[* 1] INDEX NO. 12/27/2011

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. Justice

PART 52

Index Number : 113171/2010
HERNANDEZ, GABRIEL
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 113171/10

MOTION DATE

MOTION SEQ. NO. 01

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

FILED

DEC 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/19/11

CYNTHIA S. KERN, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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GABRIEL HERNANDEZ,

Plaintiff,

Index No. 113171/10

-against-

DECISION/ORDER

THE CITY OF NEW YORK,

Defendant.

----------x

HON. CYNTHIA S. KERN, J.S.C.

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

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Affirmations in Opposition to the Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff commenced the instant action to recover damages for personal injuries he allegedly sustained when he helped police officers fix their overheated police car. Defendant the City of New York (the "City") now moves to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(7) on the grounds that plaintiff failed to comply with GML §50-e(2) and that plaintiff's complaint fails to state a cause of action upon which relief can be granted. For the reasons set forth below, the City's motion is granted.

The relevant facts are as follows. On October 8, 2009, at approximately 11:00 a.m., while plaintiff was walking in front of 60 Nagle Avenue, approximately 185 feet from the corner of Nagle Avenue and Ellwood Street, New York, New York, he came across a New York City Police Department police car. Three New York City police officers from the 34th precinct were

standing around the vehicle. It appeared that the police officers were experiencing car trouble. Plaintiff approached the police officers to offer his help as he had previously worked as a mechanic. The police officers informed plaintiff that the engine had overheated. Plaintiff then told the police officers that they "have to open the radiator to see if it needs water." Plaintiff alleges that the police officers then directed him to open the radiator cap. Using a handkerchief, plaintiff removed the radiator cap and steam and anti-freeze erupted from the vehicle, injuring plaintiff. The police officers then escorted plaintiff to a nearby bathroom so he could administer cold water to his injuries. Plaintiff suffered second degree burns to his left hand, forearm and wrist, requiring surgery, among other injuries.

The state of the case law on municipal immunity is somewhat ambiguous. The Court of Appeals has specifically held that governments or municipalities are immune from liability for the actions of their agencies if those actions were discretionary. *See McLean v City of New York*, 12 N.Y.3d 194, 203 (2009). The *McLean* court explained that, "Governmental 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...". *Id.* In *McLean*, the Court of Appeals specifically held that the "special relationship" exception can only apply if the governmental action at issue is ministerial. *See id.* Subsequently, in *Dinardo v City of New York*, 13 N.Y.3d 872 (2009), Chief Judge Lippman stated in his concurrence that although he believed that the *McLean* decision "effectively eliminates the special relationship exception," the court was nevertheless constrained by its holding. *See id.* at 876. However, in *Valdez v City of New York*, the First Department subsequently held that "it is inconceivable that the Court [in *McLean*] intended to eliminate the special duty exception" in police cases." 74 A.D.3d 76 (1st Dept 2010). The *Valdez* court went on to hold that the analysis should begin, not end, with whether the municipality had a special

relationship with the plaintiff. *See id.* at 78. In *Valdez*, the First Department explicitly stated that when police action is involved, "a governmental agency's liability for negligent performance depends *in the first instance* on whether a special relationship existed." *Id.* at 78 (emphasis added). This court will therefore follow *Valdez* and determine first if such a special relationship existed. If not, the inquiry ends there. *See id.*

There are three ways a special relationship can be formed: "(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when [the municipality] 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 N.Y.3d 186, 199-200 (2004). It is undisputed that there exists no such statutory duty and that the City did not voluntarily assume any duty with regard to plaintiff in the instant case. Plaintiff asserts that a special relationship exists under the third exception - that the City assumed positive direction and control in the face of a known, blatant and dangerous safety violation. Therefore, this court will address the third way in which a special relationship can be formed.

In the instant case, plaintiff fails to raise an issue of fact as to whether there was a special relationship between plaintiff and the municipality by virtue of the City assuming "positive direction and control" of the situation in the face of a known "safety violation." *Pelaez*, 2 N.Y.3d at 203 (*citing Smullen v. City of New York*, 28 N.Y.2d 66 (1971). Plaintiff has not demonstrated that the City assumed any direction or control of plaintiff and he points to no known or blatant safety violation on the part of the City. Simply asserting that an overheating and disabled vehicle is an inherently dangerous instrumentality is insufficient to meet the special relationship standard under the third exception as it is not a known and blatant safety violation.

In *Smullen*, the court found that a special relationship existed where the city inspector assigned to a construction site observed plaintiff descending into a trench, stated that the trench was pretty solid and that he did not think it needed to be shored, where in fact there was a "blatant violation" of safety rules relating to such trenches. The plaintiff was killed when the trench subsequently collapsed. The *Smullen* court explained that in that case, the municipality went "beyond the basic failure to perceive a violation. Here a blatant violation existed; the categorical regulations did not permit the inspector to form a judgment but he nevertheless proceeded to do so and wrongly adjudged the trench to be safe and stood by while decedent, knowing of his presence and approval, entered into the perilous situation," thereby establishing a special relationship. 28 N.Y.2d at 71. Similarly, in *Garrett v. Holiday Inns, Inc.*, the court held that a municipality may be liable to the owners of a motel for damages incurred in a fire when "[i]f, as is alleged in the complaint[], known, blatant and dangerous violations existed on these premises but the town affirmatively certified the premises as safe, upon which representation appellants justifiably relied in their dealings with the premises..." 58 N.Y.2d 253, 262 (1983).

In the instant case, plaintiff has not cited any safety rule or regulation which was blatantly violated, a necessary predicate to finding a "special relationship" based on the municipality's assumption of "positive direction and control" of the situation. In both *Smullen* and *Garrett*, knowledge of "blatant" and "dangerous" safety violations were necessary to the courts' holdings that liability might be imposed. *Smullen*, 28 N.Y.2d at 71; *Garrett*, 58 N.Y.2d at 262. Without that predicate, plaintiff cannot raise an issue of fact as to whether he had a "special relationship" with the municipality and therefore the City is immune from liability.

Finally, the court will not address the City's argument that plaintiff's Notice of Claim is

deficient as plaintiff's claim is dismissed for failure to state a cause of action.

Accordingly, the City's motion to dismiss plaintiff's complaint is granted. Plaintiff's complaint is hereby dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 12/19/11

Enter: _____ _____
J.S.C.

CYNTHIA S. KERN
J.S.C.

FILED

DEC 21 2011

NEW YORK
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