

Canzoneri v City of New York

2007 NY Slip Op 30330(U)

February 13, 2007

Supreme Court, Queens County

Docket Number: 0004379

Judge: Augustus C. Agate

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

-----X

ROBERT CANZONERI and CATHY CANZONERI,

Index No.: 4379-05

Plaintiffs,

Motion Dated:
January 16, 2007

-against-

Cal. No.: 8

THE CITY OF NEW YORK AND C.A.C. INDUSTRIES
INC.,

Defendants.

-----X

The following papers numbered 1 to 9 read on this motion by defendant The City of New York for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 4
Answering Affidavits - Exhibits	5 - 7
Reply Affidavits	8 - 9
Defendant City of New York's Memorandum of Law	
Plaintiff's Memorandum of Law	

Upon the foregoing papers it is ordered that this motion by defendant City of New York is decided as follows:

Plaintiff Robert Canzoneri, a New York City firefighter allegedly sustained serious injuries on May 28, 2004 at approximately 2:00 P.M. when the fire truck in which he was riding struck a construction plate located in the roadway at the intersection of Beach 69th Street and Rockaway Freeway in Queens County. As a result of the incident, plaintiff was caused to knock his head on the top of the truck. At the time of the incident, plaintiff and five other individuals from Ladder 173 were in the process of relocating to Ladder 134 since all of the firemen in Ladder 134 had responded to a large fire in the

Rockaways. "Relocating", as used in this context, refers to the situation where firefighters from one firehouse are sent to another firehouse to supply men and fire protection.

Plaintiff and his wife, derivatively, commenced the instant action, which seeks to recover damages for common law negligence and violation of General Municipal Law § 205-a. Defendant City of New York now moves for summary judgment dismissing the plaintiff's claim for common law negligence as well the claim for violation of General Municipal Law § 205-a as asserted against it.

In support of its motion for summary judgment, defendant City contends that General Municipal Law § 205-a is not applicable herein since the activity of "relocating" is not a particular danger which firefighters are expected to assume as part of their duties. Defendant City further alleges that plaintiff's claim for common law negligence must be dismissed since the City never received prior written notice of the alleged dangerous condition.

In opposition to the motion, plaintiffs maintain that they can recover under General Municipal Law § 205-a inasmuch as defendant City, through its contractor, defendant C.A.C. Industries Inc., violated various regulations, ordinances and codes by placing unguarded and unbarricaded construction plates in the public roadway, which led to the plaintiff's injury. Further, plaintiffs assert that since the defendant City created the unsafe condition at issue, prior written notice of the condition is not required.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993].) Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (Peerless Ins. Co. v Allied Bldg. Prods. Corp., 15 AD3d 373, 374 [2005].)

Traditionally, the "firefighter's rule" precluded recovery in negligence for injuries sustained by firefighters in the line of duty. (Santangelo v State of New York, 71 NY2d 393, 397 [1988].) In 1935, the Legislature sought to "ameliorate the harsh effects" of the firefighter's rule by enacting General Municipal Law §

205-a. (Zanghi v Niagra Frontier Transp. Commn., 85 NY2d 423, 441 [1995].) General Municipal Law § 205-a creates a cause of action for firefighters injured in the line of duty where the injuries are caused directly or indirectly by the violation of statutes or regulations. (Doherty v Sparacio, 35 AD3d 530 [2006].) In order to establish a claim under General Municipal Law § 205-a, a plaintiff must (1) identify the statute or ordinance which defendant violated; (2) describe the manner in which the firefighter was injured; and (3) set forth facts from which it may be inferred that defendant's negligence directly or indirectly caused the injuries to the firefighter. (Giuffrida v Citibank Corp., 100 NY2d 72, 79 [2003].) This has been interpreted to mean that a defendant is liable whenever there is a practical or reasonable connection between the alleged violation and the harm. (Mullen v Zoebe, Inc., 86 NY2d 135, 140 [1995].) Recovery under General Municipal Law § 205-a "does not require proximate causation or even a direct connection between the safety violation alleged and the resulting injury." (O'Connell v Kavanagh, 231 AD2d 29, 30 [1997].)

In 1996, the Legislature enacted General Obligations Law § 11-106, which partially abrogated the "firefighter's rule" and permitted firefighters injured in the line of duty to maintain a common law cause of action sounding in negligence against any person who proximately caused the injury, other than the injured firefighter's employer or co-employee. (Giuffrida v Citibank Corp., 100 NY2d at 78; Melendez v City of New York, 271 AD2d 416, 416-417 [2000].)

In their third supplemental verified Bill of Particulars, plaintiffs allege violation of various regulations and provisions of the New York City Administrative Code. While a supplemental Bill of Particulars may be served without leave of court no later than 30 days before trial, it may only be served "with respect to claims of continuing special damages and disabilities..." (CPLR 3043[b].) Here, the additional statutes and regulations do not constitute continuing special damages and, thus, a supplemental Bill of Particulars cannot be used to allege these new violations. Thus, plaintiffs' "supplemental "Bill of Particulars" is, in fact, an "amended" Bill of Particulars. In order to serve an amended Bill of Particulars, however, a party is required to make a motion once the note of issue has been filed. (CPLR 3042[b].) Inasmuch as this Bill of Particulars was served without leave of court after the filing of the note of issue, this Bill of Particulars is a nullity. (see Gaisor v Gregory Madison Ave., LLC, 13 AD3d 58, 60 [2004]; Leon v First Natl. City Bank, 224 AD2d 497, 498 [1996].)

Plaintiff's original verified Bill of Particulars alleges that defendant City violated Department of Transportation of the

City of New York Rules Sections 2-01 and 2-02 and New York City Department of Highway Operations 11 RCNY 214.

The court finds that plaintiffs have alleged a sufficient statutory provision to form a predicate for a claim under General Municipal Law § 205-a. Section 2-02 of the Department of Transportation of the City of New York Rules provides, inter alia, that every excavation, street opening, material pile or obstruction on a roadway shall be protected by barricades, fences or railings with red flags or signs. Plaintiffs have, at a minimum, raised a triable issue of fact, that there is a reasonable connection between this alleged statutory violation and the firefighter's injury.

Turning to the claim for common law negligence, pursuant to the Administrative Code of the City of New York, § 7-201(c)(2), a plaintiff must plead and prove that the City of New York had prior written notice of a street defect before it can be held liable for its alleged negligence in failing to maintain the street in a reasonably safe condition. (Vertsberger v City of New York, 34 AD3d 453 [2006]; Cabrera v City of New York, 21 AD3d 1047, 1048 [2005].) Prior written notice, however, is not required where the defendant caused or created the alleged defect. (Amabile v City of Buffalo, 93 NY2d 471, 474 [1999]; Ferreira v County of Orange, 34 AD3d 724 [2006].)

In the case at bar, plaintiffs concede that defendant City did not receive prior written notice of the alleged defect. Plaintiffs contend, though, that the condition was created by defendant C.A.C. Industries, an agent of the defendant City. Plaintiffs assert that C.A.C. placed an unsecured plate in the roadway. However, the deposition testimony indicates that plaintiffs' contention that the City created the defect is based on speculation. (Quiroz v Incorporated Vil. Of Cedarhurst, 31 AD3d 624 [2006]; Nash v Vil. Of Cedarhurst, 291 AD2d 485, 486 [2002].)

Accordingly, this motion by defendant the City of New York for summary judgment is granted solely to the extent that plaintiffs' cause of action for common law negligence is dismissed only as against the defendant City of New York. The remainder of the action shall continue.

Dated: February 13, 2007

AUGUSTUS C. AGATE, J.S.C.