

Ferriolo v City of New York

2007 NY Slip Op 32492(U)

August 3, 2007

Supreme Court, New York County

Docket Number: 0105667/2004

Judge: Eileen A. Rakower

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.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RAKOWER
Justice

PART 5

Index Number : 105667/2004

INDEX NO. _____

FERRIOLO, VINCENZO

MOTION DATE _____

vs

CITY OF NEW YORK

MOTION SEQ. NO. _____

Sequence Number : 003

MOTION CAL. NO. _____

SUMMARY JUDGMENT

n this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits _____

2, 3

Replying Affidavits _____

4 5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/3/07

EILEEN A. RAKOWER
J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
VINCENZO FERRIOLO,

Plaintiff,

Index No.
105667/04

- against -

Decision and
Order

THE CITY OF NEW YORK and POLICE OFFICER KIEN GIAN,

Defendants.

-----X
HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries he sustained when he was shot in the leg by a fellow police officer, defendant P.O. Kien Gian ("Gian"), while they were both in the locker room of the seventh precinct in the County and State of New York. The incident occurred on August 12, 2003 at approximately 11:15 pm, just before both officers were to attend roll call for their midnight tours of duty. Defendants City of New York and Gian ("City") move for summary judgment, dismissing plaintiff's complaint pursuant to CPLR § 3212. Plaintiff cross moves for partial summary judgment.

The undisputed facts are that plaintiff was already dressed in his police uniform, and was talking to a fellow officer in the locker room prior to roll call. Gian walked in, and proceeded to his locker to change into uniform. Gian had previously brought his Sig Sauer 9mm semi automatic weapon to the precinct to be inventoried. Gian was holding the Sig Sauer semi automatic weapon, it fired, and the bullet shattered plaintiff's femur bone.

Defendant and plaintiff, in support of their motions, provide the 50(h) hearing testimony as well as the deposition testimony of plaintiff, and the deposition testimony of Gian. The stories diverge at the point of the shooting, when plaintiff

[* 3]

states Gian “called out my name, and he had the gun pointing at me, and a round went off.” (Plaintiff deposition, page 15, lines 13-14). “Police Officer Gian called out my name, he said, ‘Vinny,’ had the gun pointed at me and shot me.” (Plaintiff 50(h) hearing transcript at page 43, lines 3-5). Plaintiff recalls not being aware that he was shot until his leg collapsed beneath him.

Gian states that he was moving the gun to his storage locker when it went off. He does not recall pulling the trigger, but concedes he must have. (Gian deposition at page 46, line 20 and line 25) Immediately after the gun discharged, Gian heard plaintiff ask “What are you doing? What are you doing that for?” (Gian deposition at page 50, lines 19-20)

Defendants assert that plaintiff is precluded from bringing these claims by the “firefighter’s rule,” which states

Where some act taken in furtherance of a specific police or firefighter function exposes the plaintiff to a heightened risk of sustaining the particular injury, he or she may not recover damages for common law negligence. (*Zanghi v. Niagara Frontier Transp. Comm’n*, 85 NY2d 423 [1995]).

Defendants assert that the risk of injury by the accidental discharge of a firearm is related to the special hazards associated with police duties.

Plaintiff, in opposition to defendant’s motion and in support of his own motion for partial summary judgment, asserts that he has brought not only a cause of action for common law negligence, but also a claim pursuant to General Municipal Law § 205-e, which permits a police officer to bring a cause of action where the cause of the officer’s injuries were “premised upon the violation of any statute, ordinance, rule or requirement of the federal, state, county, village or town government or on any and all of their divisions and bureaus.” (*Schiavone v. New York*, 92 NY2d 308 [1998]). Violations of Penal Law sections that prohibit specific acts, such as reckless endangerment, are proper predicates for liability under GML § 205-e. (*McCormick v. New York*, 2 NY3d 352 [2004]). The pleadings must set forth the specific statutes that defendant allegedly violated. (*Giuffrida v. Citibank Corp.*, 100 NY2d 72 [2003]).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman, supra*).

Plaintiff serves an amended bill of particulars wherein he cites the statutes he alleges Gian violated to support his § 250-e claim. Plaintiff charges that Gian violated Penal Law § 120.05 (4), which states that a person is guilty of assault in the second degree when “he recklessly causes serious physical injury to another person by means of a deadly weapon or dangerous instrument;” and Penal Law § 120.00(2)(3), which states that a person is guilty of assault in the third degree when “he recklessly causes physical injury to another person; or with criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.” Gian and City state that no criminal charges were ever brought against Gian, and that as a result of the investigation, Gian was only placed on modified duty by the Police Department.

Where no criminal charges have been brought against the defendant, a rebuttable presumption exists that there was no Penal Law Violation. Summary Judgment can only be avoided if plaintiff comes forward with compelling evidence demonstrating a material question of fact as to whether the prohibited conduct occurred and was not justified. (*McCormick, supra*).

Gian and plaintiff describe two very different incidents. Gian presents that accidental discharge of his weapon while moving it from one locker to another. He cannot state whether the gun had a safety to prevent accidental discharge. Plaintiff describes what can only be seen as “gun play,” where Gian recklessly points his loaded weapon directly at plaintiff, calls plaintiff’s name, and fires, presumably, accidentally.

* 5 J
Plaintiff provides the expert affidavit of Henry C. Branche, C.P.P., C.F.E., trained in the safe handling and operation of handguns, who examined the firearms discharge report of Captain John H. Wallace and the report of Captain Timothy Beandette, both of which were attached to Branche's affidavit. He opines that

His [Gian's] gun must have been loaded and pointed in the plaintiff's direction; His finger must have been placed inside the trigger guard; and He must have pressed the trigger with sufficient force to disengage the hammer mechanism. . . . in causing his weapon to discharge, Officer Gian recklessly disregarded all of the well-settled rules concerning the safe handling of a gun.

Further, he states

. . . in order to fire this particular weapon, effort is required; a "long, heavy pull" is needed to cock and release the hammer. . . . Guns, such as the Sig Sauer P228, are designed with weighted triggers, a safety feature, to prevent the incidence of accidental discharges.

Plaintiff has presented a version of events, which if true, demonstrates compelling evidence that criminally reckless behavior occurred and was not justified. Therefore, there is an issue of fact to be determined by the jury, and summary judgment must be denied.

Wherefore, it is hereby

ORDERED that defendants' motion for summary judgment ~~is denied~~ and all claims is denied; and it is further

ORDERED that plaintiff's cross motion for partial summary judgment is denied.

This constitutes the decision and order of the court.

DATED: August 3, 2007


EILEEN A. RAKOWER, J.S.C.

FILED
AUG 13 2007
NEW YORK
COUNTY CLERK'S OFFICE