SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY, J.S.C. PART 5

GOWKARRAN JAGATPAL
Plaintiff

INDEX NO. 161749/2015

MOT. DATE October 10, 2017

- v -

MICHELLE CHAMBLE (SHIELD #3925), ANGELA BROWN (SHIELD #3863), THE CITY OF NEW YORK, JODEL LENEUS, And HAYMAN RAMNARINE
Defendants

MOT. SEQ. NO. 002

The following papers were read on this motion for Summary Judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits A through J	ECFS DOC No(s). 1-15
Notice of Cross-Motion/Answering Affidavits — Exhibits A through D	ECFS DOC No(s). 1-3
Replying Affidavits	ECFS DOC No(s). 1-11

This is an action for personal injuries allegedly sustained by plaintiff, Gowkarran Jagatpal on October 27, 2014 when he was a passenger in a vehicle involved in a two-car accident at the intersection of Delancey and Bowery Streets in New York City. Plaintiff claims that New York City Police Department Traffic Agents Micelle Chamble ("Chamble" and/or "municipal defendants") and Angela Brown ("Brown" and/or "municipal defendants"), employed by defendant, The City of New York ("City" and/or "municipal defendants"), were negligent in directing traffic at the intersection, thereby allegedly causing plaintiff to sustain personal injuries. Specifically, plaintiff claims that municipal defendants "directly communicated" that each driver should proceed into the intersection which was a substantial factor and cause of the collision. Defendant Hayman Ramnarine, the driver of the vehicle in which plaintiff was a passenger, has cross-moved for an Order pursuant to CPLR 3212 to dismiss the complaint and all cross claims asserted against him. The motion and cross motion are consolidated for decision.

FACTUAL BACKGROUND and CONTENTIONS

The City is seeking an Order pursuant to CPLR §3212 granting summary judgment to dismiss the complaint and all cross claims against the municipal defendants. The City argues that plaintiff has failed to properly plead facts to support a claim of a special duty owed to him and that the City has made a *prima facie* showing that it did not owe plaintiff a special duty. Alternatively, the City contends that if the court finds plaintiff pleaded and established a special duty, it is entitled to summary judgment because the City was performing a governmental function when the accident occurred and as such, the City is entitled to governmental immunity for its inherently discretionary actions.

Defendant Hayman Ramnarine, the driver of the vehicle in which plaintiff was a passenger has cross-moved for an Order pursuant to CPLR 3212 to dismiss the complaint and all cross claims asserted against him. Ramnarine contends that pursuant to Vehicle and Traffic Law 1102, no person shall fail or refuse to comply with the lawful direction of any police officer or other person duly empowered to regulate traffic and that Ramnarine only proceeded into the intersection at the direction of the traffic agent. As such, Ramnarine contends that he is entitled to summary judgment.

Plaintiff and defendant Jodel Leneus, oppose the City's motion; the City and defendant Leneus oppose Ramnarine's purported cross motion. Plaintiff contends that the City's motion is premature as issues of fact that are solely in possession of defendants, must be developed through discovery and depositions. In addition, plaintiff claims that the City is not entitled to immunity as this is not a "special du-

ty" case but rather a negligence action wherein plaintiff claims that he suffered injuries due to the negligence of the traffic officers "directing both vehicles into a known and blatant danger"; additionally, plaintiff claims that because the City was "actively negligent" as well as negligent in the training of its police officers, the City is not entitled to immunity. Finally, plaintiff claims that his affidavit raises numerous issues of fact which precludes the granting of summary judgment.

The City contends that Ramnarine's cross motion must be denied pursuant to CPLR 3212 (f) as there is discovery outstanding which bears materially on the issues of liability. Specifically, the City contends that the depositions of all parties, and possibly non-parties, along with the opportunity to conduct post-deposition document discovery remain outstanding and demonstrate that the cross motion for summary judgment must be denied as premature. In further support of its motion summary judgment, however, the City claims that no discovery is necessary to support its contention that it owed plaintiff no special duty; that the public duty rule shields it from liability and that the absence of communication between plaintiff and the traffic agents demonstrates that plaintiff cannot reasonably conclude that he was lulled into a false sense of security by the traffic officers conduct, causing him to forego other available avenues of protection.

In support of its motion, the City submits the pleadings, including the Notice of Claim, Summons and Complaint, the Answers of the co-defendants and its Answer and Amended Answer, as well as the Bill of Particulars and plaintiff's 50-h testimony. (Papandrew Aff., Ex. A through G). In opposition to the motion, plaintiff submits his affidavit, his demand for a verified bill of particulars as to the affirmative defenses, and the case scheduling order along with the City's response thereto. (Roth Aff. in Opp., Ex. A through D). In opposition to the City's motion and Ramnarine's cross motion, co-defendant Leneus submits his affidavit and the police report. (Toomey Aff. in Opp., Ex. A and B).

Based on the affidavits of plaintiff and co-defendant Leneus, it is alleged that on the date of the accident, the traffic light at the subject intersection was out of service and two traffic officers were directing traffic; one for the eastbound traffic and one for westbound traffic. (Toomey Aff. in Opp., Ex. A, ¶ 4; Roth Aff. in Opp., Ex. A, ¶6). Leneus states that after the officer for eastbound traffic signaled the eastbound vehicles to proceed, he entered the intersection and observed co-defendant Ramnarine's vehicle make a left turn in front of his vehicle. As a result, Leneus claims that he had no time to safely stop to avoid the accident and that immediately after the accident Leneus overheard the westbound traffic officer yelling at co-defendant Ramnarine "I told you to stop, I told you to stop." (Toomey Aff. in Opp., Ex. A, ¶ 6-7, 8-9).

Not surprisingly, plaintiff has a different recitation of the facts that led to the collision. According to plaintiff's affidavit, the westbound traffic officer directed co-defendant Ramnarine (the driver of the vehicle in which plaintiff was a passenger), to proceed to make a left turn by "clearly motioning with his hand" and that after so directing, the traffic officer abruptly began to move. According to plaintiff, at the same time that the westbound traffic officer was directing Ramnarine to proceed through the intersection, the eastbound officer directed the Leneus vehicle into the intersection which caused the two vehicles to collide. Plaintiff claims that the traffic officers had their backs to each other and the officers did not take any action to avoid the collision. (Roth Aff. in Opp., Ex. A, ¶ 7, 9, 10, 11 and 13). After the collision, plaintiff claims that he remained in the vehicle and overheard the two traffic officers "yelling, arguing loudly, and gesturing about the crash. Although I could not hear exactly what they were saying, it was clear from watching them that each was blaming the other for the accident." (Roth Aff. in Opp., Ex. A, ¶ 18).

Based on the record before the court, discovery is not complete and no party depositions or non-party depositions have been held. For the reasons that follow the City's motion is granted; defendant Ramnarine's cross motion is denied.

STANDARD OF REVIEW and ANALYSIS

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue *(Rotuba Extruders* v. *Ceppos,* 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding, "not "issue determination" (*Sillman* v. *Twentieth Century Fox Film,* 3 NY2d 395 [1957]). When deciding a summary judgement motion, the Court's role is solely to determine if there are any triable issues of fact, not to determine the merits of any such issues. *Winegrad v. New York Univ. Med. Ctr.,* 64 NY2d 851, 853, 476 N.E.2d 642, 487 NYS2d 316 (1985). The Court must view the evidence in the light most favorable to the nonmoving party, and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Sosa v. 46th St. Dev. LLC,* 101 AD3d 490, 492, 955 NYS2d 589 (1st Dept. 2012). If there is any doubt as to the existence of a triable fact, the motion for summary judgement must be denied. CPLR §3212[b]; *Grossman v. Amalgamated Housing Corp.*, 298 AD2d 224, 226, 750 NYS2d 1 (1st Dept. 2002).

A party opposing a motion for summary judgment may not rely upon conclusory allegations, but must present evidentiary facts sufficient to raise a triable issue of fact. *Mallad Construction Corp. v. County Federal Savings & Loan Assoc.,* 32 N.Y.2d 285, 290 (1973); *Tobron Office Furniture Corp. v King World Productions,* 161 A.D.2d 355,356 (lst Dept. 1990) (the opponent of a motion for summary judgment must assemble, lay bare and reveal his proofs; merely setting forth factual or legal conclusions is not sufficient); *Polanco v. City of New* 244 AD2d 322 (2d Dept. 1997) ("a shadowy semblance of an issue or bald conclusory allegations, even if believable, are insufficient to defeat a motion for summary judgment"). The opposing party has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. *Zuckerman* v. *City of New York,* 49 NY2d 557, 562 (1980).

The City's Motion

In the Notice of Claim plaintiff alleged that the motor vehicle accident was the result of the municipal defendants' negligence, recklessness and carelessness. (Papandrew Aff., Ex. A). Specifically, plaintiff alleged that he sustained personal injuries as a result of the negligence of the City and its traffic enforcement officers' failure to properly direct, control and guide traffic, at the intersection in question and the failure to coordinate their directions, thereby causing the two vehicles to collide and injure plaintiff. (Papandrew Aff., Ex. A).

Similarly, plaintiff alleged in the complaint that the municipal defendants, at the time of the accident, were directing traffic on behalf of the City of New York in its proprietary capacity as the owner of the streets and traffic lights at the subject intersection and that the plaintiff's injuries were caused solely by the negligence of the defendants herein, without any contributory negligence on the part of the plaintiff. (Papandrew Aff., Ex. B).

The municipal defendants seek summary judgment under the public duty rule, contending that the direction of vehicular and pedestrian traffic cannot give rise to liability unless plaintiff both pleads and establishes a special duty, beyond a plenary duty owed to the public at large. *Valdez v City,* 18 NY3d 69, 75 (2011); *Puello v City of New York,* 118 AD3d 492 (1st Dept. 2014).

Alternatively, the City argues that should the court find that plaintiff has established a special duty owed to plaintiff, municipal defendants are entitled to summary judgment based on the defense of governmental immunity as the conduct complained of involves discretionary governmental functions and the record demonstrates municipal defendants exercised discretion in the performance of those func-

tions. *Casale v City of New York,* 117 AD3d 414 (1st Dept. 2014); *Lewis v City of New York,* 82 AD3d 410 (1st Dept. 2011); *Devivo v Adeyemo,* 70 AD3d 587 (1st Dept. 2010).

Plaintiff opposes the City's motion for summary judgment contending that the motion is premature, as this case is in the early stages of discovery, however, plaintiff has not identified what specific discovery would bear upon the legal issue under which the City's motion is based. Additionally, plaintiff argues that a special duty need not be established when the acts alleged invoke a proprietary function wherein the municipality "is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties". *Wittorf v City of New York,* 23 NY3d 473, 479 (2014). Finally, plaintiff argues that he has properly pled a failure to train the traffic officers to control traffic at the subject intersection, which allegations are sufficient to withstand the City's motion for summary judgment.

"When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013])." *Turturro v City of New York,* 28 NY3d 469, 471 (2016). "A government entity performs a purely proprietary role when its 'activities essentially substitute for or supplement traditionally private enterprises (citations omitted).' *Id.* "In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are 'undertaken for the protection and safety of the public pursuant to the general police powers" (citations omitted). *Id.*

Traffic regulation is a quintessential example of a governmental function undertaken for the protection and safety of the public pursuant to the general police powers. *Balsam v Delma Engineering Corp.*, 90 NY2d 966 (1997). A municipality cannot be held liable for negligence in the performance of a governmental function unless a special relationship exists between the municipality and the injured party. *Cuffy v City of New York,* 69 NY2d 255 (1987). In order to sustain liability against a municipality for negligently performing traffic control or traffic regulation functions, "the party must demonstrate that a special relationship existed between it and the municipality," resulting in the creation of a special duty to use due care for the benefit of particular persons or classes of persons. *Kohn v City of New York,* 19 Misc.3d 1140[A] (Sup. Ct. N.Y. County 2008); see also, *Ajjarapu v City of New York,* 2011 NY Misc. LEXIS 1379 (Sup. Ct. N.Y. County 2011).

To establish a "special relationship" between the injured party and the municipality, the injured party must plead and prove the following: 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) the injured party's justifiable reliance on the municipality's affirmative undertaking. *Kohn v City of New York,* 19 Misc.3d 1140[A]; *Cuffy v City of New York,* supra.

Even affording plaintiff the most liberal construction of the pleadings and allowing plaintiff the benefit of all reasonable inferences that can be drawn from the evidence, the court finds that based on the record, the City has established its *prima facie* entitlement to summary judgment. Plaintiff has not pled or established the existence of a special relationship sufficient to withstand the City's motion. A review of the Notice of Claim, Summons and Complaint and the Bill of Particulars, demonstrates that plaintiff has simply failed to allege a "special relationship" as a theory of liability. (Papandrew Aff., Ex. A, B and F).

It is axiomatic that a plaintiff is bound by the Notice of Claim and all new causes of action are barred if they are not alleged in the Notice of Claim. *Gonzalez v NYCHA,* 181 AD2d 440, 441 (1st Dept. 1992). One claim cannot necessarily be inferred by the existence of another. *Ajjarapu v City of New*

York, 2011 NY Misc. LEXIS 1379, citing, *Garcia v O'Keefe,* 34 AD3d 334 (1st Dept. 2006). "Where a plaintiff did not allege in his notice of claim or complaint the existence of a special relationship, he cannot assert that theory or the facts underlying it for the first time in opposition to a motion for summary judgment. *Ajjarapu v City of New York,* 2011 NY Misc. LEXIS 1379, citing, *Rollins v New York City Bd. Of Educ.* 68 AD 3d 540 (1st Dept. 2009).

Not only has plaintiff failed to allege and establish a special relationship between him and the municipal defendants, there is also no evidence in the record that the traffic officers assumed to act on plaintiff's behalf, nor has plaintiff alleged that he had any contact with the traffic agent or that the traffic agent communicated information to him directly upon which he reasonably and detrimentally relied. Rather, plaintiff simply proffers conclusory allegations that the traffic officers had their backs to each other and the officers did not take any action to avoid the collision. (Roth Aff. in Opp., Ex. A, ¶ 7, 9, 10, 11 and 13). Moreover, plaintiff summarily asserts that after the accident, he remained in the vehicle and overheard the two traffic officers "yelling, arguing loudly, and gesturing about the crash. Although I could not hear exactly what they were saying, it was clear from watching them that each was blaming the other for the accident." (Roth Aff. in Opp., Ex. A, ¶ 18). Such "a shadowy semblance of an issue or bald conclusory allegations, even if believable, are insufficient to defeat a motion for summary judgment". *Polanco v. City of New* 244 AD2d 322 (2d Dept. 1997).

Plaintiff attempts to get around the legal requirement of establishing a "special relationship" by arguing that his claims arise from the municipal employees' negligence in performing a governmental act and thus, no special relationship need be established. *Pelaez v Seide,* 2 NY3d 186 (2004). Additionally, plaintiff contends that he can sustain his claims against the municipal defendants because a municipality has a proprietary duty to keep its roads and highways in a reasonably safe condition. *Wittorf v City of New York,* 23 NY3d at 480. (holding that a supervisor with defendant City's Department of Transportation was engaged in a proprietary function when he allowed plaintiff to proceed onto the transverse without warning her of the conditions of the roadway).

Plaintiff relies on *Wittorf* to argue that the direction of traffic control is a roadway maintenance function that falls under a proprietary function. Notably, however, the purpose of the Department of Transportation personnel at the accident location in *Wittorf* was to perform roadway maintenance, not to direct traffic. Rather, as the court held in Santoro, "traffic regulation is a classic example of a governmental function undertaken for the protection and safety of the public pursuant to the general police powers." *Santoro,* 17 A.D.3d at 563. Likewise, in *McLean v. City of New York,* 12 N.Y.3d 194, (2009) and *Valdez v. City of New York,* 18 N.Y.3d 69 (2011), the Court of Appeals held that a municipality cannot be held liable for the negligent acts of its employees when they are performing discretionary governmental functions, regardless of the existence of any "special relationship."

Plaintiff's attempts to distinguish *McLean* are unpersuasive and demonstrates a misunderstanding of the law of governmental immunity as it pertains to municipalities. Established precedent provides that "to sustain liability against a municipality, the duty breached must be more than a duty owing to the general public. There must exist a special relationship between the municipality and the plaintiff, resulting in the creation of a duty to use due care for the benefit of particular persons or classes of persons.'" (*Florence v Goldberg,* 44 NY2d 189, 195,(1978); quoting *Motyka v City of Amsterdam,* 15 NY2d 134, 139, [1965]; citing *Evers v Westerberg,* 38 AD2d 751, [2nd Dept. 1972], aff'd 32 NY2d 684, 296 N.E.2d 257, 343 N.Y.S.2d 361 [1973]). Those activities aimed at the public at-large, rather than an individual or specific class of individuals, are considered governmental functions and are protected from liability by governmental immunity. See, *Florence v Goldberg, supra.*

Based on the record before the court, the municipal defendants cannot be held liable for plaintiff's alleged injuries, even if the injuries resulted from traffic officers' negligence, because the officers were

engaged in the discretionary governmental function of traffic control (*see Valdez v City of New York*, 18 NY3d 69, 75, (2011); *McLean v City of New York*, 12 NY3d at 202; *Lewis v City of New York*, 82 AD3d 410, (1st Dept. 2011), *lv denied* 16 NY3d 713, 948 NE2d 929, 924 NYS2d 322 (2011); *Devivo v Adeyemo*, 70 AD3d 587, (1st Dept. 2010).

Finally, plaintiff's contention that he can sustain a claim against the municipal defendants on the basis that the City failed to properly train and supervise its traffic officers, is similarly unavailing. The City has appeared for and interposed an answer on behalf of the defendant traffic officers. The City has averred that the traffic officers were acting within their scope of employment at the time of the accident, and as such, no claim may proceed against the employer, the City, for negligent training. *Karoon v. New York City Transit Auth.*, 241 A.D.2d 323, 324, (1st Dept. 1991).

"Where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of *respondeat superior*, no claim may proceed against the employer for negligent hiring or retention [or training]." *Karoon v. New York City Transit Auth.*, 241 A.D.2d at 324. (granting defendant employer summary judgment, dismissing plaintiff's negligent hiring, retention and training claims). The Court reasoned that this is because "if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training." Id. at 951. In fact, a review of the summons and complaint indicates that plaintiff acknowledges that the acts complained of in this action involve liability arising out of *respondeant superior*. As such, the City is entitled to summary judgment on the negligent training claims.

Defendant Ramnarine Cross Motion for Summary Judgment

Defendant Ramnarine's cross motion seeking summary judgment is an "improper vehicle" through which he may seek such relief as against defendant Leneus. The rule is that a cross motion is an improper vehicle for seeking relief from a non-moving party. *Mango v Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843 (2nd Dept. 1986); CPLR §2215. While the court may overlook this mislabeling as a "technical defect", here, defendant Ramnarine's motion must nonetheless be denied, as issues of fact relating to the proximate cause of the accident have been raised by the competing affidavits submitted by plaintiff and defendant Leneus.

Defendant Ramnarine's contention that he is entitled to summary judgment on the basis of Vehicle and Traffic Law 1102, claiming that he cannot be held liable for plaintiff's injuries because he was simply following the direction of the traffic officers, ignores the fact that essential discovery remains outstanding, which discovery will bear directly upon the liability issues presented by this record. Specifically, there are three different versions of the facts leading to the collision presented by the police reports, plaintiff's affidavit and the affidavit of defendant Leneus, submitted in opposition to the motions.

Additionally, the City has opposed Ranmarine's motion pursuant to CPLR §3212 (f), on the basis that facts essential to justify opposition to the motion may exist but cannot be stated, due to the outstanding discovery, including party and non-party depositions.

Accordingly, defendant Ranmarine's motion should, as a technical matter, be denied as against defendant Leneus, as it is not a proper cross-motion as against him, denial of the motion is also the proper result when addressing the merits of same, as there are questions of fact, presented by this record, which preclude summary judgment. *Grossman v. Amalgamated Housing Corp.*, 298 AD2d 224, 226, 750 NYS2d 1 (1st Dept. 2002).

CONCLUSION

ORDERED, that Defendants', The City of New York, Michelle Chamble and Angela Brown, motion, Sequence No. 002, for an Order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and any and all cross-claims, is granted and the complaint and any cross-claims are hereby severed and dismissed as against said municipal defendants, and the Clerk is directed to enter judgment in favor of said municipal defendants; and it is further,

ORDERED, that Defendant Hayman Ramnarine's cross motion, Sequence No. 002, for an Order pursuant to CPLR 3212 to dismiss the complaint and all cross claims asserted against him, is denied; and it is further,

ORDERED that the caption is amended to delete The City of New York, Michelle Chamble and Angela Brown, from the caption accordingly; and it is further,

ORDERED that the remainder of the action shall continue against the remaining defendants; and it is further,

ORDERED that Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Counsel for said moving defendants shall serve a copy of this Order on all other parties and on the Trial Support Office, 60 Centre Street.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

SO ORDERED:

Dated: December 14, 2017
New York, New York

HON.W. FRANC PERRY, J.S.C.

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**