SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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ELAINE SUTTON, as Executor of the Estate of HENRY PIOTROWKSI, deceased,	**Part C2**
Plaintiff,	**Present:**
	HON. THOMAS P. ALIOTTA
-against-	**DECISION AND ORDER**
THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT and NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,	**Index No. 102267/09**
Defendants.	**Motion No. 770-003**

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The following papers numbered 1 to 3 were marked fully submitted on the 6th day of June, 2012.

	Papers Numbered
Notice of Motion by Defendants, with Supporting Papers and Exhibits (dated March 8, 2012)	1
Affirmation in Opposition by Plaintiff, with Supporting Papers and Exhibits (dated May 30, 2012)	2
Reply Affirmation in Further Support of Motion (dated June 5, 2012)	3

Upon the foregoing papers, the motion by defendants the City of New York (hereinafter the "City"), the New York City Police Department (hereinafter "NYPD") and the New York City Department of Health and Mental Hygiene (hereinafter "DOH") for summary judgment and dismissal of the complaint is granted, and the complaint is dismissed.

This is an action to recover damages for personal injuries and the subsequent wrongful death of Henry Piotrowski following an

attack by two pit bulls on July 1, 2008. The dogs in question were owned by defendants James McNair and Kim DePalma, against whom criminal charges were preferred[1]. Decedent's injuries required his hospitalization from the date of the attack until he succumbed to those injuries on August 17, 2008. It is undisputed that decedent was ninety-years old at the time of his death and that decedent's neighbors had made nine complaints to the Police Emergency Notification ("911") system about unleashed dogs roaming in the vicinity of decedent's home at 94 John Street on Staten Island, during the three-month period preceding the attack (*see* Defendants' Exhibit "C"). These were the same dogs that eventually mauled the decedent.

Plaintiff, decedent's niece and the Executrix of his Estate, subsequently commenced this action against the City alleging that (1) the NYPD and DOH were negligent in not adequately responding to the prior complaints made by decedents neighbors; and (2) their inaction violated, respectively, both Agricultural and Markets Law § 121 and New York City Administrative Code sections 17-345 and 17-349.

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[1]Both of these defendants eventually pled guilty to the crimes of Reckless Felony Assault and Manslaughter in the Second Degree as a result of this incident (*see* Certificates of Disposition , Defendants' Exhibit "B")

Defendants move to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) or, in the alternative, for summary judgment.

A motion to dismiss pursuant to CPLR 3211(a)(7) will fail "if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34, 38). When addressing such a motion, the Court must also accord the same benefit to the allegations in plaintiff's submissions in opposition to the motion and in determining "whether the facts as alleged fit within any cognizable legal theory" (Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 414). As this is the only question presented by such a motion, the Court concludes in conformity with these principles that the complaint and plaintiff's opposing papers and exhibits (*see e.g.* Plaintiff's Exhibit "D"), when viewed in conjunction, are legally sufficient to state a cause of action against these defendants.

Turning to defendants' motion for summary judgment pursuant to CPLR 3212, it is axiomatic that "a municipality is immune from negligence claims arising out of the performance of its governmental functions unless the injured person establishes a

special relationship with the municipality which would create a special duty of protection with respect to that individual" (Gotlin v. City of New York, 90 AD3d 605, 607; *see* Joline v. City of New York, 32 AD3d 492, 494). The well-established elements required to prove the existence of a special relationship are "(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; Etienne v New York City Police Dept., 37 AD3d 647, 649 [absent a special relationship, a municipality may not held liable for injuries caused by the breach of a duty owed to the public at large, *e.g.*, to provide police protection]).

Recently, in Valdez v City of New York (18 NY3d 69), the Court of Appeals considered a claim based upon an alleged negligent failure to provide adequate police protection to a woman who was eventually shot by her estranged boyfriend. Noting that the provision of police protection is a classic governmental function, the Court noted that the facts of 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, said the Court, relates to the plaintiff's ability to prove that the duty owed to the injured party was beyond that owed to the public at large. The second was observed to relate to the municipality's assertion of the defense of "governmental function immunity", which operates to "shield public entities from liability for discretionary actions taken during the performance of governmental functions" (*id.* at 76), and notwithstanding plaintiff's ability to establish all of the elements of the tort claim, including the existence of a special duty (*id.* at 76). Purporting to distill the import of some of its earlier cases, the Court observed that "[w]hen both of these doctrines are asserted in a negligence case, the rule that emerges is that government 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 [internal quotation marks omitted]). In so doing, the Court quoted from another of its recent cases, McLean v City of New York (12 NY3d 194, 203) Although, the existence of a special relationship depends upon the facts of the particular case,

it appears that plaintiff's burden of proof on the issue will always be significant (*see e.g.* Lauer v City of New York, 95 NY2d 95).

At bar, despite plaintiff's insistence that a "special relationship" existed between the decedent and the municipality, there is no basis either in law or fact to support this argument. Applying the standards set forth in Cuffy v City of New York (69 NY2D 255, *supra*), plaintiff has failed to show, through promises or actions, the assumption of any affirmative duty on the part of the City to act specifically on behalf of plaintiff's deceased. To the contrary, since the "911" calls about the alleged danger presented by the unrestrained dogs were indisputedly made by decedent's neighbors and the second cousin of a niece, rather than by decedent himself or a member of his immediate household, there was clearly no "direct contact" between the municipality's agents and the decedent (*see* D'Ambria v. DiDonna, 305 AD2d 958, 960).

While this might suffice to end our inquiry, plaintiff has also failed to present any evidence in opposition to the motion sufficient to raise a triable issue as to whether some "affirmative act" was taken or promised by the municipality for the exclusive benefit of the deceased upon which he justifiably relied for his safety, thereby lulling him into a false sense of security (*see*

Smullen v City of New York, 28 NY2d 66, 71-73; Zimmerman v City of New York, 74 AD3d 439; Buder v City of New York, 43 AD3d 720).

In this regard, the Court rejects as misguided plaintiff's reliance upon Joline v. City of New York (32 AD3d 492) and Fonville v. New York City Health & Hosp. Corp. (300 AD2d 623) as authority for the proposition that a triable issue of fact has been raised regarding the City's non-feasance *i.e.*, its failure to act reasonably in response to a known hazard. In each of the above cases, it was undisputed that municipal employees undertook affirmative measures to save the lives of the individual decedents to whom they were specifically directed for the provision of medical assistance. As such, issues of fact clearly existed as to whether their conduct was sufficient to create a "special relationship" with the aided under the elements delineated in Cuffy, or whether, after deciding to render aid, they acted with due care.

Moreover, plaintiff has failed to establish a "special relationship" through the purported breach of the statutory duties enumerated in Agricultural and Markets Law § 121 and/or New York City Administrative Code §§ 17-345 and 17-349 (*see* Plaintiff's Exhibit "D"). Here, too, it is well settled that in the absence of "a special relationship creating a municipal duty to exercise care

for the benefit of a particular class of individuals, no liability may be imposed upon a municipality for [its] failure to enforce a statute or regulation" (Sanchez v Village of Liberty, 42 NY2d 876, 877-878). As noted in McLean v City of New York (12 NY3d 194, 200, quoting Pelaez v Seide, 2 NY3d 186, 200), in order to form a special relationship through the breach of a statutory duty "the governing statute must authorize a private right of action ... [o]ne [of which] may be fairly implied when (1) the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) recognition of a private right of action would promote the legislative purpose of the governing statute; and (3) to do so would be consistent with the legislative scheme. If one of these prerequisites is lacking, the claim will fail" (*id.*).

Here, a careful reading of each of the statutes and ordinances relied upon by plaintiff indicates that they are essentially regulatory and self-executing in nature, and that the fines and administrative sanctions therein provided are, by statute, stated to be in addition to "any claim or cause of action any person who is injured by a dog with a vicious disposition or ... propensity may have under common law" or otherwise (Agricultural and Markets Law §121[12]. Hence, the recognition of an additional private

right of action would be inconsistent with the legislative scheme underlying each.

Consistent with and prior to the holding in Valdez (18 NY3d 69 [2011]), the Court of Appeals had observed that:

> "Government 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. ... Thus, [absent the finding of a special relationship or duty] there [can] be no liability, whether the actions at issue were characterized as ministerial or discretionary" (McLean v City of New York, 12 NY3d 194, 203 [2009]),

Equally valid today, this Court is well aware of the longstanding principle that the touchstone of the "special duty" requirement is that the government has undertaken to go above and beyond the duty it owes to the general public by creating a unique relationship between itself and a plaintiff upon which the latter was entitled to rely (*see also* Dinardo v City of New York, 13 NY3d 872, 877 [2009] [Lippmann, J. concurring]).

Here, notwithstanding its disastrous consequences for the deceased and his family, this Court must be mindful of legal precedent as well as the future consequences of each of its decisions in every case that comes before it. As recognized long ago by our Court of Appeals, "[w]hile it may seem that there should

be a remedy for every wrong, this is an ideal [necessarily] limited by the realities of this world. Every injury has ramifying consequences ... without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree" (Tobin v Grossman, 24 NY2d 609, 619 [1969]). And so in this case, strong legal precedent compels the conclusion that plaintiff has failed to raise a triable issue of fact on the issue of "special duty", *i.e.*, that a special relationship was created by direct contact between the municipal defendants and plaintiff's deceased that was unique to the latter. The undisputed facts are clearly to the contrary (*see e.g.* Bihn v Munch, 200 AD2d 700).

On the other hand, to hold, as plaintiff would have it, that direct contact with a third-party, be it a neighbor or the "second cousin of decedent's niece", is sufficient to create a "special relationship" would unacceptably dilute the longstanding rules affecting governmental immunity, and with it represent a fundamental change in the law with such far-reaching ramifications as to require legislative action. For good or ill, the current exceptions to the principle of sovereign immunity are retracted to a few "special" cases of which this is not one (*see* Latraro v City of New York, 8 NY3d 79).

In the absence of any triable issue on the question of "special duty", it is not necessary for this Court to decide whether or not the purported non-feasance at bar constituted a ministerial failure or an exercise of discretion.

Accordingly, it is hereby

ORDERED that defendants' motion is granted and the complaint dismissed; and it is further

ORDERED that the Clerk enter judgment accordingly

E N T E R,

___/s/________________________________
Hon. Thomas P. Aliotta
J.S.C.

Dated: August 13, 2012