

White v City of New York

2003 NY Slip Op 30093(U)

September 18, 2003

Supreme Court, New York County

Docket Number:

Judge: Martin Shulman

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OF THE STATE OF NEW YORK — NEW

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

----- X
ANTHONY WHITE,

Plaintiff,

-against-

Index No.: 114916/97

**Decision, Order and
Judgment**

THE CITY OF NEW YORK,

Defendant.

----- X

HON. MARTIN SHULMAN, J.S.C.:

Defendant, City of New York (“defendant” or “CITY”), moves pursuant to CPLR §4404(a) for a judgment notwithstanding the verdict rendered on February 19, 2003¹ in favor of plaintiff, Anthony White (“plaintiff” or “White”) due to plaintiffs failure to prove a *prima facie* case and dismissing White’s claims as a matter of law and/or to set aside the jury’s verdict on the ground that it is against the weight of the credible evidence. White opposes the motion.

The jury returned a verdict against the CITY finding that the actions of Barry Thomas² (“Thomas”) were within the scope of his employment as a New York City

¹ Normally, a motion to challenge a jury verdict pursuant to CPLR §4404(a) is governed by the 15-day time limit of CPLR §4405. This Court permitted the parties to stipulate to extend the time for the parties to present written arguments. See, “(CPLR 2004; see, 4 Weinstein-Korn-Miller, NY Civ Prac para. 4405.05)...” Brown v. Two Exchange Plaza Partners, 146A.D.2d 129, 539 N.Y.S.2d 889 (1st Dept., 1989).

² Prior to opening statements to the jury, it was initially stipulated to, and then ordered, that the caption be amended to eliminate Thomas as a co-defendant as he was no longer a party in this case. (*see*, Trial Transcript, February 13, 2003, p.7, lines 5-11, as Exhibit C to motion) The court ruling fully preserved the CITY’s right to name Thomas in various interrogatories on the special verdict sheet.

Police Officer and awarded White the sum of \$80,000 for pain and suffering caused by Thomas' unlawful detention of White, \$20,000 for pain and suffering caused by Thomas' battery, \$5536.06 for medical expenses and \$8,948.03 for White's lost earnings (see, Exhibit B to motion).

The Trial Record³

This action arises from an encounter between White and Thomas on the Triborough Bridge⁴ Bronx Toll Plaza on February 6, 1997 White, a driver for Airborne Express, (an air express and nationwide ground delivery company), had loaded his van with packages and was expected to proceed with his delivery route in the South Bronx. The traffic conditions were rather congested. As White was approaching the toll booth, he noticed another vehicle cutting in front of him and the driver gesturing with fingers (February 13, 2003 Tr., p.31, lines15-24).

After paying the toll and progressing towards the first exit, White noticed the driver of the vehicle which preceded him at the toll booth directing him to pull over to the right side of the roadway. Plaintiff did so and parked his van several feet in front of the other vehicle. The non-uniformed driver using expletives identified himself as a New York City Police Officer, demanded that plaintiff roll down his window, then reached in

³ For a proper consideration of the issue of whether the jury verdict against the CITY should be set aside, this Court refers to the relevant factual history gleaned from the trial transcripts and/or portions of deposition transcripts read into the trial record ("Tr.") (Exhibit C to motion).

⁴ The Triborough Bridge consists of three bridges, a viaduct, and 14 miles of access roadways connecting Manhattan, Queens, and the Bronx. In particular, the Bronx Crossing leads to locations north through the Bruckner and Deegan Expressways and to the South Bronx and the Port Morris Industrial Area.

to the van and forcibly opened the locked door (February 13, 2003 Tr., p.35, lines 2-11). Plaintiff, still wearing a seat belt, reached for the microphone attached to a two-way radio to contact his dispatcher and the driver then pushed him towards the passenger side of the front seat and pistol whipped him about his head 5-6 times (February 13, 2003 Tr., p.36, lines 9-23). As a N.Y.C. Department of Corrections van pulled up to plaintiffs van with the siren blaring to attract the Triborough Bridge and Tunnel Authority ("TBTA) police officers, the driver publicly identified himself as a police officer to those officers and presented his shield, grabbed plaintiff from the van, threw him on the ground and restrained White by placing his knee on plaintiffs back (February 13, 2003 Tr., p.37, lines 9-24).

Immediately thereafter, TBTA officers approached White and the driver and the latter got off plaintiffs back and walked away. In interviewing these two individuals, it was learned that the driver was Thomas, an officer of the New York City Police Department ("NYPD"), who was off duty and traveling with his fiancée in his personal vehicle, a Pathfinder, to Philadelphia, Pennsylvania for a closing (February 18, 2003 Tr. p.191, lines 3-25). Thomas claimed that when he approached the van and ordered White to unlock the door, he was acting, and furthering his duties, as a police officer in effectuating White's arrest (February 18, 2003 Tr., p.179, lines 21-25, p. 180, lines 9-13), because he observed plaintiff "about commit a crime or had [sic] who had committed a crime and criminally possessing a weapon..." (February 18, 2003 Tr., p.180, lines 15-18). Notwithstanding Thomas' self-perceived suspicions, the vehicles had never come into contact with each other and White was never charged with committing any traffic infraction.

When questioned, White advised that Thomas accused him of cutting the latter off while crossing the Triborough Bridge, jumped on plaintiff in his van and struck plaintiff with his gun about the left side of his face and temple (February 13, 2003 Tr., p.41, lines 9-17). After the assault, Thomas then approached White and attempted to apologize for “losing his cool” (February 13, 2003 Tr. p.80, lines 12-20). A TBTA officer who had observed Thomas with a gun in his waistband, relieved Thomas of his weapon, unloaded same and turned it over to his then superior officer (February 18, 2003 Tr., p.157, lines 7-14).

White was initially transported to a Queens Police Precinct and then to the 25th Precinct located in Harlem (where he was photographed and questioned both off and on the record). While the interviewing officers treated plaintiff well, White claimed “off the record” discussions ensued to convince plaintiff not to file a complaint against Thomas for false arrest and battery. It was during this questioning that plaintiff learned who Thomas was and that he held the rank of Sargeant with the NYPD (February 13, 2003 Tr., p.52, lines 12-14). After a number of hours in the lock-up, White eventually signed a Desk Appearance Ticket (Plaintiffs Exhibit 3) charging him with assaulting Thomas⁵ (but not charging plaintiff with possession of a weapon or a moving violation [see, discussion, *infra*]), and White was released during the early evening hours. Interestingly, White was never handcuffed during this entire ordeal (February 13, 2003

⁵ Thomas alleged that White bit his thumb during the scuffle in the van and White countered that if Thomas' thumb was injured, it was self- inflicted when he assaulted him (see, February 13, 2003 Tr. p.49, lines 6-19). In any event, White was charged with Assault in the third degree, a class A misdemeanor and not Assault in the second degree, a class D felony (causing injury to a police officer) (see, February 18, 2003 Tr., p.188, lines 7-25. p. 189, line 3).

Tr., p.95, lines 13-17).

White and his retained counsel had one meeting with an Assistant District Attorney and were advised that the criminal complaint against White had been dismissed (February 13, 2003 Tr., p. 96, lines 22-25, p.97, line 2).

Inspector Neil Spadarso, then a Captain and the Commanding Officer of the 25th Precinct made the decision to arrest Thomas, who was charged with Assault in the second degree and suspended him (February 19, 2003 Tr., p.241, lines 24-25, p.242, lines 2-10). Thomas was eventually arraigned and released on his own recognizance (February 18, 2003 Tr., p.195, lines 3-18). Inspector Spadarso also disapproved Thomas' Line of Duty Injury Report (Defendant's Exhibit C) because "...Line of Duty Injury Reports are for uniformed officers when they're injured taking police action...the Sargeant [Thomas] was not taking police action." (February 19, 2003 Tr., p.249, lines 5-17).

Discussion

"A court may set aside a jury verdict and grant judgment as a matter of law to the losing party only where 'there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial' (*Cohen v. Hallmark Cards*, 45 NY2d 493, 499) ..." Brewster v. Prince Apts., Inc., 264 A.D.2d 611, 695 N.Y.S.2d 315 (1st Dept., 1999); see also, Smolinsky v. 46 Rampasture Owners, 230 A.D.2d 620, 646 N.Y.S.2d 110 (1st Dept., 1996); and Niewieroski v National Cleaning Contractors, 126 A.D.2d 424, 425, 510 N.Y.S.2d 127 (1st Dept., 1987). Upon the court's review of the trial record, it must construe the evidence in the light most favorable to the non-moving party

(see, Mirand v City of New York, 84 N.Y.2d 44, 50, 614 N.Y.S.2d 372 [1994]).

Restating the latter standard more broadly:

To be entitled to a judgment as a matter of law, the defendant must demonstrate that the plaintiff failed to make out a prima facie case; the plaintiff's evidence must be accepted as true, and the plaintiff must be given the benefit of every favorable inference which can reasonably be drawn from the evidence (*Windisch v Weiman*, 161 AD2d 433, 437). The motion should be granted only if there is no rational process by which the jury could find for plaintiff as against the moving defendant (*supra*, at 437; *Harding v Noble Taxi Corp.*, *supra*, at 369).

Campbell v. Rogers & Wells, 218 A.D.2d 576, 631 N.Y.S.2d 6 (1st Dept., 1995).

Under a different standard, “[w]hile the trial court has the power to set aside the jury’s verdict if contrary to the weight of the evidence (CPLR 4404 [a]), the court must first conclude ‘that the jury could not have reached its verdict on any fair interpretation of the evidence’ (*Delgado v Board of Educ.*, 65 AD2d 547, *affd* 48 NY2d 643)...”

Wiseberq v. Douglas Elliman-Gibbons & Ives, 224 A.D.2d 361, 638 N.Y.S.2d 82 (1st Dept., 1996). In this context, the court’s analysis will not involve a question of law, but rather will require a discretionary balancing of many factors. See, Nicastro v. Park, 113 A.D.2d 129, 495 N.Y.S.2d 184 (2nd Dept., 1985). Thus, the trial court may not set aside the jury verdict “merely because it disagrees with the result. Its power in this area must be exercised with caution since, in the absence of an indication that substantial justice has not been done, a litigant is entitled to the benefit of a favorable verdict. Fact-finding is within the province of the jury, not the trial court...” Brown v. Taylor, 221 A.D.2d 208, 209, 633 N.Y.S.2d 170, 171 (1st Dept., 1995).

It is well settled that an employer will only be liable for an employee’s actions if

the latter acted in furthering the employer's business and the employer exercised, or could have exercised some control, directly or indirectly, over the employee's activities (Lundberg v. State of New York, 25 N.Y.2d 467, 306 N.Y.S.2d 947 [1969]). The Appellate Division, First Department refined this scope of employment rule:

Regardless of the way the rule is phrased, an employee's actions are not within the scope of employment unless the purpose in performing such actions is to further the employer's interest, or to carry out duties incumbent upon the employee in furthering the employer's business. Thus, where an employee's conduct is brought on by a matter wholly personal in nature, the source of which is not job related, his actions cannot be said to fall within the scope of his employment ...

Stavitz v. City of New York, 98 A.D.2d 529, 531, 471 N.Y.S.2d 272, 274 (1st Dept., 1984) (City of New York not liable for off-duty police officer's assaultive conduct against neighbors). See also, Davis v. City of New York, 226 A.D.2d 271, 641 N.Y.S.2d 275 (1st Dept., 1996), *lv. den.*, 88 N.Y.2d 815, 651 N.Y.S.2d 17 (1996) (City of New York not liable when off duty corrections officer personally motivated to arrest plaintiff for purportedly cutting in front of him on line at a McDonald's restaurant); and Pekarsky v. City of New York, 240 A.D.2d 645, 659 N.Y.S.2d 496 (2nd Dept., 1997), *lv. den.*, 91 N.Y.2d 806, 669 N.Y.S.2d 1 (1998) (jury verdict against the City of New York reversed because the actions of the off duty officer in causing the wrongful death of the decedent plaintiff⁶ were not within the scope of his employment within the NYPD).

⁶ The facts in Pekarsky are strikingly similar to this case, albeit without a fatal outcome. An off duty police officer, on vacation, got into a minor traffic accident with the decedent-plaintiff. The officer got out of his vehicle to inspect the damage and walked over to the plaintiff's vehicle. When the officer saw the plaintiff reach under his seat, he believed the plaintiff was trying to get a weapon. The defendant identified himself as a police officer flashed his shield and drew his weapon. The plaintiff then got out of his vehicle and apparently

“The applicability of this doctrine, and the question of whether a particular act falls within the scope of the servant’s employment, depends heavily on the facts and circumstances of each particular case and as a result, the determination of that question is normally left to the trier of fact [citations omitted].” Schilt v. New York City Transit Authority, et al., 304 A.D.2d 189, 759 N.Y.S.2d 10 (1st Dept., 2003).

After a careful analysis of the trial record, this Court ineluctably finds that no rational person could conclude that Thomas’ actions in detaining White on the Triborough Bridge Bronx Toll Plaza and assaulting plaintiff with his service revolver were in furtherance of any police business. Contrarily, he was driven by his ego and an immediate animus against White for allegedly cutting his vehicle off on the Triborough Bridge. Interestingly, Thomas never wrote any summons for a moving violation for such alleged driving misconduct (*i.e.*, unsafe lane change⁷).

At best, *to off* set his exposure for his assaultive behavior, Thomas filed a cross-complaint against White for allegedly biting his thumb (February 13, 2003 Tr., p.93, lines 19-25, p.94, lines 2-10) while the latter was being beaten about the head with his gun— a wholly unsubstantiated charge which was summarily dismissed.

The fact that Thomas masked his rage at White by indicating he was a police

charged at the officer brandishing a tire iron. The officer shot at the decedent-plaintiff and killed him.

⁷ VTL §1128 (a) state: “A vehicle shall be driven as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.” If a motorist cuts off another vehicle, that motorist maneuvering the unsafe lane change can be charged and convicted of violating this traffic infraction. See, People v. Trembling, 298 A.D.2d 890, 748 N.Y.S.2d 631 (4th Dept., 2002).

officer and drawing his weapon as he approached White's van does not render his conduct lawful and within the scope of his employment. See, Turk v. McCarthy, 661 F. Supp. 1526 (E.D.N.Y., 1987). Significantly, "[t]he fact that a police officer uses, or abuses, his authority may be relevant in deciding whether he was acting under color of state law. It is not relevant, however, in determining whether the actions taken were within the scope of employment..." Mahmood v. City of New York, 2003 U.S. Dist. LEXIS 7745 (S.D.N.Y., May 6, 2003, Scheindlin, J.). More to the point, Thomas' production of a shield and public declaration to the N.Y.C. Department of Correction Officers and the TBTA officers of his efforts to arrest White simply do not cause liability to attach to the CITY. Rather, White's legitimate grievances can only be placed at Thomas' doorstep.

"[A]s a matter of law the quality and quantity of the evidence was such that reasonable minds could not differ and...the only rational conclusion to be reached was one in favor of defendant." Febesh, et al., v. Elcejay Inn Corp., 157 A.D.2d 102, 105, 555 N.Y.S.2d 46, 48 (1st Dept., 1990). Stated more precisely, "[t]here is no rational process by which a properly-instructed jury could have concluded that the defendant was vicariously liable for the [unlawful detention]... or batteries ...committed by [Thomas]..." (bracketed matter added). Farkas v. City of New York, 242 A.D.2d 597, 599, 662 N.Y.S.2d 558, 559 (2nd Dept., 1997). Accordingly, this Court grants the CITY's post-verdict motion pursuant to CPLR §4404(a) for a judgment of dismissal notwithstanding the verdict.

This constitutes the decision, order and judgment of this Court. Courtesy copies of this decision, order and judgment have been sent to the parties' counsel.

DATED: New York, New York
September 18, 2003



HON. MARTIN SHULMAN, J.S.C.