| **Alhovsky v City of New York** |
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| 2018 NY Slip Op 31059(U) |
| May 11, 2018 |
| Supreme Court, New York County |
| Docket Number: 158318/2014E |
| Judge: Alexander M. Tisch |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 52

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ALEXANDER ALHOVSKY,

Plaintiff,

- against -

THE CITY OF NEW YORK,

Defendant.

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DECISION & ORDER

Index No. 158318/2014E

ALEXANDER M. TISCH, J.:

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained when he fell in two separate incidents that occurred near Wien Walk, in Central Park, in August 2010. Defendant City of New York (City) now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the application. For the reasons set forth below, the motion is granted.

**Background**

On July 19, 2010, defendant, acting through its Department of Parks and Recreation (Parks), implemented new rules regulating expressive matter vendors in its parks. *See* 56 RCNY § 1-01 *et seq.* (Rules). Expressive matter is defined as "materials or objects with expressive content, such as newspapers, books or writings, or visual art such as paintings, prints, photography, or sculpture. 56 RCNY § 1-02. Except in limited circumstances, a vendor may not vend or "provide or offer to provide services, items … in exchange for a donation" in a City park without a permit. 56 RCNY § 1-05 (b) (1). A person selling expressive matter, though, may vend without a permit in specifically designated vending spots, or by moving through the park "without occupying a specific location for longer than necessary to conduct a transaction." 56 RCNY § 1-05 (b) (2).

According to his declaration submitted in an earlier federal action brought by plaintiff, former Assistant Commissioner and Senior Counselor Jack T. Linn (Linn) stated that Parks propounded the Rules

in response to a significant increase in expressive matter vending activities.[1] The Rules were meant to address the impact of those activities on park congestion and aesthetics. Additional regulations were added for several popular parks such as Central Park. The Rules permitted for expressive matter vending in eight areas in Central Park, including Wien Walk. *See* 56 RCNY § 1-05 (b) (3). Linn stated there were 13 specifically designated spots for expressive matter vendors on Wien Walk, and each spot was marked with a Parks decal or medallion. Such spots were "allocated upon a first come, first served basis." 56 RCNY § 1-05 (b) (2). The parties do not dispute that plaintiff is an expressive matter vendor.

In excerpts from his deposition in the federal action, plaintiff described securing and maintaining a designated expressive matter vendor spot or "green spot" as a "battle" between 20 to 50 other vendors. When the park opened at 6 a.m., "[i]t was like a mad rush with people carrying stuff" and he "had to fight off" other vendors once he or his partner secured a spot. He has seen vendors injure themselves by falling over their belongings as they ran. On August 1, 2010 plaintiff injured his hamstring as he ran to claim a green spot. At that time, there were eight to 20 vendors waiting to enter the park. He fell after running "maybe five steps" when his "leg would give [*sic*] up." He may have been pushed, but "like I said it was mostly the legs," and "it just happened." On August 7, 2010 plaintiff fell when his "leg just completely lost it," and he injured his arm. He testified that his "right foot sometimes it just doesn't hold, I don't know why." Plaintiff twice saw Park Enforcement Patrol (PEP) officers when the park opened, but they never fully supervised the process of how vendors secured green spots.

Plaintiff commenced this action on August 25, 2014 after his federal claims were dismissed on or about August 19, 2014.

According to the complaint, plaintiff alleges that defendant assumed a duty of care when it executed a green spot scheme for a class of expressive matter vendors, of which plaintiff was a member, and when it assumed positive direction and control of a known and blatant safety violation by

[1] *Alhovsky v New York City Dept. of Parks and Recreation*, No. 11 Civ. 3669 (NRM) (SDNY).

promulgating certain safety regulations including 56 RCNY § 1-03 (a) (1). That regulation states that defendant's parks open to the public at 6 a.m.

Defendant argues that it owed no duty to plaintiff in the absence of a special relationship and that plaintiff's action is barred by governmental immunity. Plaintiff argues that defendant violated a special duty owed to him because Parks assumed a positive direction and control in the face of a known and dangerous safety violation when it allowed the daily rush to secure green spots to continue despite knowledge that the practice was dangerous.

**Analysis**

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]. The motion must be supported by evidence in admissible form, *see Zuckerman v City of New York*, 49 NY2d 557 [1980], and the pleadings and other proof such as affidavits, depositions and written admissions. *See* CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]. Once movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. *Id.* The "failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Id.*

"To establish a prima facie case for negligence, plaintiff must prove that (1) a defendant owed a duty to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." *Friedman v Anderson*, 23 AD3d 163, 164 [1st Dept 2005] [internal citation omitted]. It is well settled that "[t]o sustain liability against a municipality, the duty breached must be more than that owed the public generally." *Lauer v City of New York*, 95 NY2d 95, 100 [2000] [internal citations omitted]. The duty is "born of a special relationship between the plaintiff and the governmental entity." *Pelaez v Seide*, 2 NY3d 186, 198-

199 [2004]. A special relationship arises in three situations: "(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." *Id.* at 199-200 (internal citation omitted). Defendant has demonstrated that none of the three situations for finding a special relationship exist.

A private right of action is implied when "(1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme." *McLean v City of New York*, 12 NY3d 194, 200 [2009]. A review of the Rules indicates that they regulate when and where expressive matter vendors may display their services. The Rules do not include a provision that allows for government tort liability and plaintiff points to no specific language that authorizes a private right of action for defendant's alleged noncompliance in enforcement. *See Metz v State of New York*, 20 NY3d 175 [2012].

In order to show whether a municipality voluntarily assumed a duty, plaintiff must demonstrate "'(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 v City of New York*, 18 NY3d 69, 80 (2011), quoting *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]. Here, there was no evidence of direct contact between plaintiff and a PEP officer sufficient to show that defendant assumed a duty of care to plaintiff nor was there evidence of plaintiff's justifiable reliance on Parks personnel to control the conduct of other vendors. Whether or not PEP officers observed vendors rushing the park entrance on prior occasions is not indicative of a voluntary assumption of a duty of care.

Plaintiff testified that he and his partner chose to run even though PEP officers did not act to control the rush.

Similarly, defendant has shown that it did not assume positive direction and control in the face of a known, blatant and dangerous safety violation. This last situation requires a defendant to "affirmatively act to place the plaintiff in harm's way, as by giving assurances that the situation is safe when in fact it is not, thereby inducing the plaintiff to embark on a dangerous course he or she would otherwise have avoided." *Abraham v City of New York*, 39 AD3d 21, 28 [2d Dept 2007], *lv denied* 10 NY3d 707 [2008]. Plaintiff's testimony establishes that Parks personnel took no action regarding the daily rush to secure green spots; thus, defendant cannot have affirmatively placed plaintiff in harm's way. *See Sutton v City of New York*, 119 AD3d 851 [2d Dept 2014].

Plaintiff's argument that defendant created a dangerous condition by failing to control a crowd lacks merit. A plaintiff seeking to recover on a theory of overcrowding must show that he or she was unable to find a place of safety or that his or her free movement was restricted due to overcrowding. *See Benanti v Port Auth. of N.Y. & N.J.*, 176 AD2d 549 [1st Dept 1991]. Plaintiff and non-party Oksana Goncharenko testified there always was a rush of people running to claim vending spots when Central Park opened. Plaintiff, though, failed to establish that he was unable to find a place of safety or that his movement was otherwise restricted. He offered no evidence of the number of other vendors in his immediate vicinity before he fell and his testimony was equivocal as to whether a push or shove from another vendor caused the first incident. Further, he attributed the cause of his two falls to his leg giving way, not overcrowding.

Plaintiff's argument that a special relationship was created when defendant assumed positive direction and control in the face of a known, blatant and dangerous safety violation also fails. He submits that disorderly conduct is prohibited under 56 RCNY § 1-04 (l) and that defendant aided and abetted such conduct by allowing vendors to run and potentially sustain injuries in order to claim coveted green spots

on Wien Walk.[2] In support, he offers the testimony of Michael Dockett ("Dockett"), Assistant Commissioner of Urban Park Service, to show that Parks was aware of these incidents. Dockett acknowledged the Rules were not changed with regard to how vendors claimed designated spots but he also testified that these incidents ceased three days after the Rules were implemented in mid-July. Dockett did not recall receiving any reports of vendors sustaining injuries while trying to obtain a green spot.

Even after viewing the evidence in the light most favorable to plaintiff, *see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007], the failure of Parks staff to affirmatively stop the practice is insufficient to give rise to a special relationship. *See Sutton v City of New York, supra.* Plaintiff provided no evidence that Parks staff assured him the daily rush was safe. In any event, plaintiff continued to engage in the practice even though he was aware of the alleged danger.

Given the foregoing, the court need not address defendant's alternative ground for dismissal based on the doctrine of governmental immunity.

Accordingly, it is ORDERED, that defendant's motion for summary judgment dismissing the complaint is granted and the complaint is dismissed. This constitutes the decision and order of the court.

Dated: May 11, 2018

Alexander M. Tisch, A.J.S.C.

HON. ALEXANDER M. TISCH

[2] Plaintiff refers to 56 RCNY § 1-04 (l) (9), and the rule, annexed to his opposition papers as Exhibit 4 reads in part that "a person shall be guilty of disorderly behavior who . . . engages in a course of conduct or commits acts that endanger the safety of others." Plaintiff, though, does not seek to hold defendant liable for violating its own regulation.