



cannot be held liable in this matter involving a governmental function because it did not owe a special duty to Matthew Connolly upon which the injured plaintiff relied to his detriment.

A municipality cannot be held liable for the negligent performance of a governmental function, such as the provision of police protection to members of the general public, unless the injured party had a special relationship with the municipality by which the municipality assumed an affirmative duty to act on behalf of that individual. (*See, Laratro v City of New York*, 8 NY3d 79, 82-83 [2006]; *Cuffy v City of New York*, 69 NY2d 255, 260 [1987]; *Miller v State of New York*, 62 NY2d 506 [1984].) No such special relationship has been alleged by plaintiffs or demonstrated in the record. While acting in a proprietary capacity as a property owner or landlord, however, a municipality owes the same duty to maintain its property as a private landowner. (*See, Miller*, 62 NY2d at 511, 513.) In its proprietary capacity, therefore, a municipality has a duty to maintain its park in a reasonably safe condition, including not only physical maintenance but also the prevention of ultrahazardous and criminal activity of which it has knowledge. (*See, Solomon v City of New York*, 66 NY2d 1026 [1985]; *Benjamin v City of New York*, 64 NY2d 44, 46 [1984]; *Rhabb v New York City Hous. Auth.*, 41 NY2d 200, 202 [1976]; *Nicholson v Board of Educ. of City of N.Y.*, 36 NY2d 798, 799 [1975].)

In this instance, the City acted in a proprietary capacity as the owner of the park but also in a governmental capacity by undertaking to provide for the protection and safety of the general public. (*See, Sebastian v State of New York*, 93 NY2d 790, 793-794 [1999]; *Miller*, 62 NY2d at 511-512; *see, e.g., Solomon*, 66 NY2d at 1027-1028.) Its liability is dependent upon the specific act or omission out of which the injury is alleged to have arisen and the capacity in which that conduct occurred. (*See, Sebastian*, 93 NY2d at 794; *Miller*, 62 NY2d at 513; *Weiner v Metropolitan Transp. Auth.*, 55 NY2d 175, 182 [1982].) To the extent plaintiffs' complaint is premised on the City's alleged failure to enforce the regulations prohibiting unleashed dogs in City parks except in designated parks or designated areas of a park between the hours of 9:00 P.M. and 9:00 A.M. (Rules of City of NY Dept of Parks and Recreation [56 RCNY] § 1-04[i][1],[2]), it is insufficient as a matter of law and the City is awarded partial summary judgment dismissing that claim and any cross claim based on it. By promulgating and enforcing these regulations intended for the protection of the general public, the City did not assume a special relationship with the injured plaintiff that carried with it a special duty to protect him from the prohibited activity. (*See, Solomon*, 66 NY2d at 1028; *Marino v State of New York*, 16 AD3d 386 [2005].)

To the extent the complaint seeks recovery based on the City's breach of its duty to maintain its park in a reasonably safe condition by preventing an allegedly ultrahazardous activity of which it had knowledge, however, the motion is denied. (*See generally, Rhabb*, 41 NY2d at 202-203.) The City has failed to meet its burden of making a prima facie

showing of entitlement to judgment as a matter of law in this respect, thus precluding summary judgment without regard to the sufficiency of the opposition papers. (*See, Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *David v Bryon*, 56 AD3d 413 [2008].)

Dated: June 19, 2009

---

J.S.C.