Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Hazel Robinson, Deceased by her daughter and Administratrix, Winsome Powell, and Winsome Powell, Individually,

Plaintiff,

- against -

The City of New York, Michael Bloomberg, Patricia Harris, Stephen Goldsmith, John Doherty, Bernard Sullivan, Michael Bimonte, Salvatore Cassano, John Peruggia, Joseph Bruno, Ray Kelly, Janettte Sadik-Khan, Adrian Benepe, and John Does 10-20,

Defendants.

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Index Number: 17187/12

Motion Date: 12/13/12

Motion Cal. Number: 102

Motion Seq. No.: 1

The following papers numbered 1 to 10 read on this motion by defendants to dismiss the complaint against them; and cross-motion by plaintiff for leave to serve an amended complaint.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion-Affirmation-Exhibit.....	5-8
Reply.....	9-10

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

Motion by defendants to dismiss the complaint, pursuant to CPLR 3211(a)(7) is granted. Cross-motion by plaintiff for leave to serve an amended complaint is denied.

According to the complaint, decedent, Robinson, died on December 28, 2010. The complaint alleges that Robinson lost consciousness presumably in her home at 112-31 168th Street in Queens County on said date. The complaint alleges that family members placed several calls to 911 but the line was busy and no one could get through. It also alleges that the City failed to properly respond to the snow accumulation from a massive blizzard that occurred on December 26-27, 2010, leaving 20 inches of snow on the ground and that Robinson's death was the result of the City's failure to provide timely medical care because of the unplowed and

impassable condition of the City's streets.

The City moves for dismissal of the complaint upon the grounds that plaintiffs' action is barred by governmental immunity and that there has been no allegation or showing of a special relationship with the City.

Plaintiffs cross-move to amend the complaint to state that the 911 line was busy for 20 minutes and that when family members got through, they reported Robinson's condition to the operator and the operator informed them that medical assistance "would try to get there as soon as possible". The proposed amended complaint also alleges that 15 minutes thereafter, they called 911 again several times, only to receive a busy signal. When they got through, they were told that medical help was on the way and would arrive "imminently". Approximately one-half hour later, five or six EMS technicians came to the door and indicated that they had to park their ambulance several blocks away due to the unplowed streets. They placed Robinson on a gurney and walked it to the ambulance, shoveling the snow from their path along the way, taking 10 minutes to get from the house to the ambulance. Due to the unplowed streets, the ambulance had to travel slowly and took 45 minutes to get to Jamaica Hospital 2 miles away. Upon arrival at Jamaica Hospital, Robinson was rushed into the emergency room, where she was pronounced dead 20 minutes later. The proposed amended complaint also alleges that Robinson's family members "stayed put" and awaited the arrival of medical assistance based upon the representation of the 911 operator that help would soon arrive. The balance of the proposed amended complaint is the same as the original complaint, in that it alleges that the proximate cause of Robinson's death was the delay in getting her to the hospital due to the failure of the City to plow the streets.

It is well settled that a municipality or municipal agency cannot be held liable for an injury caused by a breach of a duty to provide a service owed to the general public, such as police or fire protection or, in this case, the plowing of snow from the streets by the Department of Sanitation (see Laratro v City of New York, 8 NY 3d 79 [2006]; Cuffy v City of New York, 69 NY 2d 255 [1987]), except in a narrow class of cases where a special relationship has been established between the municipality or municipal agency and with the plaintiff (see Pelaez v.Seide, 2 NY 3d 186 [2004]; Blanc v. City of New York, 223 AD 2d 522 [2nd Dept 1996]). Plaintiffs seek to amend their complaint in an attempt to set forth facts to support a cause of action based upon violation of a special duty.

"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).

Even were the Court to grant leave to serve an amended answer to assert a cause of action based upon special duty, the amended complaint fails to set forth facts that satisfy any of these three criteria. 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 [2nd Dept 2008]).

No allegations are made in the complaint or the proposed amended complaint, and no issue has been raised, on this record, as to the applicability of the first and third bases for a special duty. With respect to the second basis for a special relationship, the voluntarily assumption of a duty that generates justifiable reliance by the person who benefits from the duty, said requires all of the following 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" (Cuffy, supra; Pelaez, supra). Moreover, not only must there be justifiable reliance, but such reliance must be to the detriment of the plaintiff (see id.; Feinsilver v. City of New York, 277 AD 2d 199 [2nd Dept 2000]).

Plaintiffs have failed to set forth any facts to support a cause of action based upon justifiable detrimental reliance. As heretofore noted, the proposed amended complaint alleges that representations were made by the 911 operator to decedent's family members that medical assistance was dispatched and would arrive "as soon as possible" and "imminently", and that they relied upon those representations and waited for help to arrive. However, such generalized statements do not constitute a sufficient assurance that help would arrive promptly. No time frame is alleged to have been given, and it is conceded in the complaint that there was a massive snowfall resulting from a blizzard that significantly slowed any transportation on the streets, so that Robinson's family members could not have reasonably relied justifiably upon any assurance that help would arrive soon or imminently. The proposed amended complaint alleges that the EMS technicians arrived approximately one-half hour after they got through to the 911 operator. Based upon the weather conditions which plaintiffs concede caused significant transportation problems, the unnamed family members could not reasonably have relied upon any statement

that an ambulance would arrive "imminently" (a term which, doubtless, is of plaintiffs' attorney's authorship and not one actually spoken by the 911 operator). Plaintiffs claim that Robinson's death was caused solely by the delay in transporting her to the hospital occasioned by the failure of the City to plow the streets. Therefore, there could not have been any justifiable reliance upon any statement that help would arrive quickly.

Moreover, no facts are stated to support a claim of detrimental reliance, and no detrimental reliance is alleged. No allegation is made as to what, if anything, Robinson's family members would have done differently had they known that help would not arrive for 30 minutes. Although the amended complaint alleges that they decided to "stay put" to wait for help to arrive, there is no allegation that they were planning to do, or could have done, anything differently.

In order to have demonstrated justifiable reliance, plaintiffs would have had to show that the assurances of the 911 operator "lulled [them] into a false sense of security, and...thereby induced [them] either to relax [their] own vigilance or to forego other available avenues of protection" (Cuffy, 69 NY 2d at 261). Cuffy involved a claim of failure to provide police protection, but the same basic definition applies to ambulance services. In our case, no detrimental reliance upon any representations of the 911 operator is articulated. There is no allegation that the family members would have, or could have, brought decedent to the hospital in a timely fashion, and, therefore, that her life may have been saved had they not waited for a City ambulance to arrive. There is no allegation that the family members even had a motor vehicle in which they could have transported decedent. Even if they did, the very basis of their claims against defendants is that decedent died because she could not get to the hospital quickly enough through the unplowed streets. There is no allegation or showing that it would have taken the family members less time to get decedent to the hospital themselves that the ambulance was able to do. And, as heretofore stated, there is no allegation that they were planning to transport, or could have transported, decedent to the hospital themselves. Therefore, not only do the allegations of the proposed amended complaint not support a cause of action based upon justifiable reliance, but they do not articulate that the family members changed their course of action to decedent's detriment in reliance upon assurances that an ambulance would arrive in a timely manner.

Since plaintiffs have failed to show or allege sufficient facts to support a cause of action based upon a violation of a special duty stemming from communications with a 911 operator, their proposed cause of action based upon special duty is barred by governmental immunity, as a matter of law.

In any event, the complaint does not allege that decedent's death was proximately caused by their alleged reliance upon the 911 operator's representations but rather by the delay in getting her to the hospital as a result of the unplowed condition of the streets. Therefore, plaintiffs' attorney's cross-motion to amend the complaint to allege that decedent's family members relied upon the operator's representations that help would arrive "as soon as possible" and "imminently" in an attempt to state a cause of action based upon a violation of a special duty is irrelevant and a red herring.

The complaint only alleges that decedent's death was caused by the unplowed condition of the streets. No factual allegations have been advanced in either the complaint or the proposed amended complaint that would support a cause of action based upon a violation of a special duty owed to decedent on the part of the City to plow the streets.

Moreover, the special duty exception to governmental immunity is not applicable to the City's delay in plowing the streets, since that exception applies only with respect to ministerial failures as opposed to discretionary acts.

A discretionary act of a governmental entity may not form the basis of liability against it, even if such act was negligent (see McLean v City of New York, 12 NY 3d 194 [2009]; Kenavan v City of New York, 70 NY2d 558 [1987]).

It is clear that the City's decision as to when to plow the streets was clearly a discretionary decision, as opposed to a mere ministerial act, which is a mechanical act "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, the City's actions in this regard were to be considered ministerial rather than discretionary acts, which they are not, plaintiffs have failed to show that the special duty exception to governmental immunity is applicable to this case.

Accordingly, the motion is granted, the cross-motion is denied and the action is dismissed.

Dated: December 19, 2012

KEVIN J. KERRIGAN, J.S.C.