

**Mannino v City of New York**

2019 NY Slip Op 33344(U)

October 23, 2019

Supreme Court, New York County

Docket Number: 805280/2015

Judge: Verna Saunders

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. VERNA L. SAUNDERS, J.S.C. PART 5

Justice

-----X

INDEX NO. 805280/2015

MICHAEL MANNINO, as Administrator of the
Estate of CARMEN MANNINO, deceased and
MICHAEL MANNINO, individually,
Plaintiffs,

MOTION SEQ. NO. 001

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY
FIRE DEPARTMENT and THE NEW YORK CITY
FIRE DEPARTMENT-EMERGENCY MEDICAL
SERVICES,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23,
24, 25, 26, 27, 28, 29

were read on this motion to/for

SUMMARY JUDGMENT

Plaintiff Michael Mannino commenced this action for negligence and wrongful death
alleging that defendants' delay in responding to 911 calls resulted in delays transporting his wife,
Carmen Mannino, to the hospital causing her death. Defendants, The City of New York, The
New York City Fire Department (FDNY), and The New York City Fire Department-Emergency
Medical Services (hereinafter "City") moves the court seeking dismissal of the complaint and all
cross-claims against it, as well as, summary judgment pursuant to CPLR §§ 3211 and 3212.

Plaintiff opposes the motion.<sup>1</sup>

When considering a defendant's motion to dismiss for failure to state a cause of action,
pursuant to CPLR § 3211(a)(7), the court must afford the pleading a liberal construction, accept
all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible
inference, and determine only whether the facts as alleged fit within any cognizable legal theory.
(Leon v Martinez, 84 NY2d 83 [1994].) Normally, a court should not be concerned with the
ultimate merits of the case. (Anguila v Koch, 179 AD2d 454 [1st Dept 1992].) However, these
considerations do not apply to allegations consisting of bare legal conclusions as well as factual
claims which are flatly contradicted by documentary evidence. (Simkin v Blank, 19 NY3d 46
[2012].)

Furthermore, the proponent of a motion for summary judgment must tender sufficient
evidence to show the absence of any material issue of fact and the right to entitlement to

<sup>1</sup> This motion by the City was previously granted, without opposition, pursuant to the Decision and Order of this
court dated August 2, 2018. Plaintiff then moved the court seeking an order vacating the court's prior decision and
permitting plaintiff to oppose the City's motion. Plaintiff's motion to vacate was granted provided that plaintiff
filed opposition on or before May 10, 2019. Plaintiff's opposition was timely filed, the City submitted reply papers,
and oral argument was held.

judgment as a matter of law. See, *Alvarez v Prospect Hospital*, 68 NY2d 320 (NY 1986) and *Winegrad v New York University Medical Center*, 64 NY2d 851 (NY 1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. See *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989).

Mr. and Mrs. Mannino reside across the street from New York Presbyterian Downtown Beekman Hospital. On April 11, 2014, Carmen Mannino collapsed in her home. At approximately 3:16 P.M., Michael Mannino called 911 and informed the operator that his wife collapsed. He was told that by the operator/dispatcher that they would take care of it. The call was transferred to an Emergency Medical Technician ("EMT") at or around 3:18 P.M. According to City witness, FDNY EMT Stanley Ko, the call received a level 6 priority and a Basic Life Support ("BLS") Unit was assigned to report to the Mannino home. At around 3:29 P.M., BLS began to make their way to plaintiffs' apartment. While in route, the BLS unit was stopped by New York Police Department (NYPD) officers to tend to an emotionally disturbed person. (EMT Ko testified that if they are flagged down, they are required to stop and notify dispatch that they were flagged down. EMT Ko further stated that failure to stop and render assistance constitutes patient abandonment.)

In the meanwhile, Carmen Mannino collapsed again, and Michael Mannino again called 911 seeking assistance. He was told by the dispatcher that it would be taken care of. Plaintiff's priority level changed from level 6 to level 5 and at or around 3:38 P.M., the BLS Unit continued toward plaintiff's home. A few minutes later, at approximately 3:42 P.M., plaintiff placed a third call to 911 requesting medical assistance. He testified that he was again told that it would be taken care of. Plaintiff further testified that during each call he was asked to describe his wife's condition and that each time he told the dispatcher that his wife was conscious and breathing but needed help. During the third call, however, EMT Ko testified that plaintiff stated that his wife was unable to breathe and thus, her priority level changed from level 5 to level 2 at which point an Advanced Life Support (ALS) Unit was dispatched. Soon thereafter, Mr. Mannino decided he would go across the street himself to seek help. On his way out of the building, at the elevator, he was met by an EMT and other fire department personnel. When asked why he did not go across the street sooner, Mr. Mannino stated that his wife was immobile and unable to travel across the street. BLS arrived at approximately 3:49 P.M. and performed cardiopulmonary resuscitation (CPR) until the ALS unit arrived. According to ALS EMT Adil Khalid, ALS continued to perform CPR on Carmen Mannino who was in cardiac arrest. They intubated her and performed an intraosseous access. Thereafter, Ms. Mannino was transported to Beekman Hospital by stretcher.

In its motion, the City argues that plaintiff asserts in the summons and complaint that the City failed to timely provide an ambulance and medical treatment upon arrival to plaintiff and decedent's home. The City claims that, as such, plaintiff was obligated to plead the existence of a special duty owed to the decedent which plaintiff failed to do. The City further argues that even if plaintiff properly alleged a special duty, the City has established that no such duty existed. The City asserts that there was no special relationship, that the City did not voluntarily assume a

special duty, and lastly, that even if a special duty existed the City is entitled to immunity as the EMS dispatcher exercised discretion while performing discretionary governmental functions.

In opposition, plaintiff argues that the City is not entitled to dismissal pursuant to CPLR § 3211 (a)(7) as the complaint reasonably sets forth a claim for breach of special duty owed to Carmen Mannino. Specifically, plaintiff asserts that paragraph 39 of its complaint states that respondents “failed in their duties and responsibilities owed to the general public and particularly, plaintiff’s decedent, Carmen Mannino.” Plaintiff further asserts that the use of the term “particularly” is not only used in the complaint but also in its Bill of Particulars to reference a special duty to Carmen Mannino and that said duty was breached.

As to the City’s motion seeking summary judgment, plaintiff argues that in the Appellate Division, First Department’s decision in *Canty v NY City Health & Hosp. Corp.*, 158 AD2d 271 [1st Dept 1990], the court upheld a verdict in favor of plaintiff based upon on a similar set of facts. Specifically, plaintiff argues that here, as in *Canty*, he made several 911 calls, informed the operator of his wife’s condition, and each time was told that someone would be arriving to assist. Plaintiff contends that he relied upon these assurances by the dispatchers and thus, did not seek assistance on his own. He asserts that these assurances, i.e., promises, constitute an affirmative duty to act on behalf of Carmen Mannino; that the dispatcher/response units knew that a failure to provide emergency services would cause harm; that direct contact between plaintiff and the dispatcher lead to reliance; and that his reliance was justifiable. Specifically, plaintiff testified that he lived across the street from a hospital but that his wife was unable to travel there to obtain assistance and further, that had he known that the first ambulance had been canceled, he would have left his wife alone in order to seek assistance from the hospital across the street.

It is well-settled that a special duty can arise in three situations; to wit: where the plaintiff belonged to a class for whose benefit a statute was enacted; where the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the general public; or where the municipality took control of a known and dangerous safety condition. (See *Applewhite v Accuhealth, Inc.*, 21 NY3d 420 [2013] and *Metz v State of NY*, 20 NY3d 175 [2012]). Plaintiff is charged with proving that the government owed a special duty of care to the injured party and if plaintiff fails to meet its burden, liability cannot be imputed to the municipality acting in a governmental capacity. (See *Lauer v City of NY*, 95 NY2d 95 [2000]; *Valdez v City of NY*, 18 NY3d 69 [2011]) and *Applewhite*, supra.

The case at bar is nearly identical to the facts in the *Canty* matter where the Appellate Division held that a special duty existed where plaintiff made several calls to 911, detailed his wife’s deteriorating condition and was told that help was arriving, resulting in him not seeking assistance on his own. Here, upon affording the complaint and Bill of Particulars a liberal construction, a special duty was plead, and defendants were sufficiently noticed of plaintiff’s intent to pursue said claim.

Further, the defendants have not established entitlement to summary judgment inasmuch questions of fact remain as to whether the statements made by the dispatcher to plaintiff constitute assurances/promises establishing a special duty. Until a determination is made in this

regard, the assertion of the City's immunity cannot be determined. Moreover, it is clear from the facts presented that reasonable minds may differ as to whether the dispatcher made the appropriate inquires in order to dispatch the most suitable unit to plaintiff's home; whether the thirty-seven minutes that elapsed between Mr. Mannino's first 911 call and FDNY's ultimate arrival to his home constitutes a breach of duty where Mr. Mannino called 911 three times and was never informed that there was a delay due to the initial ambulance being stopped by NYPD; and finally, whether plaintiff's reliance on the statements of the dispatcher was reasonable where on three separate occasions he informed the 911 of dispatch of his wife's condition and each time was told that "they will take care of it." The City's assertion in reply, that plaintiff did not report to the dispatcher his wife's "deteriorating" condition is without merit as it is the dispatcher who elicits relevant information through questioning. Furthermore, the information provided to the dispatcher over the course of the multiple 911 calls resulted in plaintiff's priority increasing with each call, with the final call being given top priority and an ALS unit assignment. Based upon this record, a summary determination is not warranted. It is hereby,

ORDERED, that The City of New York, The New York City Fire Department, and The New York City Fire Department-Emergency Medical Services' motion to dismiss and for summary judgment is denied; and it is further

ORDERED that the parties are to appear for a compliance conference on November 26, 2019 at 2 P.M., Part DCM, Room 106, 80 Centre Street, New York, N.Y.

October 23, 2019

  
HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE