Nair v City of New York
2016 NY Slip Op 32968(U)
March 9, 2016
Supreme Court, Queens County
Docket Number: 19299/12
Judge: Kevin J. Kerrigan

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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Arun Nair,

Plaintiff,

- against -

City of New York, Apple Towing Co., Jason Gray, Harry Szafranski and Gabriel M. Szafranski,

Defendants.

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Index Number: 19299/12

Motion Date: 2/9/16

Motion Cal. Number: 116

Motion Seq. No.: 7

The following papers numbered 1 to 18 read on this motion by defendant, The City of New York, for an order to dismiss and for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition(Szafranski)	5-6
Affirmation in Opposition(Gray)-Exhibits	7-9
Affirmation in Opposition(Plaintiff)-Exhibits	10-12
Reply to Szafranski	13-14
Reply to Gray	15-16
Reply to Plaintiff	17-18

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

Motion by the City for summary judgment dismissing the complaint and all cross-claims against it is granted.

Plaintiff allegedly sustained personal injuries when the vehicle operated by defendant Gray struck either plaintiff's disabled vehicle or defendant Apple Towing's tow truck that was at the scene of an accident involving plaintiff's vehicle and defendant Szafranski's vehicle on the westbound Long Island Expressway 50 feet east of Exit 17W in Queens County at 2:10 a.m. on May 25, 2012. Plaintiff was standing outside his vehicle and was

struck by his disabled vehicle that had been propelled into him when Gray either struck it, causing it to move and hit plaintiff and then continue to strike the back of the tow truck, or struck the tow truck, propelling it into plaintiff's vehicle which, in turn, moved and struck plaintiff. The record on this motion establishes the following facts:

Defendant Szafranski was driving his vehicle on the aforementioned roadway at said location at 2:10 a.m. when he experienced a blow-out which caused him to spin out of control, strike the center median and come to a rest in the left lane facing eastbound. That section of roadway was straight, level and lit so that no sighting problem issue is presented. It was also wet from a recent rainfall.

Szafranski had his headlights on and activated his emergency flashers and honked his horn to warn oncoming traffic. He also called 911 for assistance. Approximately 10 minutes later, plaintiff's vehicle approached in the left lane and struck Szafranski's vehicle, pushing it 10-50 feet. Thereupon, a flatbed tow truck owned and operated by defendant Apple Towing arrived. Approximately ten minutes thereafter, an NYPD vehicle operated by P.O. Jeremiah Winter, who was accompanied by P.O. Alex Ferraris, arrived on the scene.

Winter and Ferraris testified in their depositions that they positioned their police vehicle so that it straddled approximately half of the left lane and half of the middle lane and approximately 25-30 feet (according to Winter) or one car length (according to Ferraris) behind plaintiff's vehicle and angled toward the middle lane to divert traffic to the right lane. It undisputed that it had its emergency turret lights activated. Gray testified in his deposition that the police vehicle parked straight in the center lane and did not block the left lane where the accident vehicles were. Elwinto Pierre Louis, who was a passenger in plaintiff's vehicle, likewise testified in his deposition that the police vehicle was in the center lane and no part of it was in the left lane.

The officers exited their vehicle and went over and instructed the tow truck driver, Alejandro Diaz, to hook up Szaretski's vehicle and tow it off the LIE. They also went to plaintiff and Szaretski, who were standing outside their vehicles, and spoke to them separately and then went back to their police vehicle. Approximately 5-10 minutes from the time the officers got out of their police vehicle, walked over to the accident vehicles and tow operator and walked back to their vehicle, Officer Winter opened the trunk of the vehicle and removed flares for placement on the

roadway, at which point defendant Gray traveled past the police vehicle on the left, causing Winter to fall in the center lane to avoid being struck, and either collided into plaintiff's disabled vehicle, pushing it into the tow truck that had just loaded Szaretski's vehicle onto it, which tow truck then moved, striking plaintiff and pinning him between plaintiff's vehicle and the center median, as plaintiff's counsel contends, or collided into plaintiff's vehicle, propelling it into plaintiff.

Gray testified that he was driving in the left lane of the LIE and that after he rounded a curve, the roadway was straight and he had an unobstructed view, from a distance of approximately 100-300 feet, of the police vehicle stopped entirely in the center lane with its lights flashing, a police officer standing by the front of the police vehicle and to the left of it and the flatbed tow truck with lights on top of it and a vehicle on it 2-3 feet ahead of the police vehicle in the left lane.

Gray initially testified in harmony with the officers that the police vehicle was parked so that it partially blocked the left lane, but he did not recall how much of the police vehicle was in the left lane. He then amended his testimony, saying that the police vehicle was entirely in the center lane. He further explained that, in an attempt to avoid the tow truck, he first tried to move to the right but realized that "that was not going to be a good option, I would have ran - sideswiped the police car, probably hitting a police officer or hitting someone, so I stayed more to the left because I was already in the left lane, so I just wanted to hit the median, that would slow me down, help me." When asked why he intentionally struck the median, he replied, "When I applied the brakes the car did not stop, I tried to stop the car, and I thought that would slow me down." He also estimated that approximately 45 seconds elapsed from the time he came around the curve and saw the two truck and the police vehicle to the time he struck the median.

Plaintiff alleges that the officers were negligent in failing to protect the accident site by violating the established police protocol set forth in the NYPD Patrol Guide that requires police officers responding to an accident to park their police vehicle with turret lights activated behind the accident to block off traffic and, where the accident is on a highway, to use traffic flares to shut down the lane of the accident.

The City contends that since the officers were involved in an emergency operation when they responded to the accident between plaintiff's vehicle and Szafranski's and since they did not act with reckless disregard for the safety of plaintiff, it is entitled

to immunity from liability pursuant to VTL 1104(e). The City also contends that it is immune from liability because the acts of the officers in the way they responded to the accident were discretionary acts for which the City may not be held liable as a matter of law. Finally, the City also contends that the officers' actions, even if negligent, were not the proximate cause of the accident.

Plaintiff's counsel contends that the there are issues of fact as to whether the police vehicle blocked the left lane, as the officers testified, or whether it was in the center lane, leaving the left lane unprotected, and whether their admitted delay of 5-10 minutes before they allege they went back to their vehicle to set up flares was an unreasonable delay and thus, whether their actions violated the NYPD Patrol Guide. Counsel argues that there are issues of fact as to whether the officers' actions in failing to protect the accident site in the aforementioned manner constituted recklessness, and argues that since the requirements of parking their police vehicle behind the accident and to close off the accident lane with flares set forth in the NYPD Patrol Guide are mandatory, the officers' actions were not discretionary.

VTL 1104 is inapplicable to the facts of this case. Pursuant to VTL 1104(b) and (c), an authorized emergency vehicle that is engaged in an emergency operation may disregard traffic laws if safety precautions are taken (see, Criscione v City of New York, 97 NY2d 152 [2001]; Baines v City of New York, 269 AD2d 309 [1st Dept 2000]), and the driver of the emergency vehicle will be provided with a qualified immunity from civil liability for injuries to a third party unless the driver "acted in reckless disregard for the safety of others" (VTL 1104[e]; Saarinen v Kerr, 85 NY2d 494, 501 [1994]).

Although there is no question that Winter's and Ferraris' police car was an emergency vehicle and was involved in an emergency operation at the time of the accident (see VTL 114-b), plaintiff's claim against the City is that the officers failed to comply with police protocol in protecting the accident scene so as to prevent Gray from driving into the tow truck and the disabled vehicles. Notwithstanding the mere boilerplate allegations of negligence set forth in the complaint as against all defendants, which the City argues must be disregarded insofar as asserted against it because they were not set forth in the predicate notice of claim, plaintiff's counsel does not contend that Winter violated any traffic laws and does not contend that the police vehicle was involved in the subject accident or that the accident was in any way caused by the operation of the police vehicle so as to implicate VTL 1104. Plaintiff's counsel's argument that there is an

issue of fact as to whether the failure of the officers to park their police vehicle directly in back of the accident vehicles and to set down flares promptly after arriving at the scene in order to protect the accident scene constituted reckless conduct, in opposition to the City's meritless contention that it is immune from liability upon the basis of VTL 1104, is also without merit and unworthy of further refutation.

Plaintiff's counsel contends that Officers Winter and Ferraris failed to follow the procedures set forth in the NYPD Patrol Guide, PG 217-01, regarding vehicle accidents, specifically, the instructions to park the responding police vehicle behind the accident vehicles and to place flares and/or cones on the roadway at least 200 feet from the accident. Counsel contends that since Officers Winter and Ferraris did not park their police vehicle in the left lane directly behind the accident vehicles to protect them from being struck by oncoming traffic but instead parked in the center lane, and since they did not place flares or cones on the roadway to divert traffic from the accident lane within a reasonable time after arriving but, instead, expended 5-10 minutes engaging in conversation with those involved in the accident and the tow truck operator, the City may be held liable in negligence for plaintiff's injuries resulting from the failure of Officers Winter and Ferraris to adhere to police protocol.

As noted, the City also moves for dismissal upon the grounds that the acts of the officers in the way they handled the accident scene, even if negligent, were discretionary acts for which the City may not be held liable, and that even if they violated the procedures set forth in the Patrol Guide, such acts were not the proximate cause of plaintiff's injuries.

"[D]iscretionary municipal acts may never be a basis for liability, while ministerial acts may support liability only where a special duty is involved" (see McLean v City of New York, 12 NY 3d 194, 202 [2009]). Liability may not be imposed for a public employee's discretionary act even if it was negligent Kenavan v City of New York, 70 NY2d 558 [1987]).

Plaintiff's counsel argues since the procedures of parking the police vehicle behind the accident and to close off the accident lane with flares or cones set forth in the NYPD Patrol Guide are mandatory, the officers' actions that deviated from these required procedures were not discretionary so as to shield the City from liability. Counsel also contends that even were the officers' actions discretionary, immunity for discretionary acts of municipal employees does not apply where the defendant police officers violate acceptable police practices, citing Lubecki v City of New

York (304 AD 2d 224 [1st Dept 2003]). Counsel contends that the conflicting deposition testimony concerning whether the police vehicle was parked partially across both the left and center lanes or was parked only in the center lane and whether the length of time it took for Officer Winter to prepare to set down flares was reasonable or excessive raise triable issues of fact as to whether the officers violated the procedures of the Patrol Guide.

The Patrol Guide provisions relied upon by plaintiff are those contained in the interim order issued by the NYPD on April 2, 2012 revising Patrol Guide 217-01, "Vehicle Accidents - General Procedure". Police officers responding to a vehicle accident are directed, inter alia, to "Park radio motor patrol car behind vehicles involved, so that traffic will not be impeded", "Ascertain if there are any injuries and request ambulance if needed", "Divert traffic, if necessary", in which case they are directed to "Use traffic cones, turret lights and danger signs, whenever available", "Place the first cone at least two hundred feet from the accident on high-speed highways, bridges, etc." "have vehicles removed from roadway as soon as practical", "Determine the cause of the accident by inquiry and observation", "Survey the scene carefully and be alert for common insurance fraud indicators", and "Take summary action, if necessary". The rest of the instructions concern obtaining diver's licenses, registrations and insurance cards of those involved in the accident and filling out the police accident report.

Although the Guide directs officers as to the procedures they shall follow when responding to an accident, only the preparation of accident reports may be considered as ministerial acts. The balance of the aforementioned directives are not mere robotic tasks that may be viewed as ministerial, but involve the use of discretion, since every accident scene is different and the directives must conform to the situation as it presents itself, and responding officers have to use their judgment. A ministerial act 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]).

Since the manner in which the officers placed their vehicle at the accident scene and their determination as to when to place down flares after their arrival and survey of the accident and initial communication with the persons at the scene involved the use of discretion, and may not be second-guessed, the City may not be held liable in negligence, as a matter of law. Indeed, the instruction in the interim order to "Divert traffic, if necessary", demonstrates that this instruction does not call for the performance of a mechanical, ministerial act, but for the exercise

of discretion. Moreover, there is no direction requiring the diversion of traffic within any specific time frame. Therefore, the decision of the officers to first go over to the persons involved in the accident and to the tow truck driver and ascertain their condition, get their documents and instruct the tow operator to hook up the vehicles and get them off the road as quickly as possible before going back to their vehicle 5-10 minutes later to remove flairs from the trunk to set down, rather than immediately setting down flares or cones, was one left to their discretion and the instruction to divert traffic was not a mechanical, ministerial requirement. Furthermore, the direction to "Use traffic cones, turret lights and danger signs, whenever available", calls for the use of whatever may be on hand for the diversion of traffic, if necessary. No mechanical act producing a compulsory result is involved. It is not disputed that the officers did use their turret lights and that they did have flares which they were intending to lay down when the accident occurred. And it is neither alleged or shown that the officers had cones or danger signs with them, and, therefore, plaintiff's argument that the officers disregarded the interim order by failing to place down cones at least 200 feet away is without merit.

Plaintiff's counsel, citing Lubecki v City of New York (supra), argues that even if the officers' actions in the way they parked their police vehicle and their decision to take 5-10 minutes to talk to those involved in the accident and the tow operator before going back to their vehicle to place flares on the road were discretionary acts, immunity does not apply where the officers violated acceptable police practices, in this case, the aforementioned interim order concerning the placement of the police vehicle directly behind the accident vehicle and the closing of the accident lane with flares or cones.

Counsel's reliance upon Lubecki is misplaced. That case was a wrongful death action in which plaintiff's decedent was killed in a police shoot-out with a bank robber who was holding the decedent hostage. The applicable police practices implicated were those sections of the Patrol Guide and interim order addressing the use of deadly force and the procedures to be followed in a hostage situation. It was found that the police officer egregiously violated procedures by shooting a fusillade of bullets at the robber while the robber was using the decedent as a human shield, killing the decedent. The Appellate Division, First Department, held that the immunity for discretionary conduct did not extend to that situation.

In our case, plaintiff was not injured by Officers Winter and Ferraris. They were not involved in the accident that caused

plaintiff's alleged injuries. The only claim of negligence against them is that they failed to protect the accident site, allegedly as required under the Patrol Guide, questioning their placement of their vehicle and their judgment in deciding to spend 5-10 minutes interviewing the participants of the accident and instructing the tow operator to get the vehicles off the highway instead of immediately closing the left lane with flares and cones, which actions were clearly discretionary.

In any event, there is no showing that the interim order of the NYPD was in any way violated. The only police practices alleged by plaintiff to have been violated are the aforementioned instructions in the interim order relating to the placement of the police vehicle and the diversion of traffic. Plaintiff's entire case against the City is premised upon his contention that the officers violated these mandatory procedures for protecting the accident site.

With regard to the placement of the police vehicle, plaintiff contends that the interim order required Officer Winter to park his vehicle directly behind the accident vehicles so as to protect them. However, there is no such instruction. The paragraph relied upon states, "Park radio motor patrol car behind vehicles involved, so that traffic will not be impeded" (emphasis added). This instruction thus states the precise opposite of what plaintiff's counsel contends that it says. Police officers are instructed to park behind the accident vehicles in order not to block traffic, not in order to block the accident vehicles from traffic. Therefore, the plain language of the interim order demonstrates that this instruction has no application to this case.

With respect to the remaining basis of plaintiff's case against the City, the instruction in the interim order regarding the diversion of traffic, said instruction does not require the diversion of traffic by the setting down of cones, flares or danger signs within any specific time frame and does not set forth the manner in which traffic must be diverted. The only specific instruction is that the first cone be placed at least 200 feet from the accident, but that instruction applies only if cones are available and if they are used. The instruction only calls for the use of whatever is available, including the use of turret lights which were used.

Even if, arguendo, the interim NYPD order regarding the placement of the police vehicle behind the accident were for the shielding of the accident vehicles and not merely so as not to be a hindrance to traffic, and even if the parking of the police vehicle and the laying down of flares or cones were mere

ministerial tasks, plaintiff has failed to establish a special relationship so as to expose the City to liability. As noted, liability may be imposed against the City for its employees' ministerial acts only where a special duty was owed to the plaintiff. Moreover, it is well settled that a municipality 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 (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 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]).

"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).

Plaintiff has failed to show that any of these three criteria are applicable to the facts of this case. 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 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 demonstrate that Officers Winter and Farreris assumed any affirmative duty to act on behalf of plaintiff. There is no evidence, and it is not alleged, that

plaintiff was placed or directed to stand at the location where he was at the time of the accident or that he was instructed by them to do anything that placed him in greater jeopardy than he otherwise would have been, and that he would not have been in the position of danger that he was, but for the actions of the officers.

Plaintiff has thus also failed to demonstrate any justifiable detrimental reliance. In order to have demonstrated justifiable reliance, he would have had to show that the officers, by their actions or promises, "lulled [him] into a false sense of security, and...thereby induced him either to relax his own vigilance or to forego other available avenues of protection" (Cuffy, 69 NY 2d at 261).

Thus, even if the officers' actions in placing their vehicle allegedly in the center lane instead of in the left lane behind the accident vehicles and in delaying 5-10 minutes before attempting to close the accident lane with flares were ministerial breaches and not discretionary actions, since plaintiff has failed to show that there was a special duty owed to him, his action against the City is barred by governmental immunity, as a matter of law.

But since, as heretofore stated, the officers' actions in this regard involved the use of their discretion, they may not form the basis of liability against the City.

Finally, since Officers Winter and Ferraris were not involved in the accident, and since their alleged failure to park their vehicle directly in back of the accident vehicles in the left lane did not violate any mandated police procedure for the protection of those involved in accidents, and since they have not been shown to have violated the instruction for the diversion of traffic, the City has demonstrated that their claimed lapses in following proper police procedure were not a proximate cause of plaintiff's injuries. Moreover, even if plaintiff had demonstrated that the officers violated the instruction in the interim order to block off the accident lane by failing to set down flares or cones in a timely manner and failing to park their vehicle in the left lane behind the accident vehicles, such, at most, only furnished the condition for the accident and were not proximate causes of the accident (see Ely v Pierce, 302 AD 2d 489 [2nd Dept 2003]).

Accordingly, the motion is granted and the complaint and all cross-claims are dismissed against the City. The caption of this action is hereby amended to read as follows:

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Arun Nair,

Plaintiff,

- against -

Apple Towing Co., Jason Gray, Harry Szafranski and Gabriel M. Szafranski,

Defendants.

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Index Number: 19299/12

Dated: March 9, 2016

KEVIN J. KERRIGAN, J.S.C.

FILED

MAR 17 2016

COUNTY CLERK
QUEENS COUNTY