Rivas v City of New York
2019 NY Slip Op 30318(U)
February 7, 2019
Supreme Court, New York County
Docket Number: 157011/2017
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **IAS MOTION 52EFM**

Justice

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INDEX NO. 157011/2017

ERICKA RIVAS, GRACE MONTERO, JENNIFER MONTERO

Plaintiff,

MOTION DATE 10/10/2018

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF PARKS & RECREATION,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

were read on this motion to/for DISMISSAL.

Upon the foregoing papers, defendants The City of New York and Department of Parks and Recreation (collectively, the City) move pursuant to CPLR 3211 for dismissal of the complaint or in the alternative, pursuant to CPLR 3212, for summary judgment. For the following reasons, the motion is granted.

Plaintiffs Ericka Rivas, Grace Montero, and Jennifer Montero (plaintiffs) commenced this instant action on August 4, 2017, seeking to recover damages for the City's alleged negligent supervision and security, as well as negligence in the hiring, retention, and training of its agents, servants and/or employees.

Plaintiffs testified that on July 28, 2016 they were visiting the Tony Dapolito Recreation Center public outdoor swimming pool. At around 6:00 pm, plaintiffs allege they were attacked and assaulted, both verbally and physically, by unknown assailants. Plaintiffs testified that three security guards were present, but only one came to their assistance after the attack stopped.

In support of their motion, the City argues that plaintiff's notice of claim and complaint fail to plead a special duty as required by the public duty rule. The City further maintains that they are entitled to the governmental immunity defense because their actions involve the exercise of discretionary governmental functions.

In opposition, plaintiffs argue that the City has not met its prima facie burden demonstrating the performance of a governmental function or discretionary actions. Plaintiffs maintain that the public duty rule does not apply because the City, in owning and operating the public swimming pool, was acting in a proprietary capacity. Further, even if the public duty rule did apply, plaintiffs have sufficiently plead a special duty.

In a negligence claim against a municipality, the court first must decide if the municipality was engaged in a proprietary or governmental function at the time the claim arose (see Applewhite v Accuhealth, Inc., 21 NY3d 420, 425 [2013]). If the conduct was that of a governmental function, then pursuant to the public duty rule, the ordinary rules of negligence do not apply (see Valdez v City of New York, 18 NY3d 69, 75 [2011]). Rather, under the public duty rule, liability for the performance of governmental functions does not attach unless the plaintiff establishes the existence of a special duty of care, outside the duty owed to the general public at large (id. at 75). "[T]he existence of a duty is an essential element of a negligence cause of action, a plaintiff bears the ultimate burden of pleading and proving the existence of a special duty" (Santaiti v Town of Ramapo, 162 AD3d 921, 924 [2d Dept 2018]).

"It is not disputed that when [a governmental entity] acts in a proprietary capacity as a landlord, it is subject to the same principles of tort law as is a private landlord" (Miller v State of New York, 62 NY2d 506, 511 [1984]). In determining the scope of the City's acts as a landlord, the court must first distinguish between those governmental activities which are performed in a

proprietary capacity from those which are governmental in nature (see id.) When the [City] is engaged in both proprietary and governmental functions, "it is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability, not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred" (Weiner v Metropolitan Transp. Auth., 55 NY2d 175, 182 [1982]).

Here, plaintiffs allege that their injuries were the result of the City's negligence in failing to provide adequate protection for plaintiffs and other public patrons of the pool (NYSCEF Doc. No. 1, ¶23). The specific act or omission out of which the injury has arisen, providing or failing to provide security, is that of a governmental function (see Calero v New York Tr. Auth., 168 AD2d 659 [2d Dept 1990] [providing security or police is a governmental function rather than a proprietary one]; see also Harris v City of New York, 40 AD3d 701 [2d Dept 2007]; Farber v New York City Tr. Auth., 143 AD2d 112 [2d Dept 1988]). Consequently, the City has met its prima facie burden by demonstrating that the alleged acts and omissions involved a governmental function, and thus liability turns on whether a special duty was plead.

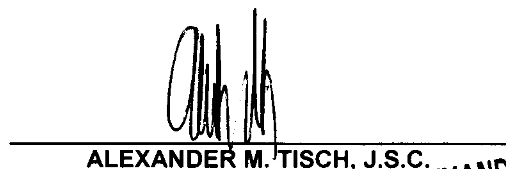
Because the special duty rule applies, plaintiff must plead either "1) the breach of a statutory duty for the benefit of particular class of persons, 2) [that] the municipality assume[d] positive direction and control in the face of a known, blatant, and dangerous safety violation, or 3) [that] the municipality voluntarily assume[d] a duty that generates justifiable reliance by the person who benefits from the duty" (Pelaez v Seide, 2 NY3d 186 [2004]).

Plaintiff's complaint does not adequately plead a special duty under any of the possible avenues (see Gertler v Goodgold, 107 AD2d 481, 485 [1st Dept 1985], affd 66 NY2d 946 [1985] ["While it is axiomatic that on a motion addressed to the sufficiency of a complaint the facts

pleaded are presumed to be true and accorded every favorable inference, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration"] [citations omitted]). The complaint merely states that the City owned, operated, and controlled the pool and were responsible for the health and welfare of the public invitees (NYSCEF Doc. No. 1, ¶15-16). While this does give rise to a general duty of care, it does not sufficiently plead a special duty. Further, in opposition, plaintiff did not adequately indicate how the pleading was sufficient, simply stating that there are triable issues of fact as to whether a special relationship was formed.

Accordingly, it is hereby ORDERED that the motion is granted and the action is dismissed.

This shall constitute the decision and order of the Court.



2/7/2019
DATE

ALEXANDER M. TISCH, J.S.C.
HON. ALEXANDER M. TISCH

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE