SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JULIO RODRIGUEZ, III **PART** IAS MOTION 62EFM

Justice

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SAMANTHA CARROLL,

Plaintiff,

- v -

FIRST KID INC., NAML HAQUE,

Defendants.

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FIRST KID INC., NAML HAQUE,

Third-Party Plaintiffs,

- v –

CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, and TRAFFIC AGENT DEBRINA MUNOZ,

Third-Party Defendants.

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INDEX NO. 450930/2018

MOTION DATE 06/20/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Plaintiff Carroll commenced this action seeking damages arising out of a car accident at the intersection of 34th Street and Park Avenue, Manhattan, on February 22, 2016. Defendants/third-party plaintiffs First Kid Inc. ("First Kid") and Naml Haque ("Haque") filed a third-party complaint against third-party defendants City of New York, New York City Police Department, and Debrina Munoz (hereinafter referred to collectively as "third-party City defendants") alleging that third-party City defendants caused the accident by reason of their "carelessness and negligence" and seek common law indemnification or contribution (City aff. in supp., Ex C, third-party summons and complaint at 9-10). Third-party City defendants now move the court to dismiss pursuant to CPLR 3211 (a) (7) and for summary judgment pursuant to CPLR 3212 ultimately to dismiss the third-party complaint in its entirety as against them. Defendants/third-party plaintiffs First Kid and Haque oppose the motion.

Facts

As described by plaintiff Carroll at her deposition (City aff. in supp., Ex P), on February 22, 2016, at approximately 11:00 a.m., plaintiff Carroll was driving a four-door sedan westbound

on 34th Street (*id.* at 12-13, 18). As she approached the traffic signal for Park Avenue, the traffic signal turned yellow and then red (*id.* at 23). Plaintiff Carroll stopped at the traffic signal (*id.* at 24). After one or two seconds, plaintiff Carroll was directed by third-party defendant traffic agent Munoz to proceed through the intersection (*id.* at 31, 41-42). Ms. Munoz was blowing a whistle and waved plaintiff Carroll through (*id.*). Plaintiff Carroll entered the intersection against a red light (*id.*). On 34th Street crossing Park Avenue, plaintiff Carroll proceeded through the northbound lanes of Park Avenue entirely and about halfway through the southbound lanes of Park Avenue when her vehicle was struck by a taxi operated by defendant Haque (*id.* at 53). Plaintiff Carroll stated that she observed defendant Haque's taxi stopped at the Park Avenue traffic signal before she was waved through and proceeded into the intersection (*id.* at 29-30).

Defendant Haque testified (City aff. in supp., Ex Q) that he was driving the taxi at issue on February 22, 2016 (*id.* at 11). Immediately before the accident occurred around 11:00 a.m., he was driving southbound on Park Avenue, having turned onto Park Avenue from 38th Street (*id.* at 12-15). Defendant Haque stopped at a red light at 34th Street (*id.* at 18). He did not observe any traffic control agents in the intersection of 34th Street and Park Avenue (*id.* at 23). The light turned green, and defendant Haque proceeded into the intersection (*id.* at 23-25). A car proceeding westbound on 34th Street struck his taxi in the general front left area of his vehicle (*id.*).

As described by third-party defendant Munoz at her deposition (City aff. in supp., Ex R), on February 22, 2016, at approximately 11:00 a.m., she was working as a traffic control agent for the New York City Police Department directing traffic at the intersection of 34th Street and Park Avenue (*id.* at 7-12). Traffic conditions were heavy for the westbound lanes of 34th Street, so she was ordered by a supervisor to "pull the cars through" (*id.* at 18-22). Ms. Munoz directed the southbound traffic on Park Avenue to remain stopped as she directed plaintiff Carroll's vehicle through the intersection westbound on 34th Street (*id.* at 26-29). Ms. Munoz had her left hand in a pause position toward the Park Avenue southbound drivers including defendant Haque's taxi (*id.* at 58-59). Ms. Munoz directed plaintiff Carroll's vehicle through the intersection by waving her right hand and blowing her whistle "consistently" (*id.* at 59). As she initially made these gestures, the light for Park Avenue southbound drivers was red (*id.* at 59); it then changed to green for those drivers, and Ms. Munoz continued her gestures (*id.* at 59-60, 63). As Ms. Munoz directed the vehicle behind plaintiff Carroll to stop, plaintiff Carroll's vehicle proceeded through the intersection, and defendant Haque's taxi proceeded as well (*id.* at 30-31). Ms. Munoz did not see the impact (*id.* at 30). Ms. Munoz believes defendant Haque's taxi had a green light on Park Avenue southbound when he proceeded forward (*id.* at 65).

Parties' Positions

Third-party City defendants argue that they are entitled to summary judgment because 1) no special duty existed, 2) third-party plaintiff failed to plead that a special duty existed, and 3) third-party City defendants are immune from liability when performing traffic control, a discretionary governmental function. In support of their motion, third-party City defendants attach copies of the pleadings, the third-party pleadings, plaintiff's bill of particulars, an email regarding a bill of particulars from third-party plaintiffs, a joint trial order dated December 14, 2016, a transfer order dated May 11, 2018, a stipulation regarding the joint trial and transfer status, the

City of New York's motion in the related matter *Hosten v First Kid, Inc., et al.* (Index. No. 450328/2018), an email regarding same, a decision and order dated June 22, 2018, dismissing an action by plaintiff Carroll directly against the third-party City defendants herein, the transcript of plaintiff Carroll's deposition, the transcript of defendant Haque's deposition, the transcript of third-party defendant Munoz's deposition, and a decision dated December 14, 2017, in *Jagatpal v Chamble, et al.* (Index No. 161749/2015).

Defendants/third-party plaintiffs First Kid and Haque oppose the motion, contending that third-party defendant Munoz undertook a special duty by directing plaintiff Carroll's vehicle into the intersection. Third-party plaintiffs First Kid and Haque argue that third-party defendant Munoz undertook such a duty by waving the subject vehicle through the intersection, that such waving was "direct contact", and that plaintiff Carroll "justifiably relied" on the waving. Moreover, defendants/third-party plaintiffs First Kid and Haque contend that such a special duty owed to plaintiff Carroll can be transferred to First Kid and Haque such that their third-party claims for contribution and indemnification may be sustained. Additionally, defendants/third-party plaintiffs First Kid and Haque argue that third-party City defendants' motion should be denied because 1) the failure to place two traffic control agents was ministerial (and not discretionary) and 2) summary judgment is rarely appropriate in negligence actions.

Applicable Law – Dismissal and Summary Judgment Standards

"[O]n a CPLR 3211 motion to dismiss we 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' (*Leon v. Martinez,* 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994])" (*William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501 [1st Dept 2018]). However, "factual allegations...that consist of bare legal conclusions...are not entitled to such consideration" (*Leder v Spiegel*, 31 AD3d 266 [1st Dept 2006]).

"[O]n such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618 [1st Dept 2018] citing *Leon*). "[T]he criterion is whether the proponent of the pleading *has* a cause of action, not whether he has stated one" and the court "determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013] citing *Leon*). The court may also "freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 572 [2015] citing *Leon*).

The proponent of a motion for summary judgment must tender sufficient evidence to show its entitlement to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The moving party must make a *prima facie* showing of entitlement to judgment by demonstrating the absence of any material issues of fact (*Pullman v. Silverman*, 28 NY3d 1060 [2016]). The papers will be scrutinized in a light most favorable to the non-moving party (*Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]). Once the proponent of a summary judgment motion makes such a *prima facie* showing,

"the burden shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so" (*Friedman v Pesach*, 160 AD2d 460 [1st Dept 1990]).

Applicable Law – Municipal Liability

Traffic control is a traditional governmental function (*Jagatpal v Chamble*, 172 AD3d 573, 574 [1st Dept 2019] citing *Balsam v Delma Eng'g Corp.*, 90 NY2d 966 [1997]; *cf. Wittorf v City of New York*, 23 NY3d 473, 480 [2014]) and not subject to the "proprietary" prong of governmental liability analysis (*see Connolly v Long Island Power Authority*, 30 NY3d 719, 727 [2018]).

Therefore, the rule here, as to potential municipal liability, "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 69, 76 [2011] quoting *McLean v City of New York*, 12 NY3d 194, 203 [2009]). Stated differently, "[a] public employee's discretionary acts—meaning conduct involving the exercise of reasoned judgment—may not result in the municipality's liability even when the conduct is negligent. By contrast, ministerial acts—meaning conduct requiring adherence to a governing rule, with a compulsory result—may subject the municipal employer to liability for negligence" when combined with a special duty (*Lauer v City of New York*, 95 NYD2d 95, 99 [2000]; *see Connolly v Long Island Power Authority*, 30 NYd3 719, 728 [2018]).

"Whether an action of a governmental employee or official is cloaked with any governmental immunity requires an analysis of the functions and duties of the actor's particular position and whether they inherently entail the exercise of some discretion and judgment. If these functions and duties are essentially clerical or routine, no immunity will attach" (*Valdez v City of New York*, 18 NY3d 69, 76 [2011] quoting *Mon v City of New York*, 78 NY2d 309, 313 [1991]).

Traffic control is a discretionary governmental function for which municipalities "cannot be held liable" (*Casale v City of New York*, 117 AD3d 414, 415 [1st Dept 2014]; *Lewis v City of New York*, 82 AD3d 410 [1st Dept 2011]; *see Jagatpal v Chamble*, 172 AD3d 573 [1st Dept 2019] ["The municipal defendants cannot be held liable for plaintiff's injuries, even if the traffic officers were negligent, because the officers were involved in the discretionary governmental function of traffic control"]; *Devivo v Adeyemo*, 70 AD3d 587 [1st Dept 2010]).

"[A] special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition" (*Tara N.P. v Western Suffolk Board of Co-op. Educational Services*, 28 NY3d 709 [2017] quoting *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426 [2013]). In this case, the parties dispute the second type of special relationship, namely, whether City defendants "voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally" (*id.*).

The Court of Appeals articulated the four elements of the second type of special relationship in *Tara N.P.* (28 NY3d at 714): "(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" (*id.*, quoting *Cuffy v. City of New York*, 69 NY2d 255 [1987]). "[A]ll four elements must be present for a special duty to attach" (*Tara* citing *Applewhite v Accuhealth, Inc.*, 21 NY3d 420 [2013]). Additionally, "the direct contact requirement has not been applied in an overly rigid manner" (*Tara*, 28 NY3d 709, quoting *Cuffy*, 69 NY2d 255).

Discussion and Application – City Defendants' Motion to Dismiss and for Summary Judgment

Here, the court finds that third-party defendant Munoz's waving to plaintiff Carroll does not satisfy the element of "direct contact" (*see Dinardo v City of New York*, 13 NY3d 872, 874 [2009]; *Ewadi v City of New York*, 117 AD3d 439, 440 [1st Dept 2014]) as part of an analysis of whether a special duty is owed to "plaintiff beyond what was owed to the public generally" (*Tara N.P. v Western Suffolk Board of Co-op. Educational Services*, 28 NY3d 709 [2017]). Moreover, the court finds that the decision to place one or two traffic control agents at the intersection was an exercise of discretion in the use of municipal resources (City's aff. in supp., Ex R at 41-48; *see Wittorf v City of New York*, 23 NY3d 473, 480 [2014] citing *Balsam v Delma Eng'g Corp.*, 90 NY2d 966 [1997]; *In re World Trade Center Bombing Litigation*, 17 NY3d 428, 452 [2011]).

The court further finds that third-party defendant Munoz exercised discretion in traffic control by waving defendant Carroll's vehicle through the intersection (City aff. in supp., Ex R at 18-22, 80-85; *see Casale v City of New York*, 117 AD3d 414, 415 [1st Dept 2014]; *Lewis v City of New York*, 82 AD3d 410 [1st Dept 2011]; *see also Devivo v Adeyemo*, 70 AD3d 587 [1st Dept 2010]). Consequently, defendant City of New York cannot be held liable for defendant Munoz's acts whether or not a special duty existed (*McLean v City of New York*, 12 NY3d 194, 203 [2009] ["Government 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"]). As in *Jagatpal v Chamble*, 172 AD3d 573, 574 (1st Dept 2019), "[t]he municipal defendants cannot be held liable for plaintiff's injuries, even if the traffic officers were negligent, because the officers were involved in the discretionary governmental function of traffic control".

Consequently, the court finds that third-party defendants City of New York, New York City Police Department, and Debrina Munoz made a *prima facie* showing of their entitlement to summary judgment as a matter of law, and the court further finds that defendants/third-party plaintiffs First Kid Inc. and Haque failed to raise a question of fact in opposition to the motion.

In any event, neither plaintiff's complaint nor third-party plaintiffs' third-party complaint allege a factual predicate for a special duty (*Jagatpal v Chamble*, 172 AD3d 573, 574 [1st Dept

2019]; *Puello v City of New York*, 118 AD3d 492 [1st Dept 2014]).[1] Consequently, the third-party complaint should also be dismissed pursuant to CPLR 3211 (a) (7).

Accordingly, and upon the parties' respective papers and exhibits, it is ORDERED that third-party defendants City of New York, New York City Police Department, and Debrina Munoz's motion to dismiss the complaint and for summary judgment is granted in its entirety, and the third-party complaint and all cross-claims are severed and dismissed as to third-party defendants City of New York, New York City Police Department, and Debrina Munoz; and it is further

ORDERED that third-party defendants City of New York, New York City Police Department, and Debrina Munoz are to serve a copy of this order with notice of entry upon all parties and the General Clerk's Office within twenty days; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this matter be referred to a non-City part.

Any argument or requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected. This constitutes the decision and order of the court.

July 22, 2019

HON. JULIO RODRIGUEZ III, JSC

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

[1] Neither party provided legal authority as to whether a special duty potentially owed to plaintiff Carroll could be 'transferred' to defendants/third-party plaintiffs First Kid and Haque as to support their third-party claims under these circumstances—that is, where plaintiff Carroll's direct claims against third-party City defendants were dismissed for failure to satisfy the notice of claim requirements under General Municipal Law 50-e. Considering the foregoing findings, however, the issue of such a 'transfer' need not be reached by the court at this time.