

Hephzibah v City of New York

2013 NY Slip Op 31159(U)

May 28, 2013

Supreme Court, New York County

Docket Number: 116481/2010

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 116481/2010
HEPHZIBAH, ESTHER
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

CALL # 31

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

MAY 30 2013

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 5-28-13

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 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 5

-----X
ESTHER HEPHZIBAH,

Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK CITY POLICE
DEPARTMENT and OFFICER "JOHN DOE," SUCH
NAME BEING FICTITIOUS AS THE TRUE NAME
IS NOT KNOWN TO PLAINTIFF, BADE NUMBER
987,

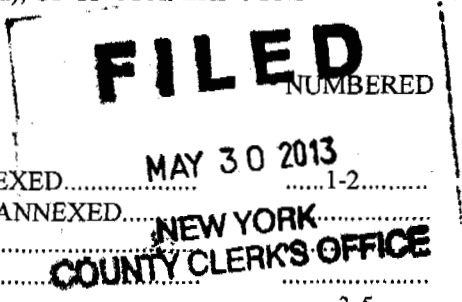
Defendants.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS

NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	MAY 30 20131-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....		
ANSWERING AFFIDAVITS.....	NEW YORK	
REPLYING AFFIDAVITS.....	COUNTY CLERK'S OFFICE	
EXHIBITS.....	3-5.....
OTHER.....		



UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants move for an Order pursuant to CPLR§3211(a)(7) dismissing plaintiff's complaint
for failure to state a cause of action. Plaintiff opposes.

After a review of the instant motion, all relevant statutes and case law, the Court grants the
motion.

Factual and procedural background:

Plaintiff brings the instant action to recover monetary damages for personal injuries she
allegedly sustained on September 26, 2009, in the vicinity of Church Street and Vesey Street, County

of New York, when she was knocked to the ground in the course of a foot chase wherein a fleeing criminal suspect was being pursued by police officers.

Plaintiff subsequently filed a Notice of Claim on December 24, 2009. She filed her Summons and Complaint on December 21, 2010. Issue was joined by service of the City's Answer on February 9, 2011. The City's Amended Answer, which also answered for P.O. Henry Bermudez, s/h/a Officer John Doe, was served on June 22, 2011. On August 9, 2012, plaintiff served her Verified Bill of Particulars.

As the first and sole cause of action in her Complaint, plaintiff alleges in pertinent part that defendant DOE was "reckless, careless, and negligent in: engaging a pursuit of a low level offender on a crowded lunch-hour sidewalk; putting the public at risk; failing to follow police departmental rules and regulations regarding pursuit of low -level suspects; using poor judgment; failing to warn the plaintiff; failing to have an efficient and sufficient personnel; confronting a sidewalk vendor solo; and the defendant DOE was otherwise reckless, careless and negligent; that defendants City of New York and New York City Police Department are vicariously liable for the negligence of the defendant DOE..." (*see* Verified Complaint annexed as Exhibit "B," p.3, par. 13).

Plaintiff's Notice of Claim states in pertinent part that "[t]he accident occurred on September 26, 2009 at approximately 1:00 p.m. at the corner of Church Street and Vesey Street, New York, New York, across the street from the Ground Zero Site. Claimant ESTHER HEPHZIBAH was a pedestrian was violently thrown to the ground in the course of a police chase (*sic*). Upon information and belief, as described above herein, the accident caused the claimant to sustain severe personal injuries to her right leg, left knee, lower back and right shoulder all without any negligence on the part of the claimant contributing thereto" (*sic*).

Positions of the parties:

Defendants first assert that in order to prove negligence, a plaintiff must first demonstrate that defendants owed plaintiff a duty of care. They argue that plaintiff fails to sufficiently state a cause of action in negligence because she fails to establish that at the time of the incident, the City owed her any duty of care. Defendants assert that since plaintiff was a member of the general public, her cause of action is barred by the public duty rule articulated by the Court of Appeals in Valdez v. City of New York, 18 N.Y.3d 69 [2011]).

Defendants also argue that the complaint warrants dismissal because plaintiff failed to plead a special duty in her Notice of Claim and Complaint. They argue that it is well established that since a plaintiff is bound by his/her Notice of Claim, any claims not alleged therein, are barred. Therefore, defendants argue that because plaintiff failed to allege a special duty in her Notice of Claim, she is now barred by the statute of limitations in doing so, as the date of incident was September 26, 2009.

Plaintiff argues that she has sufficiently pled a cause of action for negligence in both her Notice of Claim as well as her Complaint, and that defendants' assertion that she cannot factually establish a special duty is devoid of merit in that the instant case is not one where a *special* duty to her is required. She also argues that the Complaint clearly sets forth that the police officer(s) owed her a duty and breached said duty by departing from reasonable conduct under the circumstances, inevitably resulting in her incurring injury.

Plaintiff also argues that the instant case is not one where a special duty is legally required. She asserts that defendants are under the mistaken impression that she is alleging a nonfeasance theory of liability. However, she asserts that her theory of liability is really misfeasance. Hence, the special duty rule does not apply because defendant police officer, due to his negligent conduct, set

in motion the chain of causation that foreseeably caused her injuries. Plaintiff further argues that governmental immunity that is afforded to municipalities for the discretionary conduct of employees does not extend to situations wherein the employee, a police officer, violates acceptable police practice.

Conclusions of law:

It is well settled that “[o]n a motion to dismiss the complaint pursuant to CPLR§ 3211(a)(7) for failure to state a cause of action, the court must afford the pleadings a liberal construction, accept the facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (Leon v. Martinez, 84 N.Y.2d 83, 87 [1994]; *see also* Guggenheimer v. Ginzburg, 42 N.Y.2d 268, 275 [1977]; Breytman v. Olinville Realty, LLC, 54 A.D.3d 703, 704 [2d Dept. 2008], *lv dismissed* 12 N.Y.3d 878 [2009]; 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 [2002]). Moreover, the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint and, upon considering such affidavits, the facts alleged therein must also be assumed to be true (*see* Kopelowitz & Co., Inc. v. Mann, 83 A.D.3d 793, 797 [2d Dept. 2011]; Pike v. New York Life Ins. Co., 72 A.D.3d 1043, 1049 [2d Dept. 2010]).

To prevail on a cause of action alleging negligence, a plaintiff must establish the existence of a legal duty, a breach of that duty, proximate causation, and damages (*see* Pasquaretto v. Long Island University, 2013 WL 1896819 (N.Y.A.D. 2 Dept.)). “Absent a duty of care, there is no breach, and without breach, there can be no liability (Fox v. Marshall, 88 A.D.3d 131, 135 [2d Dept. 2011] citing Pulka v. Edelman, 40 N.Y.2d 781, 782). The existence of a legal duty presents a question of law for the court (*see* Eisenman v. State of New York, 70 N.Y.2d 175, 189 [1987]).

In Valdez v. City of New York, *supra*, the Court of Appeals held that a plaintiff must first establish the existence of a special duty owed to him/her by the State before it becomes necessary to address whether the State can rely upon the defense of governmental immunity. Thus, it is well settled that the State “is not liable for the negligent performance of a governmental function unless there existed a ‘special duty to the injured person, in contrast to a general duty owed to the public’ (*see also* McLean v. City of New York, 12 N.Y.3d 194, 199 [2009], quoting Garrett v. Holiday Inns, 58 N.Y.2d 253, 261 [1983]).

Indeed, there are three ways in which a special relationship can be formed, resulting in a special duty: “ ‘(1) when a 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; (3) when the municipality assumes a positive direction and control in the face of a known, blatant and dangerous safety violation’ ” (McLean, 12 N.Y.3d at 199). Moreover, “[i]n the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to enforce a statute or regulation” (O’Connor v. City of New York, 58 N.Y.2d 184, 192 [1983]).

“[C]ases on governmental tort liability have long distinguished between discretionary and ministerial acts of government officials (McLean, 12 N.Y.3d at 194). “[W]hen 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’ ” (McLean, 12 N.Y.3d at 202, quoting Tango v. Tulevech, 61 N.Y.2d 34, 40 [1983]). As to negligent ministerial acts, they will not otherwise be considered tortious unless the plaintiff can show “a duty running directly to the injured person,” and that the duty breached is “more than that owed to the public generally” (McLean, 12 N.Y.3d at 202,

quoting Lauer v. City of N.Y., 95 N.Y.2d 95, 99-100 [2000]). Therefore, the established rule is that government action, if discretionary, is never a basis for liability, and ministerial action may be only if it violates a special duty owed to the plaintiff apart from any duty to the public in general (McLean, 12 N.Y.3d at 202-203)).

In the case at bar, the Court finds that plaintiff's arguments lack persuasiveness. Indeed, because the action of the police was clearly a discretionary governmental function, and plaintiff has failed to establish that she was owed a special duty, the instant motion must be granted.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant City's motion pursuant to CPLR§ 3211(a)(7) is granted; and it is further

ORDERED that defendant City shall serve a copy of this order on plaintiff and the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: May 28, 2013

MAY 28 2013

FILED
MAY 30 2013
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:

Hon. Kathryn E. Freed
HON. J.S.C. FREED
JUSTICE OF SUPREME COURT

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT