SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 28

----------x

SOFIA RUSSO, as Administrator of the Goods, Chattels, and Credits which were of ARIEL RUSSO, Deceased, and KATIA GUTIERREZ,

Plaintiffs,

DECISION AND ORDER

- against -

FRANKLIN REYES, RAMON ESTRADA, NEW YORK CITY FIRE DEPARTMENT, NEW YORK CITY EMERGENCY MEDICAL SERVICES, CALL OPERATOR/DISPATCHER "JANE DOE", NEW YORK CITY POLICE DEPARTMENT, POLICE OFFICERS "JOHN DOE" 1-6, and THE CITY OF NEW YORK,

Defendants.

Index No. 158655/2013

----------x

Martin Schoenfeld, J.:

On the morning of June 4, 2013, tragedy struck the Russo family. Ariel Russo, a four year old girl, was walking to school with her grandmother, plaintiff Katia Gutierrez, when she and Ms. Gutierrez were hit by a vehicle that jumped the curb at the intersection of West 97th Street and Amsterdam Avenue in Manhattan.[1] Just prior to this incident, the vehicle that hit them, driven by defendant Franklin Reyes and owned by defendant Ramon Estrada, had been stopped by New York Police Department (NYPD) police officers at West 89th Street and Amsterdam Avenue for reckless driving. When the police approached the vehicle, defendant Reyes sped away. An alleged high speed chase ensued which ended when the car driven by Mr.

[1]The facts discussed here were taken from the complaint and attachments to the plaintiffs' Affidavit in Opposition. Specifically, attached to their affidavits plaintiffs included several documents helpful in determining the events of June 4th, including transcripts of testimony of Katia Gutierrez and Sofia Russo made pursuant to General Municipal Law § 50-h, sworn statements of two witnesses, and a New York City Department of Investigation report (Investigation report) dated December 2013 which analyzes the City's emergency response to the accident.

Reyes hit Ariel Russo and Ms. Gutierrez. The police subsequently arrested Mr. Reyes.

Immediately after Ariel Russo and Ms Gutierrez were hit, at about 8:15 am, the police radioed in several requests for ambulances to New York City Fire Department's Emergency Medical Dispatch Center (EMD), which is responsible for ambulance deployment. According to a New York City Department of Investigation report provided by plaintiffs (see footnote 1), there was an approximate four minute delay by EMD personnel in processing this request for assistance and dispatching an ambulance.[2] The ambulance sent by EMD for Ariel Russo arrived at the scene at 8:23 am.[3] Ms. Russo was provided with medical care at the scene and was transported to St Luke's-Roosevelt Hospital. Tragically, Ariel Russo died from her injuries. Ms. Gutierrez suffered serious injuries and has no real memory of what occurred.

On September 20, 2013, Ms. Gutierrez and Sofia Russo, Ariel's mother as administrator, brought this tort action against Mr. Reyes, Mr. Estrada, and the City. On November 6, 2013, the City filed the pre-answer motion currently before this Court asking the Court to dismiss several causes of action pursuant to CPLR 3211(a)(7). Specifically, the City moves to dismiss the third and forth causes of action on behalf of the estate of Ariel Russo claiming negligence and gross

---

[2]The Investigation report goes in to great detail concerning the causes of this four minute delay. It concludes that human error was to blame. As discussed in detail below, although the Court finds this error inexcusable and troubling, who was at fault is not relevant to the inquiries here. It is important to note that our new mayor agrees that there are significant problems with New York City's 911 system. On May 19th, Mayor De Blasio announced that he was suspending the problematic upgrade of the current system to determine how best to fix it. Nikita Stewart, *New York City Calls Halt to Overhaul of 911 System*, N.Y. Times, May 19, 2014; Juan Gonzalez, *Mayor de Blasio puts troubled 911 upgrade on hold for probe of budget, schedule delays*, N.Y. Daily News, May 19, 2014.

[3]Prior to its arrival an ambulance on the way to St. Luke's hospital was flagged down at 8:22 am. This ambulance eventually took Ms. Gutierrez to St. Luke's.

negligence by the City in how it responded to the request for emergency medical assistance and the fifth and seventh causes of action claiming negligence by the City in how it conducted its traffic stop and the police pursuit. It also moves to dismiss the portions of the sixth, eighth and ninth causes of action that are premised on negligent performance of the police.

However, at this time the City is not asking for the dismissal of the portions of the sixth, eighth and ninth causes of action that assert that the police acted recklessly during the high speed chase.[4]

Plaintiffs oppose the motion and have filed opposition papers. In addition, on February 21, 2014, defendants Reyes and Estrada filed their amended answer with a cross claim against the City and an affirmation in opposition to the City's motion to dismiss.

Discussion

When considering a motion to dismiss for failure to state a claim pursuant to CPLR 3211(a)(7), plaintiff's pleadings are "to be afforded a liberal construction." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The facts alleged by plaintiff should be considered true and plaintiff should be given "the benefit of every possible favorable inference." *Id.* The role of the court at this juncture is to "determine only whether the facts as alleged fit within any cognizable legal theory." *Id.* at 87-88 (citations omitted). Courts can look to an affidavit of the plaintiff to remedy any defects found in the complaint. *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635-36 (1976). Here, the City argues that even under this permissive standard, plaintiffs have failed to state viable negligence claims against the City. The Court agrees. As sad as this case is, for

[4]Nor are they moving to dismiss the first and second causes of action which refer to the negligence of defendants Mr. Reyes and Mr. Estrada.

the reasons set forth below, the Court must grant the motion to dismiss the claims of negligence against the City.

It is well established that "[d]espite often sympathetic facts in a particular case before them, courts must be mindful of the precedential, and consequential, future effects of their ruling, and 'limit the legal consequences of wrongs to a controllable degree.'" *Lauer v. City of New York,* 95 N.Y.2d 95, 100 (2000) (citations omitted). This is particularly true where "an individual seeks recovery out of the public purse." *Id.* In accordance, courts have limited the liability of a city and its workers for individual injuries resulting from a breach of duty owed to the general public when governmental functions, such as the duty to provide police protection and ambulance services, are concerned. *Freeman v. City of New York*, 111 A.D.3d 780, 781-82 (2d Dept. 2013); *see Valdez v. City of New York*, 18 N.Y.3d 69, 75 (2011) ("police protection" is a "classic" governmental function); *Applewhite v. Accuhealth, Inc.*, 21 N.Y.3d 420, 430 (2013) (finding "municipal emergency response system – including the ambulance assistance rendered by first responders such as FDNY EMTs . . .– should be viewed as 'a classic governmental function'" (citation omitted)). "'[T]o sustain liability against a municipality, the duty breached must be more than that owed the public generally.'" *Valdez,* 18 N.Y.3d at 75 (*quoting Lauer*, 95 N.Y.2d at 100 (2000)). The municipality must have had a special duty to the particular injured individual. *Id.*

In cases like this one where the alleged negligent actions involve reliance on ambulance service and police protection, courts have found that a municipality owes a special duty to a specific individual where a "special relationship" was created between the city and that individual. *See Cuffy v. City of New York*, 69 N.Y.2d 255, 260 (1987); *Applewhite*, 21 NY3d at

430-31; Laratro v. City of New York, 8 N.Y.3d 79, 83 (2006). In *Cuffy*, the Court of Appeals explained that this "special relationship" exists when there is:

> (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." 69 N.Y.2d at 260 (citations omitted).

To satisfy the third requirement – direct contact -- there must be contact directly between the injured party (or an immediate family member on her behalf) and the representative of the municipality concerning the care to be provided. *Larato*, 8 N.Y.3d at 83-84 (finding no direct contact where plaintiff was unable to communicate by reason of a stroke and rejecting argument that contact with 911 operator by a friend on plaintiff's behalf constituted direct contact).

Here, plaintiffs have failed to plead any facts concerning the existence of a special relationship between them and the police and/or ambulance personnel. Nothing in the complaint or supplemental information provided suggests that Ariel Russo, her grandmother, or any other family member, had any conversations with the police or 911 call operators concerning their care, or that they relied on any representations made by City employees as is laid out in *Cuffy*. *See Freeman*, 111 A.D.3d at 782 (dismissing complaint in case involving ambulance services where it failed "to allege any facts tending to show that there was any 'direct contact' between decedent and the defendants or that there was any 'justifiable reliance.'"); *contrast Radvin v. City of New York*, 38 Misc.3d 821, 824 (Queens Cnty 2012) (motion to dismiss denied where

plaintiff's amended complaint adequately alleged decedent's family members had direct contact with the city and plaintiffs relied on the city's promise to send an ambulance). The complaint merely states that "a call for emergency medical assistance on behalf of . . . . Ariel Russo was placed."[5] No matter how tragic the situation, the law is clear – "a municipality is not liable to a person injured by the breach of a duty – like the duty to provide police protection . . . or ambulance service" where there was no special relationship between the individuals harmed and the City. *Laratro*, 8 N.Y.3d at 82-83. Thus, the City's duty, here, was to the public in general. It had no special duty to Ariel Russo or Ms. Gutierrez.

Plaintiffs contend, nevertheless, that the Court should let stand the negligence causes of action because the City should not have "immunity from ordinary negligence." They argue that there should be no immunity in situations like this one where City personnel act negligently by failing to follow the City's delineated policies and procedures. Plaintiffs point specifically to EMD's four minute delay in responding to the request for emergency assistance on the behalf of Ariel Russo. In making this argument, however, plaintiffs misapprehend the law of governmental immunity. In *Valdez v. City of New York*, the Court of Appeals clearly explained that the first inquiry in determining whether to hold a municipality liable for negligence when governmental functions are involved is whether there was a duty to the individual harmed. The Court emphasized that "if plaintiffs cannot overcome the threshold burden of demonstrating that defendant owed the requisite duty of care, there will be no occasion to address whether defendant can avoid liability by relying on the governmental function immunity defense." 18 N.Y.3d at 80.

---

[5]Moreover, inexplicably, the complaint does not mention a special relationship between the plaintiffs and the City at all but, states that "a special relationship existed" between the city and the 911 call operator.

Here, the government immunity defense does not come in to play because, as discussed above, there is nothing to show that the City had a duty to the individual plaintiffs. Thus, although EMD's delay is very troubling, whether the police or EMD personnel followed the applicable rules and procedures is not relevant to the Court's analysis here.

Plaintiffs' arguments that the City should be held liable for "gross negligence" is also unpersuasive. Where the municipality has no duty to the individual, whether its actions were merely negligent or grossly negligent is irrelevant. "Without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm." *Lauer v. City of New York*, 95 N.Y.2d 95, 100 (2000)(citations omitted).

Additionally, plaintiffs argue that at the very least the claims of negligence and gross negligence should not be dismissed until plaintiffs are given the opportunity "to explore the issues and ascertain all applicable facts through appropriate channels of discovery." Plaintiff's Memorandum of Law in Opposition at 12. They believe that this CPLR 3211(a)(7) motion "is in essence seeking summary judgment under the pretext of a pre-Answer motion to dismiss" unfairly denying them the right to discovery which could lead to proof of a special duty or "some other evidentiary supported legal basis for imposing municipal liability." Plaintiffs' Memorandum of Law in Opposition at 5. The Court's job here, however, is to determine "whether the facts as alleged fit within any cognizable legal theory," not to grant a fishing expedition. Neither the complaint nor the supplemental information in the plaintiffs' affidavits, including the exhaustive Investigation report concerning EMD's response to the requests for an ambulance, provide any information that would lead the Court to infer that the City is in possession of evidence that would show that it had a special duty to plaintiffs. Nor do plaintiffs

provide any explanation as to how discovery could lead to evidence that a special relationship existed. "In the absence of any allegations of such a relationship, the complaint cannot state a viable cause of action against the City based on its alleged negligence." *Freeman*, 111 A.D.3d at 782. Therefore, the causes of action alleging negligence and gross negligence by the City's police and EMD are dismissed.

In granting this motion to dismiss the claims of negligence and gross negligence, the Court is not dismissing the entire complaint. Plaintiffs may still pursue their claims against the City for acting recklessly in conducting the alleged high speed pursuit and against the individual defendants, Mr. Reyes and Mr. Estrada.

Therefore, in accordance with the foregoing, it is

ORDERED that the Third, Fourth, Fifth and Seventh cases of action set forth in the complaint of the above captioned case are dismissed in full; and it is further

ORDERED that the portions of the Sixth, Eighth and Ninth causes of action set forth in the complaint of the above captioned case that claim negligence by the City are dismissed.

J.S.C.

Dated: New York, New York
November 18, 2014