrived at 6:31 p.m. She was placed on the floor. EMS personnel did not find a pulse or respiration. CPR was started by FDNY and EMS personnel. A bag valve mask was used to assist respiration. At 6:58 p.m., plaintiff's decedent was taken to the hospital. The report further notes that the advanced life support unit arrived at the scene at 6:32 p.m., and found plaintiff's decedent was supine (lying down), without a pulse. Plaintiff's decedent was intubated and her pulse returned . It was described as "stablish." At 6:58 p.m., the advanced life support unit brought plaintiff's decedent to the hospital.

Motion by SCVA, Inc.

The motion by SCVA, Inc., for summary judgment in its favor is granted. Plaintiff commenced the instant action against, *inter alia*, Social Concern Community Development Corporation ("SCCD Corporation"), Social Concern Vendor Agency, Inc., and Social Concern Committee of Springfield Gardens, Inc. The record indicates that Susan Joseph, the deceased's home attendant before her demise, was employed by SCCD Corporation, as a home attendant, and that SCVA, Inc. employs housekeepers, not home attendants or home health care aides. There has been no showing that SCCD Corporation

and SCVA, Inc. are effectively a single entity. SCVA, Inc. made a prima facie showing that it is a housekeeping agency that did not provide any services to plaintiff-decedent, Margaret Como. In terms of legal responsibility, parent, subsidiary or affiliated corporations are treated separately and independently and one will not be held liable for the contractual obligations of the other, unless it is shown that there was an exercise of complete dominion and control (*Alexander & Alexander of N.Y. Inc. v. Fritzen*, 114 AD2d 814, 815, 495 NYS2d 386 ([985], *aff'd*, 68 NY2d 968, 503 NE2d 102 [1986]; *Cf. Gulf & W. Corp. v. New York Times Co.*, 81 AD2d 772, 773; *Musman v. Modern Deb*, 50 AD2d 761, 762). Furthermore, the control must actually be used to commit a wrong against the plaintiff and must be the proximate cause of the plaintiff's loss (*Lowendahl v. Baltimore & Ohio R R Co.,* 247 App Div 144). There was no such showing here. Evidence submitted established that plaintiff's loss was solely due to the alleged failure of SCVA, Inc. to provide proper home attendant care services to plaintiff's decedent. Plaintiff failed to demonstrate that SCCD Corporation's alleged domination and control of SCVA, Inc. caused this loss (*Fantazia Int'l Corp. v. CPL Furs N.Y., Inc.*, 67 AD3d 511, 512–13, 889 NYS2d 28, 30 [2009]).

Accordingly, the branch of the motion by SCVA, Inc., which is for summary judgment in its favor is granted.

The branch of the motion by SCVA, Inc., which is for costs and attorney's fees from plaintiff is denied. Although defendant's motion was ultimately meritorious, under the circumstances, defendant failed to show that plaintiff's conduct in commencing the action against SCVA, Inc., was frivolous (*see,* 22 NYCRR 130.1.1; *Braverman v. Yelp, Inc.*, 128 AD3d 568, 10 NYS3d 203, 204–05 [N.Y. App. Div.], *leave to appeal denied*, 26 NY3d 902, 38 NE3d 828 [2015]; *Grozea v. Lagoutova,* 67 AD3d 611, 888 N.Y.S.2d 507 [1st Dept 2009]).

Motion by the City

At the outset, it is noted that plaintiff's claims for medical malpractice cannot succeed as liability for medical malpractice may not be imposed in the absence of a physician-patient relationship (*see, Thomas v. Hermoso*, 110 A.D.3d 984, 985, 973 NYS2d 344, 346 [2013]; *Cygan v. Kaleida Health,* 51 AD3d 1373, 1375, 857 NYS2d 869; *Gullo v. Vassar Bros. Hosp.,* 282 AD2d 708, 709, 724 NYS2d 324; *Zimmerly v. Good Samaritan Hosp.,* 261 A.D2d 614, 690 NYS2d 718). Here, there was no physician-patient relationship between the City and plaintiff's-decedent.

In any event, when a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose (*Applewhite v.*

Accuheaalth, Inc., 21 NY3d 420, 427–30, 995 NE2d 131 [2013]). If the municipality's actions fall in the proprietary realm, it is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties (*see, Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d 428, 446-447 [2011], *cert denied sub nom. Ruiz v. Port Auth. of New York & New Jersey*, 568 US —, 133 S Ct 133 [2012]). A government entity performs a purely proprietary role when its "activities essentially substitute for or supplement traditionally private enterprises" (*Sebastian v. State of New York*, 93 NY2d 790, 793 [1999] [internal quotation marks omitted]). In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are "undertaken for the protection and safety of the public pursuant to the general police powers" (*id.* [internal quotation marks omitted]).

Because this dichotomy is easier to state than to apply in some factual scenarios, the determination categorizing the conduct of a municipality may present a close question for the courts to decide (*see, Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d at 446-447; *Sebastian*, 93 NY2d at 793-794). Police and fire protection are examples of long-recognized, quintessential governmental functions (*see e.g., Valdez v. City of New York*, 18 NY3d 69, 75 [2011]; *Harland Enters. v. Commander Oil Corp.*, 64 NY2d 708, 709 [1984]). Additional examples include security operations at the World Trade Center (*see, Matter of World Trade Ctr. Bombing Litig.*, 17 NY3d at 450); oversight of juvenile delinquents (*see, Sebastian*, 93 NY2d at 796); issuance of building permits or certificates of occupancy (*see, Rottkamp v. Young*, 15 NY2d 831, 833 [1965], *affg* 21 AD2d 373 [2d Dept 1964]; *Worth Distribs. v. Latham*, 59 NY2d 231, 237 [1983]); certifying compliance with fire safety codes (*see, Garrett v. Holiday Inns*, 58 NY2d 253, 261-262 [1983]); teacher supervision of a public school playground (*see, Bonner v. City of New York*, 73 NY2d 930, 932 [1989]); boat inspections (*see, Metz v. State of New York*, 20 NY3d 175, 179-180 [2012]); and garbage collection (*see, Nehrbas v. Incorporated Vil. of Lloyd Harbor*, 2 NY2d 190, 194-195 [1957]). On the other hand, the courts have recognized that certain medical services delivered by the government in hospital-type settings are more akin to private, proprietary conduct (*see e.g., Schrempf v. State of New York*, 66 NY2d 289 [1985]; *Bryant v. New York City Health & Hosps. Corp.*, 93 NY2d 592 [1999]; *Matter of Murray v. City of New York*, 30 NY2d 113 [1972]). As a general rule, the distinction is that the government will be subject to ordinary tort liability if it negligently provides "services that traditionally have been supplied by the private sector" (*Sebastian*, 93 NY2d at 795).

If it is determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a "special duty" to the injured party. The core principle is that to " 'sustain liability against a municipality, the duty breached must be more than that owed the public generally' " (*Valdez*, 18 NY3d at

75, quoting *Lauer v. City of New York*, 95 NY2d 95, 100 [2000]). The courts have recognized that a special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition (*see e.g., Metz*, 20 NY3d at 180). It is the plaintiff's obligation to prove that the government defendant owed a special duty of care to the injured party because duty is an essential element of the negligence claim itself (*see, Lauer*, 95 NY2d at 100; *see also, Valdez*, 18 NY3d at 75). In situations where the plaintiff fails to meet this burden, the analysis ends and liability may not be imputed to the municipality that acted in a governmental capacity.

In this case, the parties dispute whether the City exercised a governmental or proprietary function when the EMTs initiated emergency care. The City asserts that the provision of 911 referrals and emergency medical service responses are within the traditional responsibilities of municipal government, similar in nature to emergency fire protection services. Plaintiff, however, maintains that the governmental function terminated with the arrival of the EMTs at Como's home and a proprietary function arose once emergency medical care was undertaken since treatment of this nature is generally offered by private parties (*e.g.*, doctors and hospital personnel). Consistent with their respective arguments, the City asserts that plaintiff failed, as a matter of law, to establish triable issues of fact pertaining to the creation of a special relationship, and plaintiff urges that summary judgment is inappropriate because there are factual disputes to be resolved before the issue of special duty can be determined.

In *Laratro v. City of New York* (8 NY3d 79 [2006]), the plaintiff sued the City for responding too slowly to a 911 call (the ambulance took 35 minutes to arrive, as opposed to the several-minute response time in this case). The court's analysis began with the recognition that "[p]rotecting health and safety is one of municipal government's most important duties" (*id.* at 81) and this responsibility extends to "the duty to provide police protection, fire protection *or ambulance service*" to the general public (*id.* at 82-83 [emphasis added]). The court proceeded to determine whether the plaintiff had sufficiently established the existence of a special duty—an inquiry that would have been unnecessary had the court viewed the City's response to the 911 call as a proprietary function. Hence, the court has previously viewed municipal emergency systems and responses to 911 calls to be within the sphere of governmental functions.

Consistent with this view and the reasoning in *Laratro* (8 NY3d 79), the Court of Appeals in *Applewhite, supra*, found that publicly-employed, front-line EMTs and other first responders, who routinely place their own safety and lives in peril in order to rescue others, surely fulfill a government function—certainly no less so than municipal garbage

collectors and school playground supervisors (*see, Nehrbas*, 2 NY2d at 194-195; *Bonner*, 73 NY2d at 932; *see also, Edwards v. City of Portsmouth*, 237 Va at 171, 375 SE2d at 750)—because they exist "for the protection and safety of the public" and not as a "substitute for . . . private enterprises" (*Sebastian*, 93 NY2d at 793 [internal quotation marks omitted]). The facts of this case reinforce this view since the purportedly negligent EMTs were employees of the City's fire department using City resources in an effort to fulfill the City's obligation to answer an emergency 911 dispatch and attempt to save Margaret Como's life. The Court further noted that the fact that private entities operate ambulance services in New York City is not determinative because those companies provide supplemental support for a critical governmental duty rather than vice versa (*see, Edwards v City of Portsmouth*, 237 Va at 171-172, 375 SE2d at 750 ["the test cannot be whether the same thing is done by private entities, but rather whether, in providing such services, the governmental entity is exercising the powers and duties of government conferred by law for the general benefit and well-being of its citizens"]).

Nor does the City's policy of charging a fee for its ambulance service (*see* 3 RCNY 4900-02 [b]) alter the analysis because it is designed to defray the cost of maintaining this essential component of the City's emergency response system, not to create a profit for the taxpayers (*see*, General Municipal Law § 122-b [2]; 2005 Ops St Comp No. 05-8; *see also, Wanzer*, 580 AD2d at 131; Edwards, 237 Va at 172, 375 SE2d at 750; *Smyser v City of Peoria*, 215 Ariz 428, 435-436, 160 P3d 1186, 1193-1194 [Ct App 2007]; *McIver v Smith*, 134 NC App at 587, 518 SE2d at 526).

Moreover, the EMTs employed by the New York City Fire Department (FDNY) and deployed via the 911 system receive training in basic life support techniques and their range of approved emergency services is limited by law (*see*, Public Health Law § 3001 [6] [defining the term "emergency medical technician"]; 10 NYCRR 800.6 [c] [listing eight types of emergency medical services personnel]; 10 NYCRR 800.20 [c] [5] [I] [describing the required curricula for various classes of first responders]). Basic EMTs function in a "pre-hospital setting" and their activities are generally restricted to "CPR, oxygen administration, bleeding control, foreign body airway obstruction removal, and spinal immobilization." Most EMTs (who are not specially certified as paramedics) are not authorized by law to administer medication, such as epinephrine, or perform invasive procedures, and do not have access to advanced diagnostic and medical treatment equipment or physician assistance (*see generally,* 10 NYCRR 800.20 [c] [5] [I] [a]-[c]), all of which are common in public and private hospital facilities. EMTs cannot be realistically compared to the proprietary medical professionals whose licensure requires extensive educational and training credentials, and who typically provide services at hospital or medical facilities rather than in the unpredictable community-at-large, the court noted.

Hence, the Court in *Applewhite*, *supra* 21 NY3d at 427–30), held that a municipal emergency response system—including the ambulance assistance rendered by first responders such as the FDNY EMTs in this case—should be viewed as "a classic governmental, rather than proprietary, function" (*Valdez*, 18 NY3d at 75).

This conclusion does not necessarily immunize the City from liability because plaintiff may yet establish that a special duty was owed to Como. Of the three (3) ways that a plaintiff may prove the existence of a special duty, only the second is at issue in the instant case – whether the City voluntarily assumed a "special relationship" with the plaintiff's decedent beyond the duty that is owed to the public generally. The response to that question requires the presence of four (4) 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' " (*Laratro*, 8 NY3d at 83, quoting *Cuffy v. City of New York*, 69 NY2d 255, 260 [1987]).

A plaintiff must satisfy each of these factors in order to establish a special relationship. Here, the City demonstrated, prima facie, that it owed no special duty of care to plaintiff's decedent, and plaintiff failed to raise a triable issue of fact in opposition. Therefore, the motion by the City for summary judgment dismissing the complaint insofar as asserted against it is granted (*see, Salone v. Town of Hempstead,* 91 AD3d at 747, 937 NYS2d 103; *Diliberti v. City of New York,* 49 AD3d 424, 424, 854 NYS2d 372; *Moore–Mohammed v. City of New York,* 101 AD3d 519, 520, 954 NYS2d 882; *Jennifer R. v. City of Syracuse,* 43 AD3d 1326, 1327, 844 NYS2d 523).

Conclusion

The branch of the motion by SCVA, Inc., which is for summary judgment in its favor is granted. The branch of the motion by SCVA, Inc., which is for costs and attorney's fees from plaintiff is denied.

The motion by the City for summary judgment dismissing the complaint and all cross claims asserted against it is granted.

Dated: March 24, 2017

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Howard G. Lane, J.S.C.