

<b>Melendez v City of New York</b>
2018 NY Slip Op 30761(U)
March 23, 2018
Supreme Court, Bronx County
Docket Number: 307653/2011
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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ESTHER MELENDEZ, MARTHA MELENDEZ,  
and MARTHA REYES as Mother and Natural  
Guardian of infants ABRAHAM REYES AND  
ISAAC REYES,

DECISION AND ORDER  
Present: HON. MITCHELL J. DANZIGER  
Index No. 307653/2011

Plaintiffs,

-against-

CITY OF NEW YORK,

Defendant.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Opposition	2
Reply	3

Defendant, City of New York seeks, *inter alia*, an order granting summary judgment in its favor dismissing the complaint. Plaintiffs commenced this action to recover damages for injuries they allegedly sustained when the pursuit of a suspect by the New York City Police Department caused the suspect's vehicle to collide with plaintiffs' vehicle. Plaintiffs also allege causes of action for negligence and intentional infliction of emotional distress by New York City police officers for firing upon and causing the suspect's death while plaintiffs were nearby. Issue has been joined, discovery is complete, and a note of issue has been filed.

In support of the motion, defendant submits ■ photographs; copies of the pleadings; an unsigned but certified deposition transcripts of Police Officer Juan Pichardo, Detective Brian Pastula, Detective Thomas Williams, plaintiffs Ester Melendez, Isaac Reyes and Abraham Reyes;

unsigned and uncertified deposition transcript of plaintiff Martha Melendez; and various police reports. Defendant maintains it is immune from liability under the government function immunity defense, that the police did not act recklessly, that plaintiffs did not sustain serious injuries, and that plaintiffs' negligent and intentional infliction of emotional distress claims must be dismissed as against public policy. In opposition, plaintiffs submit, among other things, the affidavit of expert witness Daniel A. Modell, and an uncertified police report. In reply, defendant submits additional police reports, including the New York Police Department Patrol guide, additional accident reports, and the medical examiner's autopsy report regarding the deceased suspect.

At the outset, the unsigned deposition transcripts of Police Officer Juan Pichardo, Detective Brian Pastula, and Detective Thomas Williams are admissible pursuant to CPLR 3116 (b), as the transcripts are certified by a reporter. Moreover, such transcripts have been adopted as accurate by defendant, which employs the deponents (*Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543 [1st Dept 2013]). Any procedural defect in defendants submissions are cured by the reporters certification (*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935 [2d Dept 2012]). Moreover, plaintiff has failed to demonstrate any prejudice, and plaintiffs' general objection fails to specify or allege any inaccuracy (*Ortiz v Lynch*, 105 AD3d 584 [1st Dept 2013]; *Bennett v Berger*, 283 AD2d 374 [1<sup>st</sup> Dept 2001]). Therefore, the transcripts will be considered.

Police Officer Pichardo testified that on March 26, 2011, as he and his partner, Police Officer Kevin Ortega, were in a marked police patrol car, he observed a black Ford Expedition with a non-functioning headlight on Prospect Avenue in the Bronx. He testified that he pulled the patrol vehicle to the side of the road to allow the vehicle to pass them so he could pull the vehicle over from the rear. He testified that the Expedition stopped behind the patrol car at a green light, waited for 20-30 seconds, and then sped through the intersection once the light turned yellow. He testified they followed the Expedition as it pulled into a parking lot, and activated the lights and siren of the patrol

car. Pichardo testified that the Expedition sped out of the parking lot and he followed. During the pursuit the Expedition went through stop signs and red lights, and cut off other vehicles, violating numerous Vehicle and Traffic Laws. Pichardo testified that he pursued the Expedition, but slowed down to proceed cautiously through an intersection. Pichardo testified that he called for back-up when the Expedition entered the Sheridan Expressway, and that he continued to follow as it entered the Major Deegan Expressway near 138th Street and Willis Avenue. He testified that the Expedition stopped due to heavy traffic, and that he and Officer Ortega exited the patrol car and directed the driver to stop. Instead, the Expedition forced its way through traffic, striking cars in front of it on the roadway.

Plaintiff Martha Melendez testified she observed the Expedition behind her, pushing vehicles out of the way and alternatively backing up and accelerating to strike them. The Expedition struck plaintiffs' vehicle and pushed it up on the concrete divider between the north and south bound lanes of travel. Officer Pichardo testified that the Expedition struck approximately ten separate vehicles, including plaintiffs' vehicle, and Officer Williams testified that he had to jump out of the way to avoid being struck and run over. Officer Pichardo also testified that the Expedition almost struck him, and he moved away and drew his weapon. Detective Pastula testified that he discharged the first round at the driver of the Expedition as it moved toward where he and his partner were standing. Officer Williams also fired nine rounds at the driver as the Expedition reversed toward him. Officer Pichardo fired eight rounds, from the front, approached the vehicle, and observed the driver reach for the gearshift to attempt to run him over. He testified he discharged additional rounds until the Expedition came to a stop next to a garbage truck.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once the movant meets this burden, the burden shifts to the opposing party

to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487 [2d Dept 1987]).

In negligence actions involving a governmental function, the Court of Appeals has made clear that there are two separate but well established grounds for a municipality to secure dismissal of a tort claim brought against it by a private citizen injured by a third-party (*see Valdez v City of New York*, 18 NY3d 69 [2011]). The first ground is the lack of a special duty owed to the injured party, beyond that owed to the public at large (*see Valdez v City of New York*, 18 NY3d at 75). The second ground is the defense of governmental function immunity, which "shields public entities from liability for discretionary actions taken during the performance of governmental functions," even if the plaintiff is otherwise able to establish all the elements of a tort claim, including the existence of a duty owed to the injured party (*see Valdez v City of New York*, 18 NY3d at 76 ). The enforcement of traffic regulations has been held to be a function which is "uniquely" governmental (*Shuttlesworth v Birmingham*, 394 U.S. 147, 152 [1969]). Thus, the rule that emerges is that "[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 at 76-77, quoting *McLean v City of New York*, 12 NY3d 194, 203 [2009]; *see Bawa v City of New York*, 94 AD3d 926 [2d Dept 2012]).

Discretionary acts involve the exercise of reasoned judgment which would typically produce different acceptable results, while ministerial acts envision direct adherence to a governing rule or

standard with a compulsory result (*Lauer v City of New York*, 95 NY2d 95, 100 [2000]; *see also Tango v Tulevech*, 61 NY2d 34 [1983]). Here, the adduced evidence reveals that defendant City of New York was involved in the discretionary act of controlling traffic and enforcing New York State vehicle and traffic laws at the intersection on Prospect Avenue in the Bronx. Defendant has established that no special duty exists between it and the plaintiff. Moreover, defendant has established through the testimony of Officer Pichardo that his actions were discretionary.

Having established its entitlement to summary judgment dismissing the complaint against it, it is incumbent upon plaintiffs to produce evidence in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto, supra; Rebecchi v Whitmore, supra; O'Neill v Town of Fishkill, supra*). In opposition to the defendant's motion, plaintiffs submit an affidavit of Daniel Modell, their expert, who contends that the pursuit of the Expedition should not have been commenced, that once commenced the pursuit should have been terminated, and that the discharge of firearms was in violation of police procedures and guidelines. Modell speculates about the contents of radio transmissions that he maintains have not been received by plaintiffs, who have certified in the note of issue that all discovery has been completed. It is well settled that the opinion testimony of an expert must be based on facts in the record or personally known to the witness (*see Hamsch v New York City Tr. Auth.*, 63 NY2d 723, 725-726 [1984], citing *Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Shi Pei Fang v Heng Sang Realty Corp.*, 38 AD3d 520 [2d Dept 2007]; *Santoni v Bertelsmann Prop, Inc.*, 21 AD3d 712 [1st Dept 2005]). An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion (*see Shi Pei Fang v Heng Sang Realty Corp. supra*). Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment (*see Zuckerman v City of New York supra; Leggis v Gearhart*, 294 AD2d 543 [2d Dept 2002]; *Levitt v County of Suffolk*, 145 AD2d 414 [2d Dept 1988]). The expert's opinion here is speculative, unsubstantiated,

and conclusory (*see Mestric v Martinez Cleaning Co.*, 306 AD2d 449 [2d Dept 2003]). Plaintiffs have failed to raise a triable issue of fact as, after *Valdez*, if a police officer's actions are discretionary, and that discretion was exercised the government is immune (*see Johnson v City of New York*, 15 NY3d 676 [2010]). In *Johnson* a police officer's decision to shoot at armed robbers causing injury to a bystander, by the police, was deemed discretionary and the government immunity defense prevailed (*see also Hephzibah v City of New York*, 124 AD3d 442 [1st Dept 2015]). Plaintiffs have failed to produce any evidence that the actions of the police officers on the day of the accident were ministerial in nature, or were governed by a rule, standard or plan that was compulsory in nature. Plaintiffs has failed to raise an issue of fact regarding the discretionary nature of the defendant's actions. Accordingly, defendant's motion for summary judgment dismissing the complaint is granted.

ORDERED that the defendant shall serve on all parties a copy of this Order with Notice of Entry.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: 3/23, 2018

  
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HON. MITCHELL J. DANZIGER, J.S.C.