State of New York
Court of Appeals

In the Matter of the Application of

DORA HOWELL,

Plaintiff-Respondent,

-against-

THE CITY OF NEW YORK, P.O. MOSELY LAWRENCE, P.O. MERAN,

Defendants-Appellants.

NOTICE OF MOTION FOR LEAVE TO APPEAL ON BEHALF OF PLAINTIFF-RESPONDENT WITH AFFIRMATION IN SUPPORT

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Supreme Court, Kings County, Index No. 23830/09
Appellate Division, Second Department, Docket No. 2018-08688

COURT OF APPEALS
STATE OF NEW YORK

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In the Matter of the Application of
DORA HOWELL,

Plaintiff-Appellant,

Kings County
Index No. 23830/09

App. Div., 2nd Dep't
Docket No.: 2018-08688

NOTICE OF MOTION BY PLAINTIFF-RESPONDENT FOR APPEAL

-against-

THE CITY OF NEW YORK, P.O. MOSELY-LAWRENCE, P.O. MERAN

Defendants-Appellants.

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COUNSELORS:

PLEASE TAKE NOTICE that upon the annexed affirmation of Gary N. Rawlins dated March 12, 2021, and the Exhibits 1 annexed hereto, the undersigned will move this Court at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on March 31, 2020, for an Order, pursuant to Rules 500.21 and 500.22 of the Court of Appeals Rules of Practice, granting permission to appeal to this Court from the Decision and Order of the Appellate Division, Second Department, dated February 10, 2021, and for such other and further relief as may be just and proper.

Answering papers, if any, must be served and filed in the Court of Appeals with proof of service in accordance with Rules 500.21 and 500.22 of the Court of Appeals Rules of Practice.

Dated: Brooklyn, New York
March 12, 2021

Yours, etc.

Rawlins Law, PLLC

/s/ Gary N. Rawlins

BY: Gary N. Rawlins
Attorney(s) for Plaintiff-Appellant
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AFFIRMATION OF SERVICE

State of New York
ss.:
County of Kings

I, the undersigned, an attorney duly admitted to practice in the State of New York, with offices at 777 Westchester Avenue, Suite 101, White Plains, New York, 10463, affirm as follows as under penalties of perjury:

On March 12, 2021, I personally caused to be served two copies of the within: NOTICE OF MOTION BY PLAINTIFF-RESPONDENT FOR PERMISSION TO APPEAL; AFFIRMATION IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL.

/XX/ **SERVICE BY PERSONAL DELIVERY BY OVERNIGHT MAIL:** by delivering two copies to the attorney(s) for the defendants-appellants. I knew the attorneys served to be the attorneys for the party(ies) stated below and by service by email at ServiceECF@law.nyc.gov and eravitch@law.nyc.gov .

JAMES E. JOHNSON
CORPORATION COUNSEL OF THE CITY OF NEW YORK
100 Church Street
New York, New York 10007

Dated: White Plains, New York
March 12, 2021

/s/ *Gary N. Rawlins*

Gary N. Rawlins

COURT OF APPEALS
STATE OF NEW YORK

----------X

In the Matter of the Application of
DORA HOWELL,

Plaintiff-Respondent,

-against-

THE CITY OF NEW YORK, P.O. MOSELY-LAWRENCE, P.O. MERAN,

Defendants-Appellants.

----------X

Kings County
Index No. 23830/09

App. Div., 2nd Dep't
Docket No.: 2018-08688

AFFIRMATION IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL

Gary N. Rawlins, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following to be true under penalties of perjury:

I am the principal of Rawlins Law, PLLC, counsel for the Plaintiff-Respondent (hereinafter "Plaintiff").

I respectfully submit this affirmation in support of the instant motion which seeks an Order, pursuant to CPLR 5602(a)(1)(i) and Rule 500.22 of the Rules of Procedure of this Honorable Court, granting the plaintiff permission to appeal from a Decision and Order of the Appellate Division,

Second Department (hereinafter "Appellate Division"), dated February 10, 2021 (see Notice of Entry dated February 10, 2021, which is annexed hereto as Exhibit "1"), which reversed the Decision and Order of the Supreme Court, Kings County (Hon. Reginald A. Boddie) dated April 27, 2018 (R[1]. 6).

As set forth below, this application is timely made and this Honorable Court has jurisdiction over the instant motion and the proposed appeal.

Procedural History of the Case

Plaintiff sued for personal injuries alleging that the City of New York and defendant officers (hereinafter the defendants) negligently failed to protect her and negligently hired, retained, trained and supervised the defendant officers.

On November 15, 2017, Defendants moved to dismiss the case arguing the plaintiff did not have a special relationship with the defendants. The defendants were not produced for deposition and discovery was not complete leading to Judge Boddie's denial of the motion with leave to renew upon the completion of discovery.

Defendants appealed. During the time the appeal was pending, deposition of Officer Meran was conducted on April 3, 2019. During that

[1] References to the Record on Appeal will be referred to herein as (R.__).

deposition Police Officer Meran testified that in cases involving an order of protection that is violated, an arrest is mandatory.

On February 10, 2021, the Appellate Division, Second Judicial Department reversed Judge Boddie's denial of summary judgment finding that no special relationship existed between the defendants and the plaintiff. Specifically the Court found that "the officers made no promise to arrest Gaskin, and the plaintiff could not justifiably rely on vague assurances by the officers that she would 'be okay' and that Gaskin [violator] would not be returning to the building where both he and the plaintiff lived." Citing *Cuffy v. City of New York*, 69 NY2d 255, 260 and *Axt v. Hyde Park Police Dept.*, 162 AD3d at 730. The Appellate Division also ruled that, "plaintiff's alternate contention that the defendants violated a statutory duty owed to her is without merit (see *Bawa v. City of New York,* 94 AD3d 926, 927)."

On September 18, 2009, the plaintiff filed a Summons and Complaint against the defendants, which was assigned the Index Number 23830-2009 (R. 92).

On October 1, 2009, the defendants served an Answer, with respect to the plaintiff's complaint (R. 100-109).

The defendant timely appealed Judge Boddie's denial of summary judgment dated April 27, 2018 to the Appellate Division, and by Decision and Order dated February 10, 2021 (annexed hereto as Exhibit(s) "1"), the Order of the Supreme Court dated April 27, 2018 was reversed.

On February 10, 2021, the defendants served Notice of Entry of the Appellate Division's 2/10/2021 Decision by regular mail, and said Notice of Entry was received on or about February 14, 2021 (see Exhibit "1").

No motion for permission to appeal has been made to the Appellate Division.

As such, pursuant to CPLR §5513(b), the instant motion is timely filed.

Jurisdiction

It is respectfully submitted that the Decision and Order of the Appellate Division dated February 10, 2021 is a final determination of the action, and is thus appealable pursuant to CPLR 5602(a)(1)(i).

Statement of the Questions Presented for Review and Why the Questions Presented Merit Review

1. The first question presented is as follows: Did the Appellate

Division err in reversing the Supreme Court's denial of the defendants' motion for summary judgment, with respect to the plaintiff's claims pending the completion of discovery?

The question presented merits review on the basis that a decision by the Appellate Division presents a conflict with prior decisions of the Court of Appeals regarding the applicable standard for the granting of summary judgment, specifically, that to grant summary judgment it must clearly appear that no material and triable issue of fact is presented.

The plaintiff contends that the record is replete with disputed facts sufficient to confirm that the plaintiff in fact raised a triable issue of fact, which the Appellate Division overlooked.

Specifically, the Court decided that a special relationship did not exist where the defendants who responded on three different occasions to plaintiff's calls informing them that the order of protection she had was being violated. Unlike the *Cuffy,* Plaintiff had a valid order of protection and the defendants were aware of it. Moreover, unlike *Cuffy*, the Plaintiff was told that if she called the police again she would be arrested. Under these circumstances, Plaintiff could reasonably rely on the officer's statements to her that, " he won't return", and that if she calls them again that she would be arrested. Plaintiff respectfully submits that a valid order of protection

presented to the responding officers who then directed the plaintiff where to go, informed her that the violator would not be coming back and informed her that she would be arrested if she called them again created a special relationship. Lastly, an issue of fact exists as to whether the defendants violated a statutory duty by failing to arrest the violator each of the three times the plaintiff called them. (Family Court Act § 812 (2)(f), Criminal Procedure Law § 140.10(1) and (4) and Criminal Procedure Law § 530.11) See, Devlin v. City of New York 2018 NY Slip Op 51568(U) (denying defendants' motion for summary judgment based on governmental immunity, discretionary functions and lack of special duty). The Appellate Court cited *Bawa* in concluding that her claim that a statutory duty was violated is without merit. However *Bawa* clearly states:

"[In] Valdez v City of New York (18 NY3d 69 [2011]), the Court of Appeals considered a claim by a woman who was shot by her estranged boyfriend, alleging negligent failure to provide adequate police protection. Noting that the provision of police protection is a classic governmental function, the Court stated that the case 'potentially implicate[d] two separate but well-established grounds for a municipality to secure dismissal of a tort claim brought against it by a private citizen injured by a third party' (id. at 75). The first ground upon which the municipality could be entitled to

dismissal was the lack of special duty owed to the injured party, beyond that owed to the public at large. The second ground was the defense of governmental function immunity, which 'shield[s] public entities from liability for discretionary actions taken during the performance of governmental functions,' even if the plaintiff is otherwise able to establish all the elements of a tort claim, including the existence of a duty owed to the injured party (id. at 76).' [W]hen both of these doctrines are asserted in a negligence case, the rule that emerges is that '[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general" (id. at 76-77, quoting McLean v City of New York, 12 NY3d 194, 203 [2009])."

At her deposition, P.O. Meran testified that she had a statutory duty to arrest the violator of an order of protection. That did not happen in this case. Reasonable people can agree that a "special duty" exists when: 1. two officers responded to calls for help related to a violated order of protection on three different occasions; 2. made promises to the domestic violence victim that she would be safe in her apartment and that the violator would be contained; and 3. that she will be arrested again if she called as they would be the ones answering the call. Discovery related to the identity of the uncle

in this case and why the officers were reluctant to arrest the violator remained outstanding. There is a special duty here and a statutory duty and for those reasons Plaintiff should have been allowed to complete discovery and have her day in Court.

CONCLUSION

Police officers must adhere to orders of protection from Courts. Orders of protection are always a matter of life or death. Responding to a domestic violence call where an order of protection is being violated on three different occasions and not arresting is a violation of a ministerial action. For all of the reasons set forth herein, and in the accompanying briefs and record, it is respectfully requested that the instant motion be granted.

Dated: Brooklyn, New York
March 12, 2020

Respectfully submitted,

Rawlins Law, PLLC

/s/ Gary N. Rawlins

BY: Gary Rawlins
Attorney(s) for Plaintiff-Respondent
777 Westchester Avenue, Suite 101
White Plains, New York 10604
(212) 926-0050

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D65462
T/htr

_____AD3d_____

Argued - November 13, 2020

CHERYL E. CHAMBERS, J.P.
HECTOR D. LASALLE
ANGELA G. IANNACCI
LINDA CHRISTOPHER, JJ.

2018-08688

DECISION & ORDER

Dora Howell, respondent, v City of New York, et al., appellants, et al., defendant.

(Index No. 23830/09)

James E. Johnson, Corporation Counsel, New York, NY (Fay Ng and Ellen Ravitch of counsel), for appellants.

Rawlins Law, PLLC, White Plains, NY (Gary N. Rawlins of counsel), for respondent.

In an action, inter alia, to recover damages for personal injuries, the defendants City of New York, P.O. Mosely-Lawrence, and P.O. Meran appeal from an order of the Supreme Court, Kings County (Reginald A. Boddie, J.), dated April 27, 2018. The order, in effect, denied that branch of those defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against them, and denied, as premature, that branch of those defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them.

ORDERED that the order is reversed, on the law, with costs, that branch of the motion of the defendants City of New York, P.O. Mosely-Lawrence, and P.O. Meran which was for summary judgment dismissing the complaint insofar as asserted against them is granted, and that branch of those defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against them is denied as academic.

In November 2008, the plaintiff was thrown out of a third-story window by Andre Gaskin, who was her former boyfriend and the father of her child. At the time of the incident, the plaintiff had an order of protection against Gaskin. Although the plaintiff and Gaskin were no longer in a relationship, they continued to reside in the same apartment building. The plaintiff lived on the

second floor, and Gaskin lived on the third floor.

In the days leading up to the incident, the defendant police officers Mosely-Lawrence and Meran (hereinafter together the officers) responded to several calls placed by the plaintiff in which the plaintiff stated that Gaskin was violating the order of protection.

On the first occasion, the officers assured the plaintiff that Gaskin would "be removed from the premises," that he "won't be returning," and that he would be staying with his uncle. The officers then waited outside the apartment building with Gaskin for the uncle to pick him up and the plaintiff saw Gaskin leave in the uncle's car.

On the second occasion, the plaintiff returned home to find Gaskin inside her apartment. She immediately called the police, and the officers again told the plaintiff they would "remove him from the premises," and that "he would not be coming back." The plaintiff saw the officers walk outside the building with Gaskin and saw Gaskin walk away, rounding the corner.

On the third occasion, Gaskin was back at the plaintiff's apartment, banging on her door with a pipe and breaking off one of the locks. The plaintiff again called the police, and Gaskin told the officers he had come back to pick up clothes. The officers asked the plaintiff why she did not move or stay somewhere else if this kept happening and threatened to arrest her if she called them again. The officers ordered Gaskin to go to his apartment upstairs and not come to the second floor, and assured the plaintiff that Gaskin would be leaving and that she would "be okay." That night, the plaintiff heard Gaskin stomping around and banging on the floor of his apartment, which was directly above the plaintiff's apartment.

At no time prior to the incident was Gaskin arrested. Also, at no time prior to the incident did the officers tell the plaintiff that they were going to arrest Gaskin.

On the date of the incident, Gaskin repeatedly called the plaintiff's phone. The plaintiff ignored most of his calls but eventually picked up and told him that she was at a friend's house nearby. Gaskin showed up at the friend's house and walked with the plaintiff back to their apartment building. Once inside, Gaskin dragged the plaintiff upstairs to his apartment and threw her out the third-story window.

The plaintiff commenced this action, inter alia, to recover damages for personal injuries against, among others, the City of New York and the officers (hereinafter collectively the defendants). The plaintiff alleged that the officers negligently failed to protect her, and asserted a cause of action against the City alleging negligent hiring, retention, training, and supervision. After issue was joined but prior to the completion of discovery, the defendants moved pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against them or, in the alternative, for summary judgment dismissing the complaint insofar as asserted against them. In opposition, the plaintiff contended that the motion was premature because the defendants had failed to produce the officers for depositions. By order dated April 27, 2018, the Supreme Court, in effect, denied that branch of the motion which was pursuant to CPLR 3211(a)(7) and denied, as premature, that branch of the motion which was for summary judgment. The defendants appeal.

Generally, "a municipality may not be held liable to a person injured by the breach of a duty owed to the general public, such as a duty to provide police protection" (*Etienne v New York City Police Dept.*, 37 AD3d 647, 649). "When a cause of action alleging negligence is asserted against a municipality, and the municipality is exercising a governmental function, the plaintiff must first demonstrate that the municipality owed a special duty to the injured person" (*Axt v Hyde Park Police Dept.*, 162 AD3d 728, 730; *see Valdez v City of New York*, 18 NY3d 69, 75). Such a special duty can arise, as relevant here, where the plaintiff belongs to a class for whose benefit a statute was enacted, or where the municipality voluntarily assumes a duty to the plaintiff beyond what is owed to the public generally (*see Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 426). A municipality will be held to have voluntarily assumed a duty or special relationship with a party where there is: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (*Cuffy v City of New York*, 69 NY2d 255, 260).

Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them by establishing that no special relationship existed between them and the plaintiff (*see id.* at 261). Specifically, the defendants established, prima facie, that the officers made no promise to arrest Gaskin, and the plaintiff could not justifiably rely on vague assurances by the officers that she would "be okay" and that Gaskin would not be returning to the building where both he and the plaintiff lived (*see Axt v Hyde Park Police Dept.*, 162 AD3d at 730).

In opposition to the defendants' prima facie showing, the plaintiff failed to raise a triable issue of fact, demonstrate how additional discovery may lead to relevant evidence, or establish that facts essential to opposing the motion were exclusively within the defendants' knowledge or control (*see* CPLR 3212[f]; *Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1034). The plaintiff's alternate contention that the defendants violated a statutory duty owed to her is without merit (*see Bawa v City of New York*, 94 AD3d 926, 927).

Accordingly, the Supreme Court should have granted that branch of the defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them.

In light of our determination, we need not reach the parties' remaining contentions.

CHAMBERS, J.P., LASALLE, IANNACCI and CHRISTOPHER, JJ., concur.

ENTER: Aprilanne Agostino

Aprilanne Agostino
Clerk of the Court

PLEASE TAKE NOTICE that an Order, of which the within is a copy, was duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the Second Judicial Department on February 10, 2021.

Dated: February 10, 2021

JAMES E. JOHNSON
Corporation Counsel
of the City of New York
Attorney for Appellants
100 Church Street
New York, New York 10007

By: Ellen Ravitch
ELLEN RAVITCH
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212-356-0851

To:

THE RAWLINS LAW FIRM, PLLC
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Kings County Clerk's Index No.: 23830/09
Appellate Division Case No.: 2018-08688

New York Supreme Court
Appellate Division Second Department

DORA HOWELL,
Plaintiff-Respondent,

-against-

THE CITY OF NEW YORK, et al.,

Defendants-Appellants.

APPELLATE DIVISION
ORDER AND NOTICE OF ENTRY

JAMES E. JOHNSON
Corporation Counsel
of the City of New York
Attorney for Appellants
100 Church Street
New York, New York 10007

Date and timely service of a copy of the within Order and Notice of Entry is hereby admitted.

New York, N.Y. _____, 2020

_____, Esq.

Attorney for _____

At a IAS Trial Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 27 day of April '11

Justice

Dora Howell
Plaintiff(s)

Cal. No. 23
Index No. 23830/09

- against -

The City of NY, PO Mosely
Lawrence, PO Meran, PO John Doe
Defendant(s)

The following papers numbered 1 to read on this motion

Papers Numbered

Notice of Motion - Order to Show Cause
and Affidavit (Affirmation) Annexed 1
Answering Affidavit (Affirmation)
Reply Affidavit (Affirmation)
Affidavit (Affirmation)
Pleadings - Exhibits
Stipulations - Minutes
Filed Papers

Defendants motion for Summary judgment/ dismissal of the Complaint is denied with leave to renew after completion of discovery.

Dated:

J.S.C.