Perez v Weingarten
2021 NY Slip Op 30239(U)
January 26, 2021
Supreme Court, New York County
Docket Number: 161751/2013
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **IAS MOTION 62**

Justice

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CLAUDIA PEREZ AS ADMINISTRATOR OF THE ESTATE OF AILEEN MARTINEZ, MARILYN ARIAS, BIENVENIDO MARTINEZ,

Plaintiff,

- v -

SETH WEINGARTEN, NEW YORK CITY TRANSIT AUTHORITY, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, METROPOLITAN TRANSIT AUTHORITY

Defendant.

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INDEX NO. 161751/2013

MOTION DATE 12/24/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116

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

This is an action to recover for personal injuries resulting in death sustained by plaintiff Aileen Martinez on December 26, 2012 at approximately 8:27 pm when she was struck by a bus owned and operated by defendant New York City Transit Authority ("NYCTA") and defendant Seth M. Weingarten (the "driver") (collectively, "Transit"), at the intersection of 7th Avenue and Central Park South, New York, New York.

Pending before the court is a motion wherein defendants The City Of New York and the New York City Department Of Transportation (the "DOT") (collectively, the "City") seek an order: (1) pursuant to Civil Practice law and Rules (CPLR) 3212 granting summary judgment to dismiss the complaint against the City; and (2) pursuant to CPLR 3211[a][7] dismissing the

plaintiffs' Complaint and any cross-claims as against the City. Upon the forgoing documents and oral arguments held before the undersigned on December 11, 2020, this motion is GRANTED.

In the Complaint, plaintiff argues, generally, that the City breached its duty to properly control, manage, maintain, operate, inspect, supervise and repair the traffic light(s) at the aforementioned intersection, which permitted said traffic light(s) to become dangerous for persons both operating vehicles and traversing said intersection. In the pending motion, the City argues that the court should grant the City summary judgment because: (1) there is no evidence that the City permitted a dangerous or potentially hazardous condition to exist and cause injury; (2) the City did not receive notice of any malfunctioning traffic signal; (3) it was not the proximate cause of Plaintiff's injuries; and, with respect to the Department of Transportation, (4) it is a non-jural entity that is not capable of being sued. The City further argues that plaintiff did not properly plead or establish a special duty between plaintiff and the City; that plaintiff failed to plead negligent design and incorrectly interprets inapplicable design guidelines; and that alternatively, the City is entitled to summary judgment on its defense of governmental function immunity because the Complaint implicates a discretionary governmental function and discretion was in fact exercised.

In opposition, plaintiff argues that summary judgment should be denied because there are triable issues of fact as to whether the accident was proximately caused by the City's violation of standards for traffic lights in that the lights at the intersection directed simultaneous left and right turns from Central Park South to Seventh Avenue; and whether the accident was proximately caused by the negligence of the traffic enforcement agent in failing to observe the plaintiff or the bus. Plaintiff also argues that there are triable issues with respect to the issues of qualified

immunity and sufficiency of the Notice of Claim. Finally, plaintiff argues that the City has failed to demonstrate that DOT is a non-jural entity that cannot be sued.

Transit also filed papers in opposition to the City's motion, arguing that there can be more than one proximate cause of an accident and that here, the City should be found negligent as the deposition of its traffic enforcement agent ("TEA"), Saul Cabarcas, shows that he failed to do his job by properly controlling the lights and traffic at the subject intersection. Transit also argues that the City had actual notice of the dangers posed by the simultaneous left and right turning signals at the subject intersection, in the form of a letter (the "DOT letter") dated September 7, 2010 and sent to the DOT by a Peter R. Schleger, a resident of 200 Central Park South.

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [1st Dept. 1985]). 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 judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 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 (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

Here, the arguments made by plaintiff and by Transit are tenuous at best. The driver argues that the light was operational and that he made the turn pursuant to the light signal. The driver further argues that he was not distracted, and there was no traffic agent present. Curiously, counsel for Transit admits that the light was operational and that the driver was neither distracted nor liable in making the turn, but argues instead that the traffic agent is liable for not seeing plaintiff or the bus; and the turn signal caused the driver to be distracted by having to observe the other car that was also turning. These arguments are both contradictory and inapposite.

Further, a defendant cannot be liable for a plaintiff's injuries unless it owes a duty of care running directly to the injured person (Valdez v. City of New York, 18 N.Y.3d 69 [N.Y. Ct of Appeals 2011] [discussing "the general proposition that to sustain liability against a municipality, the duty breached must be more than that owed the public generally"]; Lauer v. City of New York, 95 N.Y.2d 95 [N.Y. Ct. of Appeals 2000] ["the 'direct contact' element, which is closely related to the element of reliance, serves to rationally limit the class of persons to whom the municipality's duty of protection runs and exists"]). Under the public duty rule, liability for the performance of governmental functions cannot attach unless plaintiff both pleads and establishes a special duty (McGinness v. City of New York, 113 A.D.3d 566 [Sup. Ct. App. Div. 1st Dept. 2014] ["Petitioners failed to allege facts that would establish that respondents had a special duty to the injured petitioner to protect him from an assault"]; Davis by Walker v. Owens, 259 A.D.2d 272 [Sup. Ct. App. Div. 1st Dept. 1999] ["Nor is there evidence of any voluntary assumption by the municipal defendant through its agents of a special duty to plaintiffs. Indeed, the complaint alleges nothing more than negligence in performance of statutory duties."]).

In this case, plaintiffs' counsel asserts in his papers that the driver caused the accident in that the driver failed to see plaintiff and failed to stop after having run over plaintiff. Plaintiff did not plead, nor does the evidence establish on this record that the City owed plaintiff a special duty or that the TEA agent had any special duty at the time of the accident. Indeed, even the driver admits that the TEA agent was not directing traffic at the time, and that the driver drove pursuant to the light, which was operational.

Furthermore, even if Plaintiff had established that she was owed a special duty, here, as in Devivo v. Adeyemo, 70 A.D.3d 587 (Sup Ct. App. Div. 1st Dept. 1st Dep't 2010), "The officers' alleged negligence cannot support municipal liability as it involved discretionary acts in managing pedestrian and vehicular traffic undertaken in furtherance of public safety." In fact, there is nothing in this record to indicate that the TEA had any liability, in that he was to direct traffic only in heavy conditions and it is undisputed that the road conditions were light at the time. There is also evidence that plaintiff was crossing against the light in that the report states that the no-crossing light was on at the time. Further, the DOT letter on which Transit and plaintiff rely was about cars colliding, not about pedestrians crossing.

Given the findings above, the motion by the City is GRANTED. With respect to defendants The City Of New York and the New York City Department Of Transportation, summary judgment is granted in their favor, and plaintiff's Complaint and any cross-claims are DISMISSED WITH PREJUDICE.

Further, the caption is to amended to reflect as such, and this matter is respectfully referred to a non-City part.

This is the order of the court.

1/26/2021
DATE

J. MACHELLE SWEETING, J.S.C.

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