Kohn v City of New York
2020 NY Slip Op 32184(U)
June 12, 2020
Supreme Court, New York County
Docket Number: 154504/2019
Judge: George J. Silver

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10

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SAMUEL S. KOHN **Index №. 154504/2019**

Plaintiff

-against-

THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (NYCHHC), and NIGEL RICKETTS,

Defendants

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HON. GEORGE J. SILVER:

The instant action was commenced by plaintiff SAMUEL S. KOHN ("plaintiff") to recover for damages for personal injuries allegedly sustained by him on February 1, 2018, at the intersection of Madison Avenue and East 47th Street when defendant NIGEL RICKETTS ("Ricketts") allegedly attacked him. With the instant motion, defendant THE CITY OF NEW YORK ("City") moves for an order of dismissal on account of plaintiff's failure to state a viable cause of action as against it. Indeed, the City submits that plaintiff's claim against it for failing to protect plaintiff from the alleged assault implicates a governmental function, and as such, the City cannot be liable to plaintiff absent the existence of a special duty. The City argues that plaintiff has failed to plead a special duty in the notice of claim and summons and complaint. Moreover, the City avers that because plaintiff did not have a special relationship with plaintiff, it is not liable. As such, the City contends that the complaint and any cross-claims against it must be dismissed.

Defendant NEW YORK CITY HEALTH AND HOSPITALS CORPORATION ("NYCHHC") joins the City's request, cross-moving for identical relief and arguing that plaintiff has failed to establish that Ricketts was ever seen, treated, or discharged from any NYCHHC facility. Accordingly, NYCHHC submits that plaintiff's complaint must be dismissed as against it based on plaintiff's failure to assert a viable cause of action against NYCHHC.

Plaintiff opposes the application, arguing that its claims against the City and NYCHHC are sufficient insofar as plaintiff provided each defendant with enough information to investigate plaintiff's underlying allegations.

DISCUSSION

To state a negligence claim against the City, a plaintiff must show that the City breached a duty owed specifically to that plaintiff. Such a 'special' duty must be more than the municipality's obligations to the general public; it must be premised on a special relationship between it and plaintiff (*Florence v. Goldberg*, 44 NY2d 189, 195 [1978]; *Lee v. New York City Transit Authority*, 249 AD2d 93 [1st Dept 1998], *lv app den in part and dism in part* 92 NY2d 944 [1998]). This 'special relationship' requires the existence of four elements: "(i) an assumption by the

municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (ii) knowledge on the part of the municipality's agents that inaction could lead to harm; (iii) some form of direct contact between the municipality's agents and the injured party; and (iv) that party's justifiable reliance on the municipality's affirmative undertaking" (*Cuffy v. City of New York*, 69 NY2d 255, 260 [1987], *mot amend dis*m 70 NY2d 667 [1987]). The Court of Appeals has emphasized the particular importance of the last two elements (see *Lauer v. City of New York*, 95 NY2d 95, 102 [2000]).

Separately, the filing of a notice of claim is a condition precedent to the commencement of an action to prosecute a claim against the City of NYCHHC (Gen Mun L § 50-e[1][a]). The notice must apprise the City and NYCHHC of the following: (i) the claimant's name and address and, if claimant is represented, his attorney's; (ii) "the nature of the claim"; (iii) "the time when, the place where and the manner in which the claim arose"; and, (iv) the injuries or damages alleged (Gen Mun L § 50-e [2]). Because the notice of claim is a condition precedent, the statutory requirements cannot be excused (*see generally Silberstein v. County of Westchester*, 92 AD2d 867 [2d Dept 1983], *aff'd* 62 NY2d 675 [1984]). "The purpose of the notice of claim requirement is to afford the municipality an adequate opportunity to timely investigate and defend the claim.... In the instant case, the notice of claim was patently defective since it was silent as to the manner in which the claim [now being asserted] arose" (*Adrian v. Town of Oyster Bay*, 262 AD2d 433, 434 [2d Dept 1999][citations omitted]). Indeed, "[t]he test of the sufficiency of a notice of claim is merely whether it includes information sufficient to enable the city to investigate" (Rosenbaum v. City of New York, 8 NY3d 1, 7 [2006] *citing Brown v City of New York*, 95 NY2d 389 [2000] [internal quotation marks and citations omitted]). Therefore, the notice of claim must contain a sufficient description of "the place," "the time," and "the nature" of the claim (*see id.*).

In evaluating the facial sufficiency of a plaintiff's proposed cause of action, all allegations pleaded must be deemed true and the plaintiff must be accorded every favorable inference (*see 344 E 72 Limited Partnership v. Dragati*, 188 AD2d 324 [1st Dept. 1992]; *Licensing Development Group, Inc. v. Freedman*, 184 AD2d 682, 683 [2d Dept. 1992]).

Here, plaintiff alleges that plaintiff is the victim an unprovoked attack by a mentally ill and homeless individual, Ricketts, that occurred on February 1, 2018 near the intersection of Madison Avenue and 47th Street. As plaintiff left work and was walking toward the Grand Central Station to take the train home, plaintiff alleges that Ricketts, an individual previously unknown to plaintiff, suddenly and without any provocation, approached plaintiff and attacked him by violently pushing plaintiff and causing him to fall to the ground. As a result of the attack, plaintiff claims that plaintiff has sustained serious, severe, and permanent physical injuries.

Against the City, plaintiff solely alleges that the City was negligent for failing to follow the dictates of New York State's Mental Hygiene Law §9.60 insofar as "notwithstanding [Ricketts'] long history of violence and severe mental illness, he was released from the care and close control and supervision... of the City of New York... immediately prior to prior to his violent assault of [plaintiff]." Nowhere in the notice of claim does plaintiff make a reference to a special duty owed to plaintiff by the City as distinct from members the public at large. Where a notice of claim fails to put the municipality on notice of any claim of special duty, by specifically alleging the actions or statements that are claimed to have given rise to the special duty, the municipality

has no opportunity to investigate the facts underlying a claim of special duty and, in effect, the notice of claim is too vague to permit the prosecution of such a claim (*see Blackstock v. Board of Educ. of the City of New York*, 84 AD 3d 524 [1st Dept. 2011]; *Rollins v. Board of Educ. of the City of New York*, 68 AD3d 540 [1st Dept. 2009]). As such, plaintiff's notice of claim against the City is deficient in this respect.

Similarly, the complaint fails to plead the existence of a special duty. Plaintiff's complaint alleges that "[d]efendants... proximately caused the assault because they breached their common-law duty to plaintiff and other members of the general public by failing to protect plaintiff and other members of the general public from [Ricketts]." Pleading a duty owed to the general public is not commensurate to pleading a special duty owed directly to plaintiff (*see Vitale v. New York*, 60 NY2d 861 [1983]; *Johnson v. New York City Board of Educ.*, 249 AD3d 370 [2d Dept. 1998]). As the complaint here fails to plead a special duty running directly to plaintiff, it must be dismissed.

Moreover, plaintiff cannot amend the deficient notice of claim or summons and complaint now that the 1 year and 90 day statute of limitation has expired (*see* CPLR 217-a; *Pierson v. City of New York*, 56 NY2d 950 [1982]; *Croce v. City of New York*, 69 AD3d 488 [1st Dept. 2010]). Likewise, a plaintiff is bound by an existing notice of claim, and all new causes of action are barred if they are not alleged in the original notice of claim (*Gonzalez v. New York Cit Hous. Auth*, 181 AD2d 440 441 [1st Dept. 1992]). To be sure, all theories of liability must be expressly articulated in the notice of claim, and one claim cannot necessarily be inferred by the existence of another (*see Garcia v. O'Keefe*, 34 AD3d 334, 334 [1st Dept. 2006]). The failure to articulate a theory of liability precludes any claim under that theory (*Mahase v. Manhattan & Bronx Surface Transit Operating Auth.*, 3 AD3d 410, 411 [1st Dept. 2004]). As such, in the instant action, plaintiff's complaint must be dismissed as neither the notice of claim nor the complaint pleads a special duty.

Likewise, plaintiff does not submit that plaintiff had a special relationship with the City. As such, the complaint must be dismissed on that ground as well.

Despite conceding the absence of a special duty, plaintiff speculatively alleges that the City breached a proprietary duty by releasing Ricketts from its medical custody when it had knowledge that he would endanger the public due to his mental illness. The allegation that the City supposedly released Ricketts from its treatment is illusory, because unlike NYCHHC, the City is not a medical provider. Indeed, while plaintiff postulates that the City released Ricketts from its medical custody, plaintiff fails to show a basis in law or fact by which the City would have had medical custody of Ricketts in the first instance. The only alleged evidence plaintiff cites in support of his theory is that the police report identifies Ricketts as an "EDP" or "emotionally disturbed person." However, nowhere does the police report state that Ricketts was recently released from or was ever in the City's custody. "Rank speculation is no substitute for evidentiary proof"(*Tunusupomi v. Bronx-Lebanon Hosp. Ctr.*, 213 AD2d 236, 238 [1st Dept. 1995]; *see also Kane v. Estia Greek Rest. Inc.*, 4 AD3d 189, 190 [1st Dept. 2004]). Here, plaintiff's opposition is insufficient as the pleadings are based entirely on speculation that the City released Ricketts from its medical treatment. Plaintiff has failed to produce any competent evidence to support this allegation. Importantly, the City is not a medical provider, rendering plaintiff's factual allegation against it illusory. Therefore, on this ground as well, the action as against the City must be dismissed.

With respect to NYCHHC, plaintiff's notice of claim is similarly deficient as a matter of law. To be sure, plaintiff makes no specific allegations of negligence against any specific facility operated by NYCHHC. Additionally, plaintiff makes no allegations as to the date of negligence or the type of negligence committed by NYCHHC. To be sure, plaintiff's allegations are largely generic, failing to provide a date for when Ricketts allegedly should have been hospitalized or was released by NYCHHC. Plaintiff even fails to allege the specific facility among the many operated by NYCHHC that was negligent. Moreover, on its face the nature of plaintiff's claim is unclear as the notice of claim alleges negligence but does not specifically delineate how the claim is grounded in medical malpractice. Plaintiff's complaint therefore is not compliant with the mandates of GML § 50(e), and therefore must be dismissed.

Even if plaintiff's complaint was compliant with GML §50(e), and plaintiff's allegations were presumed true and afforded the benefit of all reasonable inferences, the pleadings still would be deficient as a matter of law, thus warranting dismissal. Indeed, plaintiff makes no specific allegations of negligence against any specific facility operated by NYCHHC. Moreover, plaintiff makes no allegations as to a date of negligence or the type of negligence committed by NYCHHC. Lastly, plaintiff does not allege what, if any, duty NYCHHC owed plaintiff, as the alleged negligence here involved a private citizen, Ricketts, who confronted plaintiff on the street. Moreover, by plaintiff's own concession, no "special duty" existed between NYCHHC and plaintiff.

In New York, it is recognized that the only narrow exception to the general rule that a municipality cannot be held liable for its failure to protect the public at large from harm exists when the plaintiff can establish the existence of a special relationship, running from the municipality to the individual or protected group, thereby creating a special duty owed to the plaintiff (*Cuffy v. City of New York*, 69 NY2d 255 [1987]). Here, plaintiff has failed to establish, by any cognizable fact before the court, the existence of a special duty on the part of NYCHHC to protect plaintiff from harm by parties outside hospital premises, where, as here, plaintiff cannot point to a specifically articulated plan designed by NYCHHC for the benefit and safety of all members of the general public similarly situated, including, but not limited to, plaintiff, outside the confines of NYCHHC's facilities.

In short, plaintiff's allegations are entirely generic, and predicated on the amorphous and unexplained axiom that somewhere, somehow NYCHHC should have known that Ricketts would attack plaintiff and therefore must be responsible for plaintiff's injuries. It is axiomatic that a complaint must be dismissed where the pleadings against a defendant are vague and the allegations are unsupported by facts (*see generally, Foley v. D'Agostino*, 21 AD2d 60 [1st Dept. 1964]; *Vanscoy v. Namic USA Corp.*, 234 A.2d 680, 681-82 [3d Dept 1996] ["Under New York rules of procedure, conclusory averments of wrongdoing are insufficient to sustain a [cause of action] unless supported by allegations of ultimate facts"). As such, plaintiff's complaint must also be dismissed for failure to state a cause of action (*see Hart v. Scott*, 8 AD3d 532 [2d Dept. 2004]).

Finally, the court grants plaintiff's unopposed motion to extend its time to serve its summons and complaint on Ricketts (CPLR. §306-b). Indeed, plaintiff (1) explains the reason for plaintiff's difficulties serving Ricketts, who has resided at several addresses, (2) timely moved for an extension of time and (3) sets forth the merit of plaintiff's claims against Ricketts. Plaintiff has

thus demonstrated an entitlement to an extension of time to serve Ricketts in the interests of justice (*id.*; *Solano v. Mendez*, 114 AD3d 614 [1st Dept. 2014]; *Henneberry v. Borstein*, 91 AD3d 493, 496 [1st Dept. 2012]). However, plaintiff's additional application to serve Ricketts by alternative means of service is denied, as the court does not believe service of process on Ricketts' social media accounts would be appropriate service of process in this action.

Accordingly, it is hereby

ORDERED that plaintiff's unopposed motion to extend its time to serve its summons and complaint on Ricketts is granted to the extent that plaintiff is permitted to effectuate service of process on Ricketts no later than 60 days after entry of this order; and it is further

ORDERED that plaintiff is directed to directed to file and serve a copy of this decision and order, with notice of entry, within 20 days of its issuance;

ORDERED that the City and NYCHHC's respective motion to dismiss plaintiff's complaint pursuant to CPLR §§ 3211(a)(5) and (7) because plaintiff failed to comply with the provisions of GML §50(e), in that plaintiff failed to file a timely and meaningful notice of claim, and based on plaintiff's failure to set forth a viable cause of action as against the City and NYCHHC, is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of the City and NYCHHC dismissing this case against them its entirety; and it is further

ORDERED that the Clerk is directed to amend the caption to reflect as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10

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SAMUEL S. KOHN **Index №. 154504/2019**

Plaintiff

-against-

NIGEL RICKETTS

Defendant

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; and it is further

ORDERED that the remaining parties are directed to appear for a virtual conference before the court on Tuesday September 9, 2020 at ~~9:30 AM~~ at ~~the courthouse located at 111 Centre Street, Room 1227 (Part 10).~~ a time to be determined

This constitutes the decision and order of the court.

Dated: June 15, 2020

George J. Silver

HON. GEORGE J. SILVER