Dick v Village of Belle Terre
2015 NY Slip Op 31597(U)
July 28, 2015
Supreme Court, Suffolk County
Docket Number: 09-44387
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 09-44387
CAL. No. 14-01253OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12-22-14
ADJ. DATE 4-20-15
Mot. Seq. # 002 - MG; CASEDISP

JEANETTE DICK, Plaintiff, - against - VILLAGE OF BELLE TERRE, Defendant.	STANLEY E. ORZECHOWSKI, ESQ. Attorney for Plaintiff 38 Southern Boulevard, Suite 3 Nesconset, New York 11767
	AVALLONE & BELLISTRI, LLP Attorney for Defendant 3000 Marcus Avenue, Suite 3E7 Lake Success, New York 11042

Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-11; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 12-20; Replying Affidavits and supporting papers 21-23; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Village of Belle Terre ("Village") for an order pursuant to CPLR 3212 granting partial summary judgment on the issue of liability is granted.

This is an action to recover damages as a result of events which occurred on September 16, 2008 when plaintiff Jeanette Dick was attending her husband's wake, at which time her house was burglarized and damaged, and personal property was stolen from her home. The complaint interposes two causes of action: the first alleging negligence and a breach of special duty of police protection and the second alleging intentional and/or negligent infliction of emotional distress.

Defendant Village now moves for summary judgment dismissing the complaint in it entirety. In support of the motion, it submits, *inter alia*, its attorney's affirmation, the pleadings, the transcripts of the depositions of plaintiff, of Elaine Freda as witness for the defendant, of Joanne Raso, as witness for the defendant, and of Robert Walker as a non-party witness. In opposition, plaintiff submits, *inter alia*, her attorney's affirmation, a copy of the order of this Court dated March 15, 2012, which granted defendant's motion to amend its answer to assert an affirmative defense of governmental function immunity, the affidavit of Chief Constable David Wolosin, sworn to on March 21, 2012, the duties rules of conduct and rules and procedure of the Village of Belle Terre constabulary, time sheets, and copies of the inventory of items allegedly stolen from the plaintiff's residence on September 16, 2008.

Plaintiff testified that she had lived at her current address in the Village for more than 40 years. Over that time, and prior to September 16, 2008, she requested the Village Constable's office to watch her home approximately six times. Normally, she would call the Constable's office and inform them that she was not going to be home and ask them to check the house. Each time she left a message, she would get a return call from the Constable's office confirming that it would be taken care of. When plaintiff's husband passed away on September 11, 2008, she wanted the Constable's office to watch her home. Her friend, Elaine Frieda, visited her on the 12th or 13th, after her husband passed away. After leaving, she called plaintiff and said that she had gone to the Village office on her behalf and had made the request. Freda, a part-time employee of the Village, told her that she asked to Joanne Raso at the Village office to make sure that the house should be watched by the constables during the upcoming wake and funeral. She did not receive a call back from the Village. She believed Mrs. Freda checked to make sure the message had been transmitted. On September 16th, the wake was held at 7:00 p.m. at the funeral home. When they returned home, she saw that her husband's safe had been broken into and her jewelry box was turned upside down. A number of pieces of jewelry and other items had been stolen. The back door had been forced open. The Suffolk County Police were called, and someone from the Constable's office arrived. She did not speak to him, but overheard him say, in response to a question from her son, that he did not know anything about watching her home. The next evening, a Village constable car parked in her driveway, and she spoke to the driver, who introduced himself as Robert Walker. He said that is how things are, messages on desks get pushed aside. For young kids, if it's not on a computer, they don't read it. She assumed that he was saying that the young constable did not know that he was supposed to be watching the house. She also thought that he indicated that there was indeed a note and he was aware that a request had been made.

Freda testified as a witness for the defendant Village. She is a part-time employee and serves as clerk of the Justice Court. After seeing the plaintiff and offering her condolences on the death of her husband, plaintiff asked her to notify the Village and that is what she did. On September 12, 2008 she went to the office of Joanne Raso, the clerk-treasurer of the Village and informed her of the request and "all of the particulars." Ms. Raso then called and left a message with the Constable's office to keep an eye on the house. Elaine Freda informed the plaintiff that she had done so. She never independently called to verify to see if the constables were going to keep an eye on the plaintiff's house.

Joanne Raso testified as a witness for the defendant Village. She is an employee of the Village and serves as clerk treasurer. One of her duties is to relay messages from Village residents to the Village Board and constabulary. These messages are relayed by telephone and, normally, no writings are created. However, she has a log book in her office which keeps track of messages that she receives.

She said that 95% of the messages would be in the logbook, including calls regarding the constabulary. In 2008, the Chief Constable was Robert Walker. If a verbal message was received to have the constables check on property, she would have them fill out the proper form, a house watch form, that would then be forwarded to the Constable's office. She was unaware of any such requests being honored without the form. She testified that no form was filled out with regard to Freda's request. She did not want to bother Mrs. Dick because of the death in the family. She was shown the logbook for September 12, 2008 and identified an entry stating "Elaine Freda" in her handwriting. They had a face-

to-face conversation on that date. She wrote that she called the Constable to keep an eye on the plaintiff's house. She did not speak to anyone, but left a message on the answering machine with the dates requested. She did not recall if she took any steps to confirm that the message was received and would be acted upon.

Robert Walker testified that, at the time of the events alleged in this action, he was the Chief of the defendant's police force and had been since 1996. He was terminated sometime thereafter. Prior to that, he retired from the Suffolk County Police Department after 30 years of service. He was the only full time constable. Normally, one constable patrolled the Village at any given time. If a resident was away and asked that property be checked, a constable would bring a form to the house to be filled out. Without the form, if a constable received a call from a resident asking them to check their property, they had the discretion to do so. No computer record was kept of such requests. He was shown and identified the constabulary logbook for September 12, 2008. He was shown the entry "Headquarter visit. One call, village office", which he identified as his own handwriting. He was then asked if the phone message was from Joanne Raso. He could not recall who it was from. He did not believe that he received a call asking to check on the Dick property on September 15th or 16th. If he had, he normally would take a form to the resident or fill it out himself if the person was not available. There were no burglaries in the Village in 2008 prior to the one at the plaintiff's residence. He testified that he had never met or spoken to the plaintiff prior to the day of his deposition.

Initially, plaintiff contends that defendant, failed to submit a copy of its amended answer, rather than its original answer with its motion papers. Notwithstanding that CPLR 3212(b) requires that motions for summary judgment be supported by a copy of the pleadings, CPLR 2001 permits a court, at any stage of an action, to "disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced" (***Avalon Gardens Rehabilitation & Health Care Ctr., LLC v Morsello***, 97 AD3d 611, 612, 948 NYS2d 377 [2d Dept 2012]; *see* CPLR 2001; ***Long Is. Pine Barrens Socy., Inc. v County of Suffolk***, 122 AD3d 688, 691, 996 NYS2d 162 [2d Dept 2014]***; U.S. Bank N.A. v Eaddy***, 109 AD3d 908, 910, 971 NYS2d 336 [2d Dept 2013). Although the defendant failed to include a copy of the amended answer with its motion for summary judgment, the plaintiff submitted a copy of the order granting the amendment with the opposition papers. Under the circumstances here, the record is sufficiently complete, and there is no proof that a substantial right of the plaintiff was impaired by the defendants' failure to submit a copy of the amended answer (*see* ***U.S. Bank N.A. v Eaddy***, *supra*; ***Avalon Gardens Rehabilitation & Health Care Ctr., LLC v Morsello***, *supra*; ***Welch v Hauck***, 18 A.D.3d 1096, 1098, 795 N.Y.S.2d 789 [3d Dept 2005]; ***Washington Realty Owners, LLC v 260 Washington St., LLC***, 105 AD3d 675, 675, 964 NYS2d 137 [1st Dept 2013]).

Turning to the parties' contentions, it is alleged by plaintiff's counsel that the proof submitted by defendant is not proper because it is not accompanied by a affidavit of a person with personal knowledge. However, the failure to submit an affidavit by a person with knowledge of the facts is not necessarily fatal to a motion where, as here, the moving party submits other proof, such as deposition testimony placed in context by the attorney's affirmation (*see* ***Notskas v Longwood Assoc., LLC***, 112 AD3d 599, 976 NYS2d 176 [2d Dept 2014]; ***Vetrano v J. Kokolakis Contr., Inc.***, 100 AD3d 984, 986, 954 NYS2d 646 [2d Dept 2012]). Here, defendant's counsel properly used his affirmation to marshal the argument for summary judgement, based upon deposition testimony and other admissible facts in the record.

Defendant has established its prima facie entitlement to summary judgment dismissing the complaint. "Under the public duty rule, although a municipality owes a general duty to the public at large to furnish police protection, this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created" (***Valdez v City of New York***, 18 NY3d 69, 75, 936 N.Y.S.2d 587 [2011]; *see* ***Applewhite v Accuhealth, Inc.***, 21 NY3d 420, 426, 972 NYS2d 169 [2013]).

The Court of Appeals has set forth the elements of such special duty or relationship as follows: "(1) an assumption by the municipality [or governmental entity], 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 [citations omitted]."(***Cuffy v City of New York***, 69 NY2d 255, 260, 513 NYS2d 372 [1987]; *see* ***Philip v Moran*** 127 AD3d 717, 7 NYS3d 294 [2 Dept 2015]). Here, there is no evidence that anyone from the Village called plaintiff to confirm that they would keep an eye on her property, as they had with all of her previous requests. Further, there is no evidence showing that a failure to act would lead to harm. The Village had not had a single burglary that year prior to September 16, 2008. There was no direct contact between the plaintiff and the Village. Rather, communication was through a friend of the plaintiff, who was also a part-time Village employee. The message was given to the clerk-treasurer who left a phone message with the Constable's office. She did not recall if she took any steps to confirm that the message was received and was going to be acted upon. The former Chief constable testified that he did not recall receiving the message, and even if, as plaintiff alleges, he did receive the message, he took no action on it. At most, Freda confirmed to plaintiff that the request was made, but did not, and could not, confirm that the Constable's office had actually received the request and agreed to act on it. Finally, as plaintiff never received confirmation from the Constable's office, there could be no justifiable reliance by the plaintiff. Thus, no special duty or relationship was created between plaintiff and defendant.

In response, plaintiff failed to raise an issue of fact. Plaintiff's counsel's argument is based on his interpretation of plaintiff's "assumptions" as to what Chief Constable Walker meant based upon remarks he allegedly made to her (Mr. Walker testified that the conversation never took place). However, even if true, any action taken or not taken by the constables was discretionary and not actionable under the doctrine of governmental function immunity. Under the doctrine of governmental function immunity, " '[g]overnment 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, apart from any duty to the public in general' " (***Valdez v City of New York***, 18 NY3d 69, 76–77, 936 N.Y.S.2d 587, quoting ***McLean v City of New York***, 12 NY3d 194, 203, 878 NYS2d 238, 2009[]; *see* ***Rodriguez v Town of Clarkstown Police Dept***, 123 AD3d 690, 999 NYS2d 422 [2nd Dept 2014]; ***Kelsey v City of New York***, 108 AD3d 689, 689, 968 NYS2d 903 [2d Dept 2013]; ***Miserendino v City of Mount Vernon***, 96 AD3d 810, 810, 946 NYS2d 605 [2d Dept 2012]). The common-law "doctrine of governmental immunity" reflects separation of powers principles and is intended to ensure that public servants are free to exercise their decision-making authority without interference from the courts; it further reflects a value judgment that, despite injury to a member of the public, the broader interest in having government officers and employees free to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory

lawsuits, outweighs the benefits to be had from imposing liability for injury ***(Valdez v City of New York***, 18 NY3d 69, 75, 936 N.Y.S.2d 587 [2011]). Even assuming that the Chief Constable received the message with regard to plaintiff's request, any decision to act on it would be discretionary and would not subject defendant Village to liability.

Turning to the second cause of action, a claim for intentional infliction of emotional distress is to be invoked "only as a last resort" (***McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.***, 256 AD2d 269, 961 NYS2d 167 [1st Dept 1998]; *see* ***Doin v Dame***, 82 AD3d 1338, 918 NYS2d 253 [3d Dept 2011]). To set forth a prima facie claim, a plaintiff must show the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized society" (***Taggart v Costabile***,_AD3d_ 2015 N.Y. Slip Op 05464 [2d Dept June 24, 2015])). The tort involves four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal relationship between the conduct and the injury; and (4) severe emotional distress (***Howell v New York Post Co., Inc.***, 81 NY2d 115, 596 NYS2d 350 [1993]). Here, defendant's conduct was not of such an outrageous manner or so extreme as to substantiate the claim of intentional infliction of emotional distress. Moreover, public policy bars claims alleging intentional infliction of emotional distress against governmental entities (*see* ***Afifi v City of New York***, 104 AD3d 712, 713, 961 NYS2d 269 [2d Dept 2013]; ***Eckardt v City of White Plains***, 87 A.D.3d 1049, 930 N.Y.S.2d 22 [2d Dept 2011]; ***Ellison v City of New Rochelle***, 62 AD3d 830, 879 NYS2d 200 [2d Dept 2009]; ***Liranzo v New York City Health & Hosps. Corp.***, 300 AD2d 548, 752 NYS2d 568 [2d Dept 2002]). Accordingly, the second cause of action is dismissed to the extent it asserts a claim for the intentional infliction of emotional distress.

The second cause of action is likewise, dismissed to the extent it asserts a claim for the negligent infliction of emotional distress but for reasons different than those asserted by defendants. In ***Taggart***, *supra*, the Appellate Division, Second Department recently clarified that the outrageous conduct that serves as a prerequisite to sustain a claim for the intentional infliction of emotional distress is *no longer* required to prevail on a claim for the negligent infliction of emotional distress. The Appellate Division held, "[n]otwithstanding the case law to the contrary, extreme and outrageous conduct is not an essential element of a cause of action to recover damages for negligent infliction of emotional distress" (***Taggart***, *supra*). Although physical injury is not required, a cause of action for negligent infliction of emotional distress is generally premised upon a breach of duty which either "unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety" (***Santana v Leith***, 117 AD3d 711, 985 NYS2d 147 [2d Dept 2014] [quoting ***Sheila C. v Povich***, 11 AD3d 120, 781 NYS2d 342 [1st Dept 2004]). The record before the Court fails to establish that plaintiff's physical well-being was at any time jeopardized or that she feared for her safety as a result of defendant's conduct. Under these circumstances, to the extent the second cause of action asserts a cause of action for negligent infliction of emotional distress, the complaint is similarly dismissed.

In light of the foregoing, the defendant's motion for summary judgment dismissing th complaint is granted in all respects.

Dated: 7/28/15

THOMAS F. WHELAN, J.S.C.