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March 24, 2021

BY FIRST-CLASS MAIL

Hon. John P. Asiello
Chief Clerk and Legal Counsel to the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: *Howell v. City of New York*
Motion No. 2021-296

Dear Mr. Asiello:

On behalf of defendants, we write in opposition to plaintiff Dora Howell's motion, returnable April 5, 2021, for leave to appeal from the Appellate Division, Second Department's unanimous decision granting summary judgment to defendants. Howell makes no serious attempt to identify a leave-worthy issue. She simply claims that the Appellate Division misapplied the "standard for the granting of summary judgment" (Motion Aff. 5)—a naked plea for one-off error correction based on her misplaced disagreement with the Appellate Division's assessment of the record in this case. The motion should be denied.

BACKGROUND

Howell brought this action against the City of New York and two of its police officers, alleging that they failed to protect her from her ex-boyfriend, Andre Gaskin, who threw her out a window.

In 2008, Howell called the police several times to complain about Gaskin—who lived in the same building she did—violating an order of protection. Howell admitted that the police never said they would arrest Gaskin, nor did she think they had ever arrested him. She testified only that the first time she called, the police told her he would leave their building and stay with his uncle. The second time she called, the police told her he would leave and would not be coming back, though she was aware that he did the next day. On the occasion of her third call, the police told Gaskin to stay on his floor of the building and, according to Howell, told her that they would arrest her if she called again.

The day after Howell's third call to the police, Gaskin called her while she was at a friend's house. She answered the call and told Gaskin where she was. When Gaskin arrived at the friend's house, Howell willingly left with him to walk home to the building where they both lived. Once at their building, they entered together. Gaskin then dragged her upstairs to his apartment and threw her out a window.

REASONS TO DENY LEAVE

This Court should deny leave to appeal. Rather than establishing that this case merits this Court's review, Howell merely invites the Court to consider whether well-established legal standards were correctly applied to the particular facts in this case. Howell questions only whether the Appellate Division correctly determined that summary judgment was appropriate: she complains that the Appellate Division concluded there was no triable issue of fact, whereas she urges that there is. Ironically, while Howell claims the Appellate Division misapplied the summary judgment standard, it is the Appellate Division that actually corrected Supreme Court's error of refusing to grant summary judgment simply because discovery was not complete.

The Second Department properly determined that summary judgment should have been granted, because defendants established their prima facie entitlement to judgment as a matter of law and Howell failed to raise any issue of material fact. Despite Howell's contention that summary judgment was granted prematurely due to the fact that the officers' depositions had not yet been taken, the CPLR imposes no such limit. *See* CPLR 3212(a). Defendants established that no special duty existed as a matter of law and, as the Appellate Division noted, Howell failed to demonstrate how additional discovery may have led to any relevant evidence or established that any facts essential to opposing the motion were exclusively within defendants' knowledge or control. In these circumstances, summary judgment is authorized.

A. Special duty based on assumption and reliance

By Howell's own admissions, the police never said they planned on arresting Gaskin, and she knew that they had not arrested him. Moreover, on the day of the incident at issue, she answered his phone call, told him where she was, and left that location with him when he showed up. On these facts, whether or not she'd earlier thought the police would keep him away from her, on the day at issue she no longer could have believed that to be true, and her conduct that day clearly was not based upon the belief that he had been arrested or kept afar from her.

To the contrary, she affirmatively and of her own accord told him her location and left that location with him. She cannot now sincerely claim that her actions that day were taken in reliance on any representation by the police that Gaskin would be kept away from her and that her well-being was put in danger because of any such reliance. Given the facts as presented by Howell herself, she could establish neither that defendants assumed a duty to act on her behalf nor that her injuries resulted from her reliance on any such assumption of duty. *See Metz v. State of N.Y.*, 20 N.Y.3d 175, 180 (2012); *Curry v. City of N.Y.*, 69 N.Y.2d 255, 260 (1987).

B. Special duty based on statutory duty

Howell also asserts that a special duty arose from a statutory duty to arrest Gaskin, upon her presentation of a valid order of protection to the officers. Again, Howell does not suggest a reason warranting this Court's review other than her disagreement with the Appellate Division's assessment of the facts. In addition, the contention that the City violated a statutory duty was improperly raised for the first time on appeal to the Appellate Division and, thus, should not be addressed. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State*, 75 N.Y.2d 175, 188 (1989).

Moreover, Howell cannot establish injury based on a statutory duty, because she cannot establish that the statute here in question authorized a private right of action, as it must. *McLean v. City of N.Y.*, 12 N.Y.3d 194, 200 (2009); *Pelaez v. Seide*, 2 N.Y.3d 186, 200 (2004). Howell bases her argument on CPL § 140.10(4)(b), which requires a warrantless arrest based on the existence of an order of protection in certain circumstances.[1] That statute, however, "gives no hint of any private enforcement remedy for money damages." *McLean*, 12 N.Y.3d at 201; *see Bawa v. City of N.Y.*, 94 A.D.3d 926, 927 (2d Dep't 2012).

Even if Howell could establish a duty running directly to her based on the violation of CPL § 140.10(4)(b) and the authorization of a private right of action, she could not establish that any failure to comply with that duty was the proximate cause of her injuries. As before, on the day Gaskin threw her out his window, Howell had first voluntarily informed him of her location and then accompanied him home to t

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[1] Howell references the deposition testimony of defendant P.O. Meran, which was taken after submission of the summary judgment motion that is the subject of this appeal, and that she stated that an arrest of a violator of a valid order of protection is required (Motion Aff. 2-3). Citing P.O. Meran's deposition is improper, because it is outside of the record here, but it also is unhelpful to Howell as to either (1) establishing that the fact that depositions were outstanding indicates that summary judgment was improperly granted or (2) establishing that there was a statutory duty that could serve as the basis of a violation of a special duty. It is the statute itself, and not the testimony of the defendant, that would establish whether a statutory duty existed for purposes of establishing a special duty.

building where they both lived, with full knowledge that the police had not arrested him. That alone defeats any claim that there is a causative link between any special duty and the alleged injury.

Even setting aside that Howell's case-specific objections raised below and here are without merit and that the Appellate Division decision was properly made (*see generally* Resp. Br. at 12-29; Reply Br. at 2-7), the motion raises no issue warranting review. 22 NYCRR § 500.22(b)(4).

CONCLUSION

This Court should deny Howell's motion for leave to appeal.

Respectfully submitted,

Ellen Ravitch

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Senior Counsel
Appeals Division

Cc:

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AFFIRMATION OF SERVICE BY MAIL

I, ELLEN RAVITCH, an attorney admitted to practice in the courts of this state, affirm, under the penalty of perjury, that the foregoing is true and correct:

On March 24, 2021, I served a copy of defendants' letter in opposition to plaintiff's motion for leave to appeal from the decision of the Appellate Division, Second Department, entered February 10, 2021, on Rawlins Law, PLLC, the attorneys for plaintiff, at 777 Westchester Avenue, Suite #101, White Plains, NY 10604, by depositing a copy of the same, enclosed in a first class postpaid properly addressed wrapper, in a post office/official depository under the exclusive care and custody of the United States Postal Service, within the State of New York, directed to said attorneys at the aforementioned address, being the address designated by said attorneys for that purpose.

March 24, 2021
New York, New York

Ellen Ravitch

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