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MORRIS DUFFY ALONSO & FALEY MUNICIPAL LAW UPDATE

First Department Requires Prior Written Notice of a Tree Well Defect as a Pre-Requisite to the City's Liability.

Tucker v. City of N.Y., 923 N.Y.S.2d, (1st Dept. 2011).

Holmes v. Town of Oyster Bay, 919 N.Y.S.2d 207 (2d Dept. 2011).

The plaintiff commenced suit in *Tucker* after a defective tree well caused him to be thrown from his bike. The soil within the tree well had a six inch height differential as compared with the sidewalk pavement, which surrounded the tree well on three sides.

The lower Court granted the City's summary judgment motion because it had no prior written notice of the defect under Administrative Code §7-201 (c)(2) (more commonly known as the "Pothole Law"). The question on the plaintiff's appeal to the First Department was whether the "*Pothole*" law also requires prior written notice of *tree well* defects as a prerequisite to the City's liability.

Supplementing the precedent established in *Vucetovic v. Epsom Downs Inc.*, the First Department held in the affirmative and accordingly affirmed summary judgment for the City because it did not have prior written notice.

In rendering its decision, the Court acknowledged that § 7-210 of the Administrative Code shifts sidewalk liability from the City to property owners in obligating the latter to maintain sidewalks in a reasonably safe condition and exposing them to liability for personal injuries sustained because of their failure to do so. However, the Court opined that the Court of Appeals' decision in *Vucetovic* found City owned tree wells to be outside § 7-210's purview and therefore, the City's responsibility. Finally, the Court noted that the well established Pothole Law requires that the City be given prior written notice of a defect as a pre requisite to sidewalk liability.

Expanding upon *Vucetovic* and, essentially, combining this decision with the Pothole Law, the Court held that the Pothole Law also requires prior written notice of City owned tree well defects.

While the Court acknowledged that the Pothole Law does not expressly include tree wells in its language, it emphasized that the statute broadly encompasses not only a sidewalk, but "any encumbrances thereon or attachments thereto." Referring to the Webster's Dictionary definition of encumbrance as a "burden or impediment," the Court held that the six inch height differential between tree well soil and the surrounding sidewalk was "clearly" an impediment to pedestrians traversing the sidewalk and, therefore, invoked the requirement of prior written notice. The Court additionally referred to prior precedent, wherein projecting gas valves and depressed manhole covers were deemed to require prior written notice to the City and even cited to the recent Second Department decision in *Holmes v. Town of Oyster Bay*, wherein a tree stump was considered to be within the purview of a local version of the Pothole Law.

As such, the Court rejected the plaintiff's argument that illogical outcomes would result from the inclusion of tree wells in the Pothole Law exclusion of them from section 7-210 of the Administrative Code and affirmed summary judgment for the City based on the lack of prior written notice of the defective tree well.

District Court for the Southern District of New York Denies City's Motion for Summary Judgment in Racial Profiling Case.

Floyd v. City of N.Y., 2011 WL 3856515.

In an extensive opinion by Judge Shira A. Scheindlin of the Southern District of New York, the majority of the City's summary judgment motion was denied, forcing the parties to either settle or proceed to trial in this putative class action wherein plaintiff alleges a plethora of illegal police practices amounting to racial profiling.

The Floyd Incident

Plaintiff Floyd seeks relief for what he claims was an illegal stop and frisk search while attempting to unlock a tenant's apartment in his grandmother's home.

Floyd, an African American from the Bronx, attempted to assist his grandmother's tenant, who had locked himself out of his own apartment during the afternoon hours. Floyd retrieved a large ring of keys from his grandmother's home and began using several keys to try and unlock the tenant's door. Passerby police officers observed Floyd and the tenant fidgeting with the keys and the lock and looking around nervously with a large bag at their feet. A stop and frisk ensued as the officers were aware of several mid day burglaries in the area and believed the two men were in progress of one.

As required, the responding officers prepared a UF250 form in connection with the stop, which is intended to itemize the details of the encounter and which included areas where the responding Officer could check boxes for "Physical Force Used," "Furtive Movements," "Area has High Incidence of Reported Offense of Type Under Investigation" and "Was Person

Searched? The UF250 forms filled out in connection with the Floyd encounter indicated that the Officer's put their hands on Floyd, that Floyd made furtive movements and that the activity being investigating corresponded to the time and place of the stop. Yet, the box for "Area has High Incidence of Reported Offense of Type Under Investigation" was not checked and one of the responding officers denied that Floyd was searched.

The Ourlicht Incident

Plaintiff Orlicht, a, African American and Italian male from Harlem, was stopped and frisked during a purported police investigation of illegal firearm possession in a public housing complex.

Plaintiff Orlicht was seated on an outdoor bench within his Harlem housing complex when several officers arrived on foot with their weapons drawn and commanded both him and those in his area to get down on the floor. The officers informed the detainees that there had been a report of a gun in the area and, accordingly, a stop and frisk ensued for about ten minutes while plaintiff Ourlicht remained on the ground. The search was fruitless and Ourlicht was eventually told that he could get up.

Several more officers arrived in a purported NYPD van and some entered the housing complex. There was no NYPD evidence of a report of an illegal firearm in plaintiff Ourlicht's vicinity or that a gun was actually found.

Allegations

Based on these occurrences, Ourlicht, Floyd and several other plaintiffs commenced a putative class action against the City, Police Commissioner, Mayor Bloomberg and named and unnamed NYPD officers alleging that the defendants implemented a policy, practice and custom of unconstitutional stop and frisks based on race and/or national origin in violation of 42 U.S.C. 1983, the Fourth and Fourteenth Amendment, the New York State Constitution and Title VI of the 1964 Civil Rights Act. Plaintiffs sought equitable relief in the form of a declaration that the defendants' policies are unconstitutional and a class wide injunction of the challenged discriminatory practices as well as compensatory and punitive damages.

In addressing the plaintiffs' allegations, the Court emphasized that Municipal liability under 42 U.S.C. 1983 will only attach when a plaintiff can establish that an identified harm results from a Municipal entity's custom, policy or practice, which can occur in a single instance, but not merely when one of the musicality's agents performs the alleged wrongdoing. The Court reaffirmed that plaintiffs alleging a 42 U.S.C. 1983 claim bear the heavy burden of establishing that the municipality engaged in deliberate conduct that was the driving force behind the alleged wrong, whether the municipality actually engaged in discriminatory practices or exuded such deliberate indifference to it so as to constructively acquiesce.

The Court further opined that qualified immunity does not shield the discretionary acts of government officials when these acts constitute a violation of a clearly established constitutional right of which a reasonable official would have known.

The Terry and Daniel's Precedent

In issuing its decision, the Southern District noted that the *Floyd* case raised issues of great public concern, potential widespread, suspicionless and race-based stop and frisks in the New York area and that the recent case of *Daniels v. City of N.Y.* involved an attempt to resolve many of these very same issues. The *Daniels* case concluded in a settlement in which the NYPD agreed to enact a Racial Profiling Policy ("RPP"), which prohibits "use of race, color, ethnicity or national origin as a determinative factor in taking law enforcement action" and obligates NYPD officers to prepare and regularly audit UF250 forms to adequately document stop and frisks procedures. The RPP further obligated commanding NYPD officers and NYPD Quality Insurance Divisions to monitor compliance with the policy in general.

The Court noted that while UF250 forms were filled out in many of the alleged occurrences in *Floyd*, the plaintiffs, nonetheless, claimed that the defendants' response to an alarming racial disparity for stop and frisk searches was woefully inadequate and amounted to deliberate and discriminatory acts under 42 U.S.C. 1983.

Reiterating the principals set forth in the seminal *Terry v. Ohio* case, the Court noted that even a limited search of an individual's outer clothing can constitute a severe and invasive intrusion of personal security and that an Officer must have a reasonable suspicion in the "totality of the circumstances" to lawfully initiate a stop and frisk search, which can be satisfied when the officer has reasonable suspicion of criminal activity or that a suspect is armed and dangerous. As set forth in *Terry*, an inchoate and unparticularized hunch or suspicion is insufficient to lawfully stop and frisk an individual.

The Court's Decision:

In denying summary judgment, the Court emphasized that the voluminous evidence submitted by each side were in direct conflict and created an issue of fact solely for the jury to decide.

First, both plaintiff and defendants disputed the magnitude of racial disparity for stop and frisk searches, with plaintiff's proffering an expert report by Professor Fagan and defendants offering the "RAND Report." In comparing the reports, the Court identified that the RAND report relied on an internal and external crime suspect benchmark and found there to be a much smaller differential between the stop and frisks of blacks and Latinos as opposed to whites, while Professor Fagan based his findings primarily on multivariate regressions analysis and concluded that minorities were much more likely to be stopped and frisked than whites, even in areas with low crime rates. Opining that defendants raised no real challenge the Fagan report's scientific

reliability, the Court refused to preclude the Fagan report on *Daubert* grounds and found the report sufficient to raise a triable issue of fact.

Second, and not surprisingly, the parties disputed whether the NYPD's actions amounted to unconstitutional police practices. The Court found an issue of fact here because while defendants indeed tendered proof of constitutional police *policies* which seemingly satisfy the RPP, plaintiff countered with sufficient evidence that the NYPD's actual *practices* fell short of the RPP's goals and violated constitutional directives. While the defendants offered deposition testimony of various NYPD personnel about the implementation of training programs instructing officers on the need for "reasonable suspicion" and "probable cause" pursuant to *Terry*, plaintiff offered deposition testimony of several other NYPD personnel that denied ever receiving this training.

Similarly, defendants offered testimony of NYPD personnel which attested to receiving and giving training that prohibited racial profiling, with plaintiff again offering deposition testimony of NYPD personnel denying that they ever took part in or heard of any such measures.

While the defendants unequivocally denied the use of quotas in NYPD police work, the Court opined that plaintiffs offered "smoking gun" evidence of a recorded roll call meeting wherein police officers were instructed to meet their quotas and were sanctioned not for doing so. An Officer from the 41st precinct even conceded at his deposition that he had witnessed illegal stops and searches performed by both himself and fellow officers and that they had issued several criminal court summonses for incidents that did not actually occur.

Plaintiffs further argued that many of the NYPD officers deposed could not articulate the reasonable suspicion standard. In particular, the Court opined that it simply could not ignore a Deputy Commissioner's testimony that the seminal *Debour* standard on the four levels of police intrusion was unclear, as this would tend to negate the full implementation and enforcement of the RPP.

With regard to the preparation and auditing of UF250s, plaintiffs offered evidence that the NYPD performs mere cursory reviews of these forms which ensures that they are physically filled out and but neither the UF250 form or its corresponding 802 and 802A worksheets allow for an evaluation of whether a stop and frisk was based upon reasonable suspicion. In any event, the plaintiffs argued that disciplinary actions taken against offending officers are inadequate and thus contravenes the RPP's goals. A 41st precinct officer also testified that he and his co workers often filled out UF 250 forms for stop and frisks that they did not perform.

With regard to the Floyd and Ourlicht incidents, the Court found that disputed facts regarding the encounters which would bear on whether the NYPD's actions were objectively unreasonable in violation of the Fourth Amendment and whether a reasonable officer would understand the NYPD's actions in either encounter to be in violation of Floyd and Ourlicht's constitutional rights for purposes of Qualified Immunity. The Court overall found that plaintiffs

presented "convincing arguments" of the "several shortcomings" in the City's approach to stop and frisks.

Essentially, the Court found that the totality of the plaintiffs' evidence created a question of fact that precluded summary judgment. The Court noted that the plaintiffs did submit evidence of numerical expectations for stop and frisks, a generalized pressure for NYPD to meet monthly quotas (although proof of same at trial would be largely circumstantial) and the lack of appropriate procedures for preparing and auditing UF 250s, as well as the lack of appropriate disciplinary measures within the NYPD. The Court noted that while the plaintiffs' statistics alone would not likely be enough to establish discriminatory intent, it could be sufficient to show deliberate indifference/constructive acquiescence when considered with the plaintiff's other evidence.

The Court held that a reasonable jury could find that the defendants' actions occurred in the "context of citywide racial disparities in stop and frisk procedures unexplained by chance, crime patterns or officer deployment actions" and that the defendants' failure to fully follow and implement RPP procedures could evince a discriminatory purpose and/or deliberate indifference.

In dicta, the Court cited the Attorney General's report and noted that while the New York crime rate experienced a "precipitous" decline since the mid nineties, the amount of pedestrian stops increased to nearly 600,000 a year. The Court noted various conflicting opinions about the correlation between the two statistics and ultimately found the issues of fact presented in ***Floyd*** to be outside of its purview.

However and without resolving the purported factual issues, the Court dismissed plaintiff Floyd's claim under the Fourth Amendment and opined that the NYPD had a reasonable suspicion in initiating the Floyd stop and frisk given the totality of the circumstances. Because the Officer had reasonable suspicion as to Floyd, the Court also granted summary judgment to defendants on Floyd's Equal Protection claim, finding that the NYPD did not act with a racial motive in initiating the stop and frisk. The Court found no clear indication of reasonable suspicion in the Ourlicht encounter and thus denied summary judgment to defendants on Ourlicht's causes of action.

As plaintiff did not oppose defendants' motion for summary judgment as it pertained to Mayor Bloomberg and Police Commissioner Kelley, the Court dismissed any and all claims against them.

Court of Appeals and Appellate Division Re Affirm the Applicability of VTL 1104 (e)'s Higher "Reckless Disregard" Standard Only to Conduct Enumerated in VTL 1104 (b).

Kabir v. County of Monroe, 2011 Slip Op. 01609.

Tatishev v. City of N.Y.,923 N.Y.S.2d 523 (2011).

LoGrasso v. City of Tonawanda, 2011 WL 4510428 (4th Dept. 2011).

Reaffirming the recent and somewhat perplexing precedent set in *Kabir v. County of Monroe*, the Court of Appeals and Appellate Division also held in these cases that while VTL 1104 (b) holds emergency vehicles in emergency operations to a higher "reckless disregard" standard in personal injury suits, this higher standard only applies when the emergency vehicle was engaged in the conduct specifically set forth in VTL 1104 (e).

In a 4-3 Court of Appeals decision by Justice Read, the *Kabir* case narrowed the protection of the reckless disregard standard to only the following acts enumerated in VTL 1104 (b): (1) Stopping, standing or parking; (2) proceeding past a red light, stop sign or flashing red signal; (3) exceeding the posted speed limit; or (4) disregarding regulations governing directions or movement or turning in specified directions. If an emergency responder's conduct does not fall into one of these four categories, a standard of ordinary negligence applies in ascertaining liability for the plaintiff's accident. The responding police officer in *Kabir* rear ended the plaintiff and the majority held that his actions, (he was not speeding or passing a red light at the time) being outside of 1104 (b), only invoked a mere negligence standard.

The Court of Appeals and Appellate Division have more recently applied *Kabir*'s precedent to different factual scenarios also involving responding police officers, but ultimately arrived at the same conclusion that the protection afforded by 1104 (e)'s reckless disregard standard is circumscribed solely to the acts of 1104 (b) :

I. Tatishev

In this case, the Court of Appeals found that a mere ordinary negligence standard applied when a responding police officer made a left turn at a green light and struck the plaintiff in the crosswalk. Citing *Kabir*, the Court held that the Officer's conduct during the emergency was not the kind enumerated in 1104 (b) and therefore, did not require plaintiff to prove his reckless disregard for liability to attach.

Oddly enough, the *Tatishev* case is a prime example of what the *Kabir* dissent forewarned of- greater protection being afforded to emergency responders who violate the rules of the road as opposed to those who obey them. The Court of Appeals in *Tatishev* emphasized in rendering its decision that the Officer's drove within the speed limit and did not operate his vehicle in violation of any restrictions on movement or turning under the VTL.

II. LoGrasso

The Fourth Department also applied the *Kabir* precedent and found that the reckless disregard standard of 1104 (e) did not apply when a responding Officer struck the plaintiff's vehicle after proceeding past a stop sign. This case presented a closer call because while 1104 (b) does provide for application of the heightened reckless disregard standard when emergency

vehicles run stop signs or lights, the Court declined to apply it here because the Officer in this case did not actually disregard the stop sign, but rather, stopped, looked both ways and then proceeded into the subject intersection where the collision occurred.

Again and in accordance with *Kabir*, the Court declined to extend 1104 (e)'s protection to an emergency responder who proceeded with caution and attempted to obey the rules of the road just before the accident.

Court of Appeals Finds Absence of Special Relationship Necessary to Create Municipal Liability Where New York Police Officers Promised to Arrest Plaintiff's Former and Abusive Boyfriend.

Valdez v. City of N.Y., 2011 N.Y. Slip Op. 07252.

Plaintiff decedent in this matter was shot by her former boyfriend, Felix Perez, and commenced a negligence suit against the City claiming the existence of a special relationship between herself and the Police Department which is a pre requisite to the City's liability. While a jury trial found the City 50% liable for the shooting (with the other 50% being apportioned to Perez), the Appellate Division and later the Court of Appeals found that no special relationship existed such that the City could be found liable and therefore, reversed the jury verdict as to the City.

The plaintiff had a first Court Order of Protection against Perez which had expired shortly before the subject incident. Plaintiff then obtained a second Court Order of Protection which was served upon Perez by the two Police officers assigned to the Domestic Violence Unit of the Police precinct in the plaintiff's neighborhood. Shortly after service of the order, Perez made oral threats to kill the plaintiff over the phone. In response to the threat, plaintiff left her apartment with her two sons to go to her mother's home. However, upon informing one of the two officers about the incident en route, the Officer instructed her to return to her apartment and told her that Perez would be "immediately" arrested. Plaintiff did as instructed and remained inside her apartment for the remainder of the night without any word from the Police. The night and next day passed without incident or further communication with the Police and the subject shooting occurred late the next night after plaintiff exited her apartment to throw out her garbage.

At trial, the City denied that plaintiff contacted the Officers the night before the shooting and produced no evidence of an investigation or attempt to arrest Perez while the plaintiff, naturally, contended that she did contact the police, that she was instructed to return to her apartment and that the Officers made an affirmative promise to arrest Perez.

The Court of Appeals noted that a pre requisite to establishing a municipality's liability is the existence of a "special relationship" between the City and a plaintiff such that the City had a duty running to that specific plaintiff. A special duty is created when (1) the municipality assumes a duty to act on the plaintiff's behalf through promises and/or actions; (2) the

municipality knows that inaction on its part could harm the plaintiff; (3) there is some direct contact between the municipality and plaintiff ; and (4) the plaintiff justifiably relies on the municipality's affirmative undertaking. The Court opined that the plaintiff must sufficiently prove the existence of this "special relationship" *before* any analysis is conducted with respect to the potential applicability of municipal immunity.

Element (4) was hotly at issue in determining whether a special duty existed in this case, with the plaintiff arguing that she was justified in relying on the Officer's instruction to stay in her apartment and his supposed promise to "immediately" arrest Perez. Conversely, the Court found no special relationship/duty running from the Police to the plaintiff because plaintiff's supposed reliance and relaxed vigilance was based solely on an Officer's "promise," made over the phone, to "immediately" arrest Perez. The Court emphasized that plaintiff was unaware of Perez's whereabouts when he made the threat and when the Officer's statement was made and that plaintiff therefore, could not have relayed any such information to the officer who promised that he would arrest Perez. The Court thus did not think it reasonable for the plaintiff to believe that Perez would, in fact, be "immediately" arrested because he first needed to be found. The Court asserted that the Officer's representation was indeed, contingent upon actually locating Perez. (Perez would be immediately arrested once he was found, but id did not appear that anyone was looking for him).

Citing *Cuffy*, the Court noted that, at best, plaintiff may have been justified in construing the Officer's statement to mean that the Police would "immediately" *look* for Perez and arrest him if and when he was located.1 *Cuffy* stands for the principle that justified reliance as a means of establishing a special duty generally cannot rest solely upon a promise that future Police action will be forthcoming without any indication that the promised action occurred. In applying this principle, the Court emphasized the plaintiff's failure to follow up with the Police as to the status of the arrest or to even inquire as to whether Perez was found. Plaintiff herself acknowledged that she expected a phone call from the Police confirming the arrest and that she received no such confirmation when she left the safety of her apartment just before the shooting.

The Court opined that claimed reliance on a Police Officer's promise does not automatically establish the *justifiable* reliance necessary to create a special duty and that to hold otherwise would allow plaintiffs to establish both justifiable reliance and a municipality's assumption of a duty based on acts/promises (both separate and necessary elements of a special duty) through a mere promise. Rather, justifiable reliance must be examined through a "prism of reasonableness" which takes into account the fact that a municipality will not and physically cannot fulfill its every promise or aspiration. Because plaintiff's claimed reliance here rested solely upon a single phone call, the Court declined to find the existence of a special duty such that the City could be liable for negligence.

1 *Cuffy v. City of N.Y.*, 69 N.Y.2d 255 (1987).

Turning to immunity, the Court noted that governmental function immunity is applicable for *discretionary* and not *ministerial* acts because public servants must be free to exercise their decision making authority without fear of lawsuits and potential liability. As such, even a municipality's negligent acts will not provide a basis for liability where those acts are discretionary ones involving an inherent and actual exercise of discretion and where the discretionary acts are the very conduct complained of. Mere clerical or routine activities fall outside of governmental function immunity. Echoing its prior precedent in *McLean v. City of N.Y.*, the Court of Appeals emphasized that ministerial acts-i.e., those acts not protected by municipal immunity-will only subject a municipality to liability where a special relationship exists.2

The Court acknowledged the existence of potentially misleading dicta in *McLean* and *Lauer*, wherein the distinction between the special duty and governmental function immunity was arguably blurred.3 However, the Court clarified that *McLean*'s precedent is a "distillation" of prior decisions which establishes that a special duty is not an *exception* to governmental immunity. Rather, the existence of a special duty is an *element* needed to establish municipal liability while immunity is a *defense* to municipal liability. The existence of a special duty is only a relevant requirement where the municipality's act is ministerial and thus *not* shielded by the immunity doctrine. In short, a municipality will not be liable, even where negligent and even where a special duty exists, if the municipality's acts are discretionary and thus shielded by governmental function immunity.

Notably, because the majority found an absence of a special duty based on the facts here, it declined to even address whether any governmental function immunity existed. However, the majority addressed the dissenters' concern in opining that applying governmental function immunity to police protection cases will not unduly hinder plaintiffs' ability to recover against municipalities for negligence because these types of cases do not invariably involve the exercise of discretion necessary to trigger municipal immunity and, therefore, can subject municipalities to negligence liability if a special duty exists and if the complained of conduct is, in fact, ministerial.

Justice Lippman's vociferous and somewhat garbled dissent deemed the majority opinion to be harsh, regressive and a bifurcation of the special duty and immunity doctrine.

With respect to the special duty, Justice Lipmann asserted that the evidence adduced at trial clearly justified the jury's finding of justifiable reliance, particularly because the Officer making the alleged promise to arrest Perez was familiar with the plaintiff's case and its history; because plaintiff had a "pre existing relationship" with this Officer; and because the Officer

2 *McClean v. City of N.Y.*, 12 N.Y.3d 194 (2004).

3 *Lauer v. City of N.Y.*, 95 N.Y.2d 95 (2000) (finding that a government's breach involving a ministerial act does not per se give rise to municipal immunity absent establishment of a special duty).

stated "don't worry, don't worry, we're going to arrest him." The dissent also placed emphasis on the plaintiff's contention that she thought her "nightmare was over" when the first night passed without incident.

Justice Lippman deemed the Officer's statements to be more than an offhanded promise and rejected the majority's emphasis on the plaintiff's failure to follow up with the police to confirm that an arrest had been made, opining that no such conduct has ever been required to find justifiable reliance in police protection cases. Distinguishing this case from ***Cuffy***, the Court noted that the plaintiffs in ***Cuffy*** *were* in a position to visually confirm that an arrest had been made because the arrestee was the plaintiff's tenant. While Justice Lippman acknowledged that plaintiff could have made a confirmatory phone call to the Police, he did not find the absence of such a phone call fatal to plaintiff's claim of justifiable reliance because her reliance did not fade with the passage of time or without confirmation of the arrest.

Justice Lippman acknowledged that justified reliance will not be automatically established in every case where the Police promises to do what they legally must. Nonetheless, he asserted that Court Orders such as the one in this case can and do foster reasonable reliance, depending on the objective circumstances.

With respect to immunity, Lippman argued that plaintiff should prevail if (as the majority indicated) there was no basis for immunity. Resolving an apparent legal inconsistency, Justice Lippman opined that immunity shields municipalities for conduct that is discretionary but will not protect a municipality from liability for ministerial acts, so long as the municipality violated a special duty relative to the ministerial act. Justice Lippman noted his prior and current doubts as to ***McClean***'s clarity and, at odds with the majority, interpreted the special duty doctrine to be an intended *exception* to municipal non liability only applicable to ministerial acts. In doing so, Justice Lippman construed the majority decision as a backhanded way of holding that plaintiff did not sufficiently prove the special duty *exception* to governmental immunity. Justice Lippman went further and asserted that the defense theory from the start was that plaintiff could not prevail absent a special duty because the complained of conduct involved police protection.

Justice Lippman forewarned that the majority's decision could be the "death knell" for similar cases because it leaves open the possibility that plaintiffs will be denied recovery even where a special relationship *does* exist because they cannot overcome the "impregnable" governmental function immunity. Justice Lippman appears to be concerned that an overly broad array of acts will be deemed discretionary and thus immune, thereby leaving plaintiff with only a dwindling hope of recovery contingent upon the slim chance that the complained of conduct will be deemed ministerial and also upon existence of a special duty. In turn, Justice Lippman also appears troubled that plaintiffs will then not be able to avail themselves of a special duty because they will not be able to establish their justifiable reliance where it does, in fact, exist.

Justice Jones' dissent simply found that the jury reasonably resolved the issue of a special duty in the affirmative. Justice Jones found no noteworthy evidence negating the plaintiff's justified reliance on the Officer's statement because "immediately" denotes urgency. Justice Jones also did not deem plaintiff's failure to make a confirmatory phone call fatal to her claim of justifiable reliance.

Court Allows a Firefighter to File Late Notice of Claim against the City Where City Arguably Had Notice of Dangerous and Defective Condition of Gloves Involved in the Accident.

Kalwiss v. City of N.Y., 2012 N.Y. Slip Op. 50139U.

Claimant in this matter is a FDNY worker who burned his hand during an emergency response in November of 2010, allegedly because of a defect with the fire safety gloves that he was mandated to wear. Claimant sought leave to file late notice of claim against the City for his lawsuit against it, wherein he alleges that the defective gloves allowed for heat penetration and caused injury to his hand. The motion was granted over the City's objection.

The Court noted that while claimants must typically serve a notice of claim against the City within 90 days of the subject occurrence, a motion to file a late notice of claim may be made within the time period prescribed for the claimant's cause of action against the City. In deciding whether a claimant should be given leave to file a late notice of claim, the Court will consider various factors, including: (1) the existence of a reasonable excuse for failing to serve a timely notice of claim; (2) claimant's status as an infant or incompetent, if applicable; (3) the municipality's actual knowledge of the facts relative to claimant's cause of action within 90 days of the date of loss (or a reasonable time thereafter) or (4) any substantial prejudice that the municipality would suffer defending the merits of the claim, based on the late filing.

While the Court found that the claimant failed factor (1), it did not deem same to be fatal because factors (3) and (4) weighed in his favor.

Specifically, the Court held that the City had actual knowledge of the facts relative to claimant's accident because of a letter from the glove manufacturer to the City in January of 2011 detailing the defectiveness of the gloves, a City report from February of 2011 informing FDNY workers of employee accidents involving these same type of gloves and a supplemental report (undated), detailing an FDNY investigation into the glove problem.

The Court then found that the City would not suffer substantial prejudice from a late notice of claim filing because it had the gloves in its possession and had begun an investigation into the glove problem, especially since there were no allegations that the condition of the gloves had changed.

The Court rejected the City's argument that the claimant's cause of action lacked merit, opining that the substantive merits of a claim are not a considerable factor in deciding whether to grant leave to file a late notice of claim.

Second Department Found No Special Relationship Between a Town and a Teenage Town Member Was Beaten in the Town's Recreational Park.

Salone v. Town of Hempstead, 2012 N.Y. Slip Op. 352 (2d Dept. 2012).

Overturning the lower Court's decision, the Second Department granted summary judgment for the defendant Town because there was no special relationship between the Town and infant plaintiff, who was beaten and injured during a game of pickup basketball in the defendant's 'town members only' park.

The Court opined that Municipalities acting as landowners are charged with the same duties as regular landowners in that their land must be kept in a reasonably safe condition. However, the Court indicated that these same municipalities will still enjoy immunity if their allegedly culpable conduct falls within their governmental function and there is no existence of a "special relationship" between the plaintiff and defendant.

The Court emphasized that in determining whether a municipality's acts are governmental or discretionary, it must look to the specific acts or omission complained of.

In this case, the Court found that the omissions complained of were governmental because they involved allegedly inadequate security, which pertains to allotment of municipal personnel and allocation of municipal resources. Therefore, while the Town owned and maintained the park where the subject attach took place, its function of providing security for the park would be governmental and thus, shielded by immunity absent a showing of a special relationship.

The Court found no special relationship between plaintiff and defendant because by plaintiff's own admission, he did not even have any contact with park personnel until after the alleged attack. Accordingly, the Court granted summary judgment to the defendants and declined to even address whether the attack was reasonably forseeable.

Court of Appeals Finds Absence of Special Relationship Necessary to Create Municipal Liability Where New York Police Officers Promised to Arrest Plaintiff's Former and Abusive Boyfriend.

Valdez v. City of N.Y., 2011 N.Y. Slip Op. 07252.

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At trial, the City denied that plaintiff contacted the Officers the night before the shooting and produced no evidence of an investigation or attempt to arrest Perez while the plaintiff, naturally, contended that she did contact the police, that she was instructed to return to her apartment and that the Officers made an affirmative promise to arrest Perez.

The Court of Appeals noted that a pre requisite to establishing a municipality's liability is the existence of a "special relationship" between the City and a plaintiff such that the City had a duty running to that specific plaintiff. A special duty is created when (1) the municipality assumes a duty to act on the plaintiff's behalf through promises and/or actions; (2) the municipality knows that inaction on its part could harm the plaintiff; (3) there is some direct contact between the municipality and plaintiff ; and (4) the plaintiff justifiably relies on the municipality's affirmative undertaking. The Court opined that the plaintiff must sufficiently prove the existence of this "special relationship" *before* any analysis is conducted with respect to the potential applicability of municipal immunity.

Element (4) was hotly at issue in determining whether a special duty existed in this case, with the plaintiff arguing that she was justified in relying on the Officer's instruction to stay in her apartment and his supposed promise to "immediately" arrest Perez. Conversely, the Court found no special relationship/duty running from the Police to the plaintiff because plaintiff's supposed reliance and relaxed vigilance was based solely on an Officer's "promise," made over the phone, to "immediately" arrest Perez. The Court emphasized that plaintiff was unaware of Perez's whereabouts when he made the threat and when the Officer's statement was made and that plaintiff therefore, could not have relayed any such information to the officer who promised that he would arrest Perez. The Court thus did not think it reasonable for the plaintiff to

believe that Perez would, in fact, be "immediately" arrested because he first needed to be found. The Court asserted that the Officer's representation was indeed, contingent upon actually locating Perez. (Perez would be immediately arrested once he was found, but id did not appear that anyone was looking for him).

Citing *Cuffy*, the Court noted that, at best, plaintiff may have been justified in construing the Officer's statement to mean that the Police would "immediately" *look* for Perez and arrest him if and when he was located.[4] *Cuffy* stands for the principle that justified reliance as a means of establishing a special duty generally cannot rest solely upon a promise that future Police action will be forthcoming without any indication that the promised action occurred. In applying this principle, the Court emphasized the plaintiff's failure to follow up with the Police as to the status of the arrest or to even inquire as to whether Perez was found. Plaintiff herself acknowledged that she expected a phone call from the Police confirming the arrest and that she received no such confirmation when she left the safety of her apartment just before the shooting.

The Court opined that claimed reliance on a Police Officer's promise does not automatically establish the *justifiable* reliance necessary to create a special duty and that to hold otherwise would allow plaintiffs to establish both justifiable reliance and a municipality's assumption of a duty based on acts/promises (both separate and necessary elements of a special duty) through a mere promise. Rather, justifiable reliance must be examined through a "prism of reasonableness" which takes into account the fact that a municipality will not and physically cannot fulfill its every promise or aspiration. Because plaintiff's claimed reliance here rested solely upon a single phone call, the Court declined to find the existence of a special duty such that the City could be liable for negligence.

Turning to immunity, the Court noted that governmental function immunity is applicable for *discretionary* and not *ministerial* acts because public servants must be free to exercise their decision making authority without fear of lawsuits and potential liability. As such, even a municipality's negligent acts will not provide a basis for liability where those acts are discretionary ones involving an inherent and actual exercise of discretion and where the discretionary acts are the very conduct complained of. Mere clerical or routine activities fall outside of governmental function immunity. Echoing its prior precedent in *McLean v. City of N.Y.*, the Court of Appeals emphasized that ministerial acts-i.e., those acts not protected by municipal immunity-will only subject a municipality to liability where a special relationship exists.[5]

The Court acknowledged the existence of potentially misleading dicta in *McLean* and *Lauer*, wherein the distinction between the special duty and governmental function

4 *Cuffy v. City of N.Y.*, 69 N.Y.2d 255 (1987).
5 *McClean v. City of N.Y.*, 12 N.Y.3d 194 (2004).

immunity was arguably blurred.6 However, the Court clarified that ***McLean***'s precedent is a "distillation" of prior decisions which establishes that a special duty is not an *exception* to governmental immunity. Rather, the existence of a special duty is an *element* needed to establish municipal liability while immunity is a *defense* to municipal liability. The existence of a special duty is only a relevant requirement where the municipality's act is ministerial and thus *not* shielded by the immunity doctrine. In short, a municipality will not be liable, even where negligent and even where a special duty exists, if the municipality's acts are discretionary and thus shielded by governmental function immunity.

Notably, because the majority found an absence of a special duty based on the facts here, it declined to even address whether any governmental function immunity existed. However, the majority addressed the dissenters' concern in opining that applying governmental function immunity to police protection cases will not unduly hinder plaintiffs' ability to recover against municipalities for negligence because these types of cases do not invariably involve the exercise of discretion necessary to trigger municipal immunity and, therefore, can subject municipalities to negligence liability if a special duty exists and if the complained of conduct is, in fact, ministerial.

Justice Lippman's vociferous and somewhat garbled dissent deemed the majority opinion to be harsh, regressive and a bifurcation of the special duty and immunity doctrine.

With respect to the special duty, Justice Lipmann asserted that the evidence adduced at trial clearly justified the jury's finding of justifiable reliance, particularly because the Officer making the alleged promise to arrest Perez was familiar with the plaintiff's case and its history; because plaintiff had a "pre existing relationship" with this Officer; and because the Officer stated "don't worry, don't worry, we're going to arrest him." The dissent also placed emphasis on the plaintiff's contention that she thought her "nightmare was over" when the first night passed without incident.

Justice Lippman deemed the Officer's statements to be more than an offhanded promise and rejected the majority's emphasis on the plaintiff's failure to follow up with the police to confirm that an arrest had been made, opining that no such conduct has ever been required to find justifiable reliance in police protection cases. Distinguishing this case from ***Cuffy***, the Court noted that the plaintiffs in ***Cuffy*** *were* in a position to visually confirm that an arrest had been made because the arrestee was the plaintiff's tenant. While Justice Lippman acknowledged that plaintiff could have made a confirmatory phone call to the Police, he did not find the absence of such a phone call fatal to plaintiff's claim of justifiable reliance because her reliance did not fade with the passage of time or without confirmation of the arrest.

6 *Lauer v. City of N.Y.*, 95 N.Y.2d 95 (2000) (finding that a government's breach involving a ministerial act does not per se give rise to municipal immunity absent establishment of a special duty).

Justice Lippman acknowledged that justified reliance will not be automatically established in every case where the Police promises to do what they legally must. Nonetheless, he asserted that Court Orders such as the one in this case can and do foster reasonable reliance, depending on the objective circumstances.

With respect to immunity, Lippman argued that plaintiff should prevail if (as the majority indicated) there was no basis for immunity. Resolving an apparent legal inconsistency, Justice Lippman opined that immunity shields municipalities for conduct that is discretionary but will not protect a municipality from liability for ministerial acts, so long as the municipality violated a special duty relative to the ministerial act. Justice Lippman noted his prior and current doubts as to ***McClean***'s clarity and, at odds with the majority, interpreted the special duty doctrine to be an intended *exception* to municipal non liability only applicable to ministerial acts. In doing so, Justice Lippman construed the majority decision as a backhanded way of holding that plaintiff did not sufficiently prove the special duty *exception* to governmental immunity. Justice Lippman went further and asserted that the defense theory from the start was that plaintiff could not prevail absent a special duty because the complained of conduct involved police protection.

Justice Lippman forewarned that the majority's decision could be the "death knell" for similar cases because it leaves open the possibility that plaintiffs will be denied recovery even where a special relationship *does* exist because they cannot overcome the "impregnable" governmental function immunity. Justice Lippman appears to be concerned that an overly broad array of acts will be deemed discretionary and thus immune, thereby leaving plaintiff with only a dwindling hope of recovery contingent upon the slim chance that the complained of conduct will be deemed ministerial and also upon existence of a special duty. In turn, Justice Lippman also appears troubled that plaintiffs will then not be able to avail themselves of a special duty because they will not be able to establish their justifiable reliance where it does, in fact, exist.

Justice Jones' dissent simply found that the jury reasonably resolved the issue of a special duty in the affirmative. Justice Jones found no noteworthy evidence negating the plaintiff's justified reliance on the Officer's statement because "immediately" denotes urgency. Justice Jones also did not deem plaintiff's failure to make a confirmatory phone call fatal to her claim of justifiable reliance.

Southern District Entirely Dismisses Plaintiffs' Constitutional Rights Claims Stemming From an Alleged Orthodox Jewish "Theocracy."

Kiryas Joel Alliance et al. v. Village of Kiryas Joel et al.

Plaintiffs in this action are members of a self proclaimed, dissident sect of an Orthodox Jewish village located in Orange County, known as the Village of Kiryvas Joel (the "Village"). By way of pertinent background, the Grand Rebbe formed and incorporated the village in the early seventies as an "enclave" for followers of the Congregation Yetev Lev D'

Satmar of Kiryas Joel ("the Congregation"). The Village has been and currently is almost exclusively inhabited by the Congregation's leaders and followers.

Kiryas Joel is a village in New York State that was established in 1977 by Grand Rebbe Joel Teitelbaum as an enclave for the Satmar Hasidim Jewish people. After the Grand Rebbe died, a large rift developed between factions within the Satmar. Following the Grand Rebbe's death, dispute erupted in the community as to which of the Grand Rebbe's two sons would assume his leadership role in the Congregation, with a majority believing it should be one brother and the "dissident" branch, which includes the plaintiffs, believing that it should be the other. As such, a once unified congregation split into two opposing factions which were the subjects of longstanding litigation that occurred long before the ***Kiryas Joel*** decision.

Allegations

With regard to the 2011 ***Kiryas Joel*** case, the plaintiffs (all members of the Village's dissident faction) asserted claims against the Village and various other municipal/clerical defendants of the Congregation under (1) The Establishment Clause; (2) The Equal Protection Clause; (3) The Free Exercise Clause and (4) the RLUIPA (Religious Land Use and Institutionalized Persons Act). The plaintiffs claimed that their constitutional rights were suppressed and violated under each aforementioned provision because of their dissident status in a "theocracy" dominated by the majority division within the Congregation.

Judge Jed S. Rakoff of the Southern District of New York ultimately granted the defendants' pre discovery motions to dismiss and threw out each claim with prejudice and barring a portion of plaintiffs' claim under the Establishment Clause (which was also dismissed, but without prejudice). He dismissed the case with prejudice on the grounds of standing, *res judicata* (the fact that some allegations were already litigated) and because the complaint did not adequately plead any Constitutional violation of equal protection.7

In detail, the plaintiffs claim that their rights were violated under the Establishment and Equal Protection Clause and the RLUIPA because of the Village's "Community Room Law" ("CRL"), which requires each structure within the village (including dwellings) to be equipped with a "community room" that is perpetually and continuously available for religious purposes. The law further mandates that a $5,000 fee be paid to a Village "community room fund" in the event that construction of a community room is unfeasible. Plaintiffs claimed that this fund diverted money to the Congregation and that the enactment and enforcement of the CRL violates the Establishment Clause, which prohibits the government from inhibiting or establishing religion.

7 Attorneys Carl Sandel and Drew Sumner of Morris Duffy Alonso & Faley defended the director of Kiryas Joel Public Safety and the actions of the Office of Public Safety.

The plaintiffs also claim that their rights under the Equal Protection and Free Exercise Clause and the RLUIPA were violated by the alleged discriminatory enforcement of Village zoning ordinances. The property at issue was a small wing of the majority faction's synagogue, which was conveyed in death to members of the plaintiffs' dissident faction and which was the subject of *prior l*itigation. The plaintiffs commenced their *first* prior lawsuit because they wished to use this wing for their own religious purposes, but were prohibited by a State Court from doing so because they failed to obtain the requisite permission from the Village and Congregation beforehand. Following this decision, the plaintiffs violated the Court's order in continuing to hold religious ceremonies in the wing without obtaining approval to use it for religious, as opposed to solely residential, purposes. As a result, the Court held plaintiffs in contempt and ordered full closure of the subject wing until plaintiffs obtained the appropriate permission to use it as a place of worship. The order was affirmed on appeal. Thereafter, plaintiffs commenced a *second* prior lawsuit pertaining to town ordinances and this same synagogue, this time seeking and receiving a temporary restraining order ("TRO") to stop construction at the property which was allegedly destroying symbolic portions thereof. Of note, the TRO was lifted on appeal.

The plaintiffs' further claim that they were denied Equal Protection because of the Village's selective and discriminatory enforcement of public speech ordinances and denial of police protection. The plaintiffs claim that the Village refused to enforce public speech laws/noise ordinances as against the majority faction, while unfairly enforcing them against the minority faction when they attempted to congregate and even hold a demonstration in front of the Grand Rebbe's house. Further, plaintiffs claimed that they were denied proper police protection when members of the Congregation's majority faction physically attacked members of the plaintiffs' faction and when the majority's followers were allowed to post offensive and belligerent posters throughout the town, which detailed the names and phone numbers of dissident followers who were marrying without the Grand Rebbe's approval. The plaintiffs claim that they had to extract funding from their religious organization to retain private security to protect them from any additional attacks. Plaintiffs claim that these same occurrences *also* violated their rights under the Establishment Clause because the Village's unlawful actions had the effect of advancing the majority religion's mission while suppressing the plaintiffs' beliefs.

Standing and Res Judicata

Before even addressing the substantive merits of the plaintiffs' claims, the Court dismissed with prejudice the plaintiffs' claims under the RLUIPA, Equal Protection and Establishment Clause pursuant to the doctrine *res judicata*, to the extent that they pertained to the Village zoning ordinances. The Court noted that *res judicata* bars commencement of claims that have been previously and fully adjudicated on the merits, so long as the subsequent claims arise from the same "transaction" as the ones already decided. The Court opined that merely asserting new legal theories or seeking new/different relief will not save a duplicative claim from *res*

judicata, if there has been finalized litigation regarding the same "transaction." The Court further re affirmed that subsequent *occurrences* will not constitute as new "transactions" for the purposes of *res judicata* if they are merely additional instances which would fall under the previously adjudicated claims.

The Court's *res judicata* dismissal was based on the fact that not one, but *two* prior lawsuits concerning these zoning ordinances had been fully adjudicated in a State Court and on appeal. Honoring the lower Court and Appellate decisions, the Court noted that plaintiffs had been afforded a full and fair opportunity to litigate their claims previously. The Court rejected the plaintiffs' argument that the synagogue construction and the Village's failure to grant approval for religious use of the wing were new transactions, finding that both instances raised the same issues that were previously litigated and decided.

In any event, the Court noted that plaintiffs' claims under the RLUIPA were not yet ripe and that the Court lacked jurisdiction as to same because the plaintiffs failed to exhaust all available zoning appeals prior to commencing a cause of action for a RLUIPA violation, as is required. Going a step further, the Court held that plaintiffs' RLUIPA claims substantively failed, even assuming their ripeness and even assuming that they were not barred by *res judicata*. In doing so, the Court noted that a RLUIPA cause of action requires that a land use regulation (i) impose a substantial burden on the free exercise of religion or (ii) discriminates on the basis of religion, or (iii) unreasonably limits religious assembly. The Court found that plaintiffs could not establish (based on their pleadings) that the they were unreasonably burdened or discriminated against because they had several other locations (other than the wing of the congregation) to use for religious ceremonies and because the State Court, and not the Village, ordered them to seek municipal approval to use the space for this purpose.

The Court then dismissed, with prejudice, several of the plaintiffs' claims for want of *standing*. The Court noted that standing requires that the actual named plaintiffs suffer real and ascertainable harm which can be redressed by the relief sought. The Court emphasized well established law that an organization cannot bring constitutional claims on behalf of its members, but may bring claims on its own behalf so long as the entity itself suffered the requisite personal harm. The Court ultimately dismissed a portion of the plaintiff's claims under the Equal Protection and Establishment Clause for lack of standing because many of their claims relative to the unlawful enforcement of town and speech ordinances, municipal fees and denial of police protection involved non party dissident followers, and not any particular harm to the faction itself. The only claim that the faction *did* have standing for was the claim for money expended to retain private security.

Remaining Claims

With plaintiffs' claims dwindling, the Court then substantively addressed those causes of action which survived *res judicata* and *standing*, i.e., the Equal Protection claims

regarding the CRL, unlawful enforcement of public speech laws and denial of police protection as well as the Establishment Clause claim regarding the Community Room Law.

In accordance with the standard for deciding motions to dismiss, the Court assumed all alleged facts as true and drew all reasonable inferences in plaintiffs' favor. Nonetheless, the Court opined that a complaint must have sufficient factual allegations on its face which state a plausible claim for relief and that arguments raised for the first time in opposition to a motion to dismiss cannot serve to supplement or save deficient pleadings. Applying this standard, the Court nonetheless, dismissed the remainder of plaintiffs' claims.

The Court found that plaintiffs had insufficiently pleaded their Equal Protection claims and dismissed same with prejudice because the plaintiffs failed to set forth how the defendants' actions were motivated by religious differences. Plaintiffs' counsel conceded the inadequacy of the pleadings during oral argument and the Court rejected the argument that the defendants' actions were motivated by the fundamental disagreement over who should rule the Congregation, as this argument was raised for the first time in opposition to the motion to dismiss. Interestingly, the Court found that the opposition arguments, even if considered, were insufficient to defeat the motions to dismiss because the plaintiffs had not adequately pled that the defendants' actions were motivated by an improper classification. In rendering its decision to this effect, the Court noted that the plaintiffs were previously denied a permit to demonstrate in front of the Grand Rebbe's house because the house was on a dead end street which also houses the Village's only ambulance service.

As to plaintiff's claims of conspiracy to violate the Equal Protection Clause, the Court found that the plaintiffs provided no factual basis to establish a "meeting of the minds" among the defendants with regard to violating the plaintiffs' equal protection under the law, as required. The Court deemed plaintiffs' "conclusory" allegations of conspiracy insufficient to survive the motions to dismiss.

The Court then dismissed plaintiffs' Establishment Clause claim regarding the CRL, but with leave to amend the defective pleadings. Again, the Court noted that the plaintiffs did not have standing because they were not personally harmed by this law and additionally held that the complaint, on its face, did not adequately assert an Establishment Clause violation under the ***Lemon*** Test.8 The Court noted that statute/practice passes ***Lemon***'s scrutiny if it (1) has a secular purpose; (2) neither advances nor prohibits religion and (3) does not foster excessive entanglement with religion. The Court emphasized that the Establishment Clause has never prohibited clergyman from also holding municipal/leadership positions and that plaintiffs here conceded that the CRL was neutral on its face. The Court, nonetheless, found that plaintiffs *could* adequately plead an Establishment Clause violation once the proper parties were named as plaintiffs, leaving this as the only claim to be dismissed *without prejudice*.

8 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).