

**Torres v City of New York**

2018 NY Slip Op 30381(U)

February 27, 2018

Supreme Court, New York County

Docket Number: 162256/2014

Judge: Alexander M. Tisch

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 52

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BRENDA TORRES, as Administratrix      :
for the Estate of ROBERT TORRES      :
(Deceased) and BRENDA TORRES,        :      Index No. 162256/2014
Individually,                          :
                                         :      Motion Seq. No. 001
                Plaintiffs,           :
                                         :
                -against-              :      DECISION AND ORDER
                                         :
THE CITY OF NEW YORK, THE NEW         :
YORK CITY POLICE DEPARTMENT and      :
THE NEW YORK CITY DEPARTMENT OF      :
PARKS & RECREATION,                  :
                                         :
                Defendants.           :
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**ALEXANDER TISCH, J.:**

Plaintiff Brenda Torres (Plaintiff) sues individually and as Administratrix of the estate of her deceased brother, Robert Torres (Mr. Torres), for damages arising from Mr. Torres's personal injuries and death. In motion sequence No. 001, defendants the City of New York, the New York City Police Department (NYPD), and the New York City Department of Parks & Recreation (collectively, the City) move to dismiss Plaintiff's verified complaint, dated December 11, 2014 for failure to state a cause of action, under CPLR 3211 (a) (7), and/or for summary judgment, under CPLR 3212.

**BACKGROUND**

Plaintiff alleges that Mr. Torres died intestate on November 1, 2013,<sup>1</sup> in Union Square Park, at East 14th Street and Broadway, in the County, City and State of New York. (See verified complaint, ¶ 2.)

In her Complaint, Plaintiff asserts that, on November 1, 2013, Mr. Torres "was caused to trip and/or slip and fall down a flight of stairs and sustain permanent injuries" at the Union Square subway station, located at 14th Street and Broadway in Manhattan. (See *id.*, ¶¶ 35, 48.) The Notice of Claim asserts that Mr. Torres fell and sustained these injuries at or after 9:45 p.m. on November 1, 2013. (See affirmation in support of Stephen Mazzalongo, Esq., filed January 26, 2017 [Mazzalongo affirmation], exhibit A.)

The verified complaint alleges that, after Mr. Torres had fallen and sustained injuries, one or more NYPD officers, informed of "the incident by other unknown witnesses," approached Mr. Torres. It further alleges that these NYPD officers, after "observing the serious injuries" Mr. Torres had

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<sup>1</sup> NYPD records that Plaintiff submits in opposition to the City's motion show THAT Mr. Torres was pronounced dead at Bellevue Hospital at 10:30 a.m. on November 6, 2013. He had been pronounced "brain dead" as of 8:50 p.m. on November 5, 2013. (See affirmation in opposition of Michael R. Reiner, Esq., dated March 23, 2017 [Reiner Affirmation], exhibit B [described as the "Full Internal Affairs File from NYPD"] at 65.)

sustained, "directed that [he] exit said location and leave said premises [that is, the subway station] without providing or obtaining any medical assistance for him." (Verified complaint, ¶ 48.)

Plaintiff also contends that Mr. Torres was later seen in Union Square Park by an employee of defendant the New York City Department of Parks & Recreation, "who also failed to provide or obtain any medical assistance" for him, and that Mr. Torres "was later discovered" in Union Square Park "and transported to the hospital where he was pronounced dead." (*Id.*)<sup>2</sup>

Plaintiff asserts four causes of action against the City:

(1) "serious personal injuries" and "conscious pain and suffering" that Mr. Torres endured as the result of the personal injuries, "which resulted in [Mr. Torres's] ultimate demise";

(2) wrongful death; (3) pecuniary loss Plaintiff suffered as Administratrix of Mr. Torres's estate; and (4) injuries that Plaintiff and/or Mr. Torres's other distributees suffered, through loss of Mr. Torres's "society, services, consortium,

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<sup>2</sup> Police records indicate that Mr. Torres left Union Square station, unescorted, just before 11:00 p.m. (Reiner affirmation, exhibit B at 105). Two NYPD officers later found Mr. Torres, unconscious and unresponsive, on a park bench at the corner of Union Square East and East 14th Street. (*Id.*) Emergency Management Services workers responded around 12:30 a.m. and, shortly before 1:00 a.m., brought Mr. Torres to Bellevue Hospital. (*Id.* at 106.) A surveillance camera recording shows Mr. Torres, shortly after 11:00 p.m., sitting at the location where he was later found unconscious. (*Id.* at 23.)

guidance, nurturing love and/or affection." (*Id.*, ¶¶ 53, 58-60, 62-64, 66-68).

The City served its verified answer on January 5, 2015. Therein, the City generally denies the allegations of the verified complaint and asserts several affirmative defenses. These affirmative defenses include the City's contention that it is "immune from suit for [its] exercise of discretion in the performance of a governmental function and/or [its] exercise of professional judgment." (Verified answer, ¶ 9.)

The City moves to dismiss the verified complaint under CPLR 3211 (a)(7) and for summary judgment under CPLR 3212. The City argues that Plaintiff failed to state a cause of action, by failing to plead that the City had a special duty to Mr. Torres. The City also argues that Plaintiff cannot maintain this action because her claims are predicated on "the City's failing to provide or obtain medical assistance for Plaintiff," which the City describes as "an inherently discretionary government function" for which it has immunity under New York law.

In her opposition, Plaintiff argues that dismissal is not warranted under CPLR 3211 or 3212, because Plaintiff makes a sufficient showing that the City assumed a special duty to Mr. Torres. Plaintiff also argues that dismissal should not be granted because the City cannot invoke the governmental function immunity defense, where it failed to protect Mr. Torres after

having voluntarily assumed a special duty to him. Plaintiff also requests that, in the event the court finds that the City carried its initial burden with respect to summary judgment, the motion should still be denied, without prejudice, in accordance with CPLR 3212(f), until the City completes relevant disclosure by producing NYPD Lt. Gerard Devine (Lt. Devine) for deposition.

The statements of several witnesses describing Mr. Torres's fall, the injuries he suffered, and the NYPD's responses to this incident, are included in the "Full Internal Affairs File from NYPD," which Plaintiff submitted in opposition to this motion. These witnesses state, among other things, that Mr. Torres fell violently down the platform stairs and, after being helped to his feet, appeared to be either intoxicated or dazed from his fall and only grunted in response to questions. At this point, however, Mr. Torres was not bleeding or otherwise visibly injured. The witnesses informed two passing NYPD officers, who were escorting a prisoner, that Mr. Torres needed medical attention. After a short time, and before any police response, Mr. Torres's condition began to deteriorate. He had propped himself up against the wall, apparently unable to stand without support, and had blood flowing from not only his nose, but also his mouth and ears, which had covered his face and shirt. He was also incoherent and refused to communicate with the witnesses, and at one point screamed at them. One witness

responded to Mr. Torres's worsening condition by going to the police station in the subway to seek medical assistance again for Mr. Torres, which prompted the response of Lt. Devine and Officer Kerwin Forde. (See Reiner affirmation, exhibit B, at 30-34, 43-44, 54-55.)

The "Full Internal Affairs File from NYPD" indicates that Mr. Torres was intoxicated on the night he suffered the injuries described in the verified complaint. According to "Lilla Khodos, Emergency Room Registered Nurse," Mr. Torres had "a Blood Alcohol Level of .272" and had "suffered a break to the Parietal Bone on his left temple causing him to bleed internally." (See exhibit B to the Reiner affirmation, at 106.) Dr. Angela McGuire, who performed Mr. Torres's autopsy on November 7, 2013, stated that Mr. Torres "sustained an epidural hematoma." (*Id.* at 68.) Dr. McGuire stated further that Mr. Torres's injuries were consistent with a fall and that, after sustaining such injuries, he "would be conscious and alert for a certain period of time (unknown time frame) and then his condition would start to deteriorate." (*Id.*)

The circumstances described by the two responding NYPD officers differ markedly from those described by the other witnesses. Officer Forde stated that when he and Lt. Devine met Mr. Torres, Mr. Torres did not appear to be injured, intoxicated, or under the influence of drugs. Mr. Torres

refused offers of medical assistance and, in response to their questions, told them he was "fine." Mr. Torres then told them he wished to leave the subway and walked away. (Deposition transcript of Police Officer Kerwin Forde, dated April 25, 2016 [Mazzalunga affirmation., exhibit G], at 61:13 to 68:21.) Lt. Devine corroborated these statements about their interaction with Mr. Torres. (See Reiner affirmation, exhibit B, at 94-95.)

## DISCUSSION

### **Standards for Dismissal Under CPLR 3211 (a) (7) and for Grant of Summary Judgment Under CPLR 3212**

On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), the court addresses only the face of the pleading itself, to decide whether the pleader's allegations fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].)

"In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [citation omitted].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*Id.*)

To prevail on a summary judgment motion, the movant must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once this showing is made, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial. (*Kosson v Algaze*, 84 NY2d 1019, 1020 [1995].)

In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the non-movant. (*Branham v Loews Orpheum Cinemas*, 8 NY3d 931, 932 [2007].) Party affidavits and other proof must be examined closely "because summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue." (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [citation and internal quotation marks omitted].) Still, "only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." (*Id.*)

### **Negligence Claims Against Municipal Entities**

The general rule is that "[p]ublic entities remain immune from negligence claims arising out of the performance of their governmental functions," (*Miller v State of New York*, 62 NY2d

506, 510 [1984]), but may face liability for negligent performance of their proprietary functions.

As the Court of Appeals explained in *Miller*, 62 NY2d at 511-512:

"A governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions. This begins with the simplest matters directly concerning a piece of property for which the entity acting as landlord has a certain duty of care, for example, the repair of steps or the maintenance of doors in an apartment building. The spectrum extends gradually out to more complex measures of safety and security for a greater area and populace, whereupon the actions increasingly, and at a certain point only, involve governmental functions, for example, the maintenance of general police and fire protection."

#### **The Special Relationship Rule and the Governmental Function Immunity Defense**

Furnishing police protection to the public is a "quintessential 'governmental' function." (*Ruiz v City of New York*, 27 Misc 3d 443, 444-45 [Sup Ct, NY County 2010], citing *Doe v City of New York*, 67 AD3d 854, 856 [2d Dept 2009].) Public entities are generally immune from negligence claims arising out of the performance of their governmental functions. Accordingly, "[a] municipality may not be held liable for injuries resulting from the failure to provide police protection to an individual" like Mr. Torres, "absent a 'special relationship' between the municipality and the individual." (*Merced v City of New York*, 75 NY2d 798, 799-800 [1990])

[citations omitted]; see also *Valdez v City of New York*, 18 NY3d 69, 75 [2011] ["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"].)

To establish that such a "special relationship" exists, Plaintiff must meet each of the following criteria:

"(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."

(*Valdez*, 18 NY3d at 80, quoting *Cuffy v City of New York*, 69 NY2d 255, 260 [1987] [citations omitted].)

Plaintiff concedes that a "crucial issue" on this motion is whether she "has alleged facts which make out the elements of this 'special relationship.'" (Reiner affirmation, ¶ 12.)

The City argues that no special relationship could arise here, "because it never made a concrete promise to protect" Mr. Torres "on which he detrimentally relied," (Mazzalonga affirmation, ¶ 40), as required under *Cuffy*. Plaintiff, however, has not only adequately stated its causes of action,

but has also raised triable issues of facts as to whether a special relationship arose between the City and Mr. Torres.

As to the first factor, a jury could conclude that, by answering the call for assistance, the responding NYPD officers implicitly promised to protect Mr. Torres. (See *Coleson v City of New York*, 24 NY3d 476, 482 [2014]; *Pascucci v Board of Educ. of City of N.Y.*, 305 AD2d 103, 105 [1st Dept 2003].) As to the second, a jury could find that, considering his head injury and intoxication, Mr. Torres may, justifiably, have surrendered his own judgment and relied to his detriment on the NYPD officers' assessment that he did not appear to need medical assistance.

"Whether a special relationship exists is generally a question for the jury." (*Coleson*, 24 NY3d at 483, citing *De Long v County of Erie*, 60 NY2d 296, 306 [1983].) Here, Plaintiff "raised a triable issue of fact as to whether a special relationship existed that should be decided by a jury." (*Id.*)

Plaintiff's claims also survive the City's motion for summary judgment because triable issues of fact exist as to whether the City is entitled to the protection of the governmental function immunity defense.

Plaintiff asserts that the City is not entitled to offer a governmental function immunity defense, because it has not shown that its decision to make no further offers

of medical aid to Mr. Torres was the result of the exercise of reasoned judgment. (See Reiner affirmation, ¶¶ 24, 31.)

"Generally, municipalities are immunized from liability for the exercise of discretion by their agencies or officials. When official acts, including those of police officers (see *Rodriguez v City of New York*, 189 AD2d 166, 17 [1st Dept 1993]), involve the exercise of discretion or reasoned judgment, there is no liability for injuries even if the official action is negligent or malicious (see *Tango v Tulevech*, 61 NY2d 34, 40 [1983])."

"However, this broad protection is neither absolute, nor automatically afforded, as the municipality must exercise discretion in compliance with its own procedures (see *Haddock v City of New York*, 75 NY2d 478, 486 [1990]). Governmental immunity will not be provided 'where the municipality violates its own internal rules and policies and exercises no judgment or discretion' (*id.* at 485). In the context of police officers, immunity 'does not extend to situations where the employee, a police officer, violates acceptable police practice' (*Lubecki v City of New York*, 304 AD2d 224, 233-234 [1st Dept 2003], citing *Rodriguez*, 189 AD2d at 178)."

(*Johnson v City of New York*, 15 NY3d 676, 682 [2010] [Jones, J., dissenting].)

At his deposition, Officer Forde provided evidence regarding police practices and procedures applied in encounters with possibly injured members of the public, and how those practices and procedures were implemented in the encounter with Mr. Torres. (See Mazzalonga affirmation, exhibit G.)

As noted above, the NYPD's "Full Internal Affairs File," which Plaintiff submits in opposition to this motion, includes several witness reports which indicate that Mr. Torres's

injuries were much more serious, and more readily apparent, than described by Officer Forde. (See Reiner affirmation, exhibit B at 30-34, 43-44, 54-55.) These discrepancies call into question the adequacy of the City's compliance with its own practices and procedures, creating triable issues of fact that preclude summary judgment.

As the City's motion for summary judgment is denied, Plaintiff's request for relief under CPLR 3212(f) is denied, as moot.

#### **Proprietary Functions**

Governmental immunity is usually not extended to municipalities acting in a proprietary role. (See *Miller*, 62 NY2d at 511-512.) As a result, "[a] governmental entity may incur liability for negligence in failing to exercise reasonable care in maintaining stairs on premises which it owns or controls, where it has notice of the defective condition." (62A NY Jur 2d, Government Tort Liability § 223 [2017], citing, *inter alia*, *Polo v New York City Hous. Auth.*, 303 AD2d 238 [1st Dept 2003] [affirming denial of Housing Authority's summary judgment motion, where plaintiff's testimony regarding her trip on stairs of Housing Authority building, and photo showing defective step, provided sufficient evidence from which jury could infer chipped step was not only substantial cause of her fall, but also came

into being over lengthy period, and so was defective condition Authority should have known of and corrected].)

Plaintiff asserts, in paragraphs 28 through 34 of the verified complaint, among other things, that defendant the City of New York is the owner of the subway station at which Mr. Torres's fall and injuries occurred, and was responsible for the station's operation, management, maintenance and repair. Plaintiff further alleges that Mr. Torres's fall and injuries were caused by the "negligence, carelessness and/or recklessness" of the City, and that of its "agents, servants, employees and/or licensees." (*Id.*, ¶¶ 48-51.)

The City, however, failed to address this claim and therefore failed to meet its burden showing its entitlement to judgment as a matter of law. Therefore the Court need not address the sufficiency of the plaintiff's opposition papers.

For the foregoing reasons, it is hereby

**ORDERED** that defendants' motion to dismiss plaintiff's complaint, under CPLR 3211 (a)(7), and/or for summary judgment, pursuant to CPLR 3212, is DENIED.

Dated: February 27, 2018

Signed:   
A.J.S.C.

**HON. ALEXANDER M. TISCH**