Madris v Martine Tours, Inc.
2012 NY Slip Op 31291(U)
May 4, 2012
Supreme Court, New York County
Docket Number: 114306/2010
Judge: Arthur F. Engoron
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SCANNED ON 5/16/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Arthur F. Engoron
Justice

PART 52

Index Number : 114306/2010
MADRIS, DANA
vs.
MARTINE TOURS
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. ______
MOTION DATE 3/14/12
MOTION SEQ. NO. ______

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 decided in accordance w/the attached memorandum decision.

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

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Dated: 5/9/12

______, J.S.C.
HON. ARTHUR F. ENGORON

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

DANA MADRIS,

Plaintiff,

- against -

MARTINE TOURS, INC., DONALD R. MARTINE, THE CITY OF NEW YORK and TRAFFIC AGENT PAULINO (Shield #3774),

Defendants.

Index Number: 114306/10

Motion Sequence No.: 002

Oral Argument Date: 3/14/12

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 4, were used on this motion to dismiss or, alternatively, for summary judgment:

	Papers Numbered:
Moving Papers	1
Opposition Papers (Martine Defendants)	2
Opposition Papers (Plaintiff)	3
Reply Papers	4

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Upon the foregoing papers, the instant motion is denied.

Prologue

This case presents the question of whether a municipal traffic control agent performs a discretionary governmental function that is immune from suit. Columbia University Philosophy Professor Sidney Morgenbesser answered the question when a student asked him whether a statement could be true and false at the same time: "Yes.......and no."

Background

Plaintiff Dana Madris claims that on August 5, 2009 she was walking through a crosswalk at the intersection of West 42nd Street and Broadway, New York, NY (i.e., Times Square), when a bus owned by defendant Martine Tours, Inc., and operated by defendant Donald R. Martine (collectively, "the Martine defendants"), struck and injured her. Madris alleges that defendant Paulino, employed by defendant The City of New York as a traffic control agent, directed the bus through the intersection heedless of plaintiff's presence. The City and Paulino now move for summary judgment or, alternatively, to dismiss, on the ground that a municipal traffic control agent performs a discretionary governmental function that is immune from suit, at least absent a "special relationship." Plaintiff and the Martine defendants argue, inter alia, that the motion is

premature because they have not had a chance to depose Paulino and because not all acts of a municipal traffic control agent are immune from suit.

Discussion

Movants vociferously argue that plaintiff cannot rely on a "special relationship" because the facts do not support it and plaintiff has not pled it. They are correct on both counts. So now we can move on to the real issue here: the degree of immunity of a municipal traffic control agent's actions.

Today's decision is not written on a clean slate. A significant line of cases has held, or at least suggested, that a municipal traffic control agent performs a discretionary governmental function that is immune from suit.

For example, in Tango v Tulevech, 61 NY2d 34, 40 (1983) (municipal agent deprived plaintiff of child custody), the Court of Appeals stated 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." In Kenavan v City of New York, 70 NY2d 558 (1987) (addressing suit by firefighters injured on the job), the Court stated that "liability will not be imposed where the [municipal employee's] conduct involves the exercise of professional judgment such as electing one among many acceptable methods of carrying out tasks, or making tactical decisions that, in retrospect show poor judgment, but judgment nonetheless." In Balsam v Delma Engn'g Corp., 90 NY2d 966, 968 (1997), the Court held that New York City could not be held liable for alleged negligence in failing to close a roadway, redirect traffic, or place warning devices in the area of an icy condition. In Lauer v City of New York, 95 NY2d 95, 99 (2000) (Kaye, C.J.), accord, Pelaez v Seide, 2 NY3d 186, 188 (2004), the Court stated 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." In Eckert v State of New York, 3 AD3d 470, 470 (2d Dept 2004), the Court held that the State could not be held liable even if "its police officers fail[ed] to replace extinguished road flares at the scene of an accident, and failed to take other reasonable measures to warn drivers of the accident." In Kovit v Estate of Hallums, 4 NY3d 499, 506 (2005), the Court held that a municipality could not be liable for a police officer's directing a hysterical driver to move her vehicle out of the middle of an intersection after an accident:

> The police officer was exercising his discretion when he told Hallums to move her car. Even if we were to assume Hallums was unfit to drive and that the officer knew or should have known it, municipal liability to plaintiff would not follow. To hold the City liable for the negligent performance of a discretionary act, a plaintiff must establish a special relationship with the municipality.

In Shands v Escalona, 44 AD3d 524, 524 (1st Dept 2007), the court held that the City could not be liable even if "a police officer was negligent when, due to the flooding at [plaintiff's] exit, he guided her back onto the highway, and that as a result her vehicle was struck by a tractor-trailer,"

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because "any negligence on the part of the officer was committed in the course of a discretionary act for which the City is immune from suit, absent a special relationship." In Devivo v Adeyemo, 70 AD3d 587, 587 (1st Dept 2010) (affirming summary judgment dismissing case based on alleged negligence in "configuring a barricade at a public event"), the court held that "The [police] officers' alleged negligence cannot support municipal liability as it involved discretionary acts in managing pedestrian and vehicular traffic undertaken in furtherance of public safety."

Despite this imposing, one might say "daunting," line of cases, this Court believes that movants are not entitled to dismissal or summary judgment. The primary reason is that movants have presented no admissible evidence, indeed do not even claim, that defendant Paulino was actually exercising any "discretion," thus performing a governmental function, at the time at issue. For all that appears, Paulino may have been daydreaming, his, or her, mind a million miles away, when he, or she, at least as alleged, waved the Martine bus through the crosswalk that plaintiff was traversing. As noted above, in Lauer, in language repeated in Pelaez, Judge Kaye wrote that "discretionary acts" "involv[e] the exercise of reasoned judgment." Obviously, sending a bus barreling into a pedestrian, if that is what actually happened, would not be the exercise of "reasoned judgment."

Perhaps the same point, but seen from a different perspective: in the cases relied upon by defendants, there was some countervailing benefit, or at least potential or arguable benefit, to the agent's acts: traffic was moved along, an intersection was cleared. There would be no benefit to sending a bus into an occupied pedestrian cross-walk.

Furthermore, the foregoing cases notwithstanding, a parallel line of decisions, but running in the opposite direction, has ruled that a municipality may be liable for the negligent acts of its traffic control agents. In Ohdan v City of New York, 268 AD2d 86 (2000) (upholding jury's finding of no proximate cause), the court upheld the negligence finding against The City, based on a traffic control agent's harassing a non-driver into moving a vehicle from a midtown street despite his obvious reluctance to do so. In Persaud v City of New York, 267 AD2d 220 (1999), the Court reversed a finding of summary judgment in favor of the municipal defendants:

> The alleged liability of the municipal defendants is predicated upon the misfeasance of the defendant police officer in directing [a passenger] to move [the subject vehicle] without inquiring as to whether she was licensed to drive. Once the police officer undertook to direct her to move the car, he was obligated to do so with due care. Accordingly, the plaintiffs were not required to demonstrate a special relationship.

Id. at 221 (emphasis added) (citations omitted); accord, Maloney v Scarfone, 25 AD2d 630 (1966).

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In the final analysis, applying governmental immunity to a traffic control agent who allegedly directed a bus to proceed through an occupied crosswalk just makes no sense, absent some justification or explanation. As disclosure has not occurred, we have no such justification or explanation, and at best the instant motion is premature and must be denied.

Note that to the extent that today's decision runs contrary to Ajjarapu v City of New York, 2011 NY Slip Op 30778 (Sup Ct, NY County, 2011), this Court respectfully disagrees therewith.

Motion denied.

Dated: May 4, 2012

Arthur F. Engoron, J.C.C.

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