

Wadler v City of New York

2008 NY Slip Op 30572(U)

February 28, 2008

Supreme Court, New York County

Docket Number: 0116207/2006

Judge: Eileen A. Rakower

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

EILEEN A. RAKOWER

PRESENT:

J.S.C.

PART 5

Index Number : 116207/2006

WADLER, DAVID

vs

CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO.

116207/06

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3, 4

Cross-Motion: Yes No

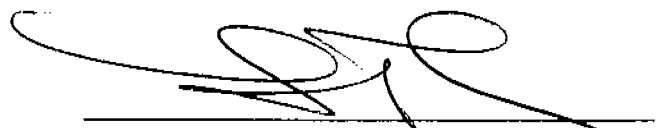
Upon the foregoing papers, it is ordered that this motion

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

FILED
MAR 03 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/28/08



EILEEN A. RAKOWER 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
DAVID WADLER,

Plaintiff,

Index No.
116207/06

Mot. Seq. No. :
001

- against -

Decision and
Order

THE CITY OF NEW YORK and THE NEW YORK
CITY POLICE DEPARTMENT

Defendants.

FILED
MAR 03 2008
NEW YORK COUNTY CLERK'S OFFICE

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

Plaintiff was an active New York City Police Officer when, on October 31, 2005, he was injured at a police checkpoint at Avenue of the Finest and Pearl Street in the County and State of New York. Specifically, he was driving a police department vehicle and was permissibly traversing the police barricade, which had been retracted into the ground for him to pass, when the barrier operation was reactivated prematurely. It hit the under portion of the vehicle, lifting the vehicle off the ground. Plaintiff, as a result of this incident, alleges neck and back injuries.

Plaintiff brings this motion for partial summary judgment on the issue of liability. City opposes the motion, and cross moves to dismiss plaintiff's cause of action on the grounds that plaintiff did not suffer a grave injury as described by the Worker's Compensation Law, and that plaintiff is precluded from recovering damages based on the "firefighter's rule." Plaintiff opposes the cross motion.

Plaintiff, in support of its motion, submits the following: the police accident report and accident report for the police department vehicle involved and line-of-duty injury report; the notice of claim; portions of plaintiff's 50-h hearing transcript; the

pleadings; discovery demands and case scheduling orders; and defendant's admission that an officer assigned to the barrier operation accidentally activated the barrier contained within a police accident report provided to plaintiff through discovery.

City, in support of its cross motion and in opposition to plaintiff's motion provides: the notice of claim, plaintiff's verified bill of particulars; and a complete copy of plaintiff's 50-h hearing transcript.

Plaintiff, by way of reply, provides his own additional sworn affidavit, dated February 4, 2008.

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]).

Plaintiff establishes that the police operated barricade was activated exclusively by defendant, and that as a result, he was injured. Normally, upon such a showing, it would be incumbent upon defendant to show by proof in admissible form that issues of fact exist as to whether defendants are liable for the instant accident. Here, however, City argues alternatively that plaintiff is also negligent, barring summary judgment, or that plaintiff is barred from bringing his negligence claim.

First, defendants state that, although this accident was caused by the operation of the security barrier, plaintiff may have contributed to the cause of the accident. Defendants point out that there was no mechanical or vehicular defect alleged, and thus the actions of the parties themselves are the proximate cause of the accident. However, there is no evidence submitted which raises an issue of fact regarding comparative negligence. It is not alleged that plaintiff stopped the vehicle inappropriately while over the barrier, or that he communicated with the operator of the barrier in a way so as to encourage the barrier's premature activation. To the

contrary, reports consistently fault the barrier operator with its premature activation.

Secondly, defendants argue that plaintiff fails to meet his burden of showing a grave injury as required by Workers' Compensation Law § 11. However, plaintiff points out that the New York State Insurance Fund's statement excludes police officers from the Worker's Compensation Law of New York. Therefore, the inquiry into whether plaintiff's injuries are "grave" as defined by the Workers' Compensation Law is moot.

Finally, 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]).

Plaintiff attempts to raise an issue of fact as to whether the firefighter rule is even applicable to him in this situation. Mr. Wadler provides his own self serving affidavit stating that he was not working at the time of the accident. Rather, he had dropped off his own personal vehicle at the 68th precinct, took his assigned police vehicle, and was headed to 1 Police Plaza to begin his tour of duty at 8:25 a.m.. Reports indicate that this accident occurred at 8:15 a.m.

Generally, a self-serving affidavit offered to contradict earlier testimony does not raise a bona fide question of fact and will be disregarded (*Lupinsky v. Windham Const. Corp.*, 293 A.D.2d 317[1st Dept. 2002]). The police accident report indicates that plaintiff was operating a police department vehicle. Boxes are checked indicating that the vehicle was on both routine patrol and "responding to C.O.P." The line-of-duty injury report indicates that the injured officer (plaintiff) was on duty, and that the investigating supervising officer recommends line-of-duty designation. This report, in part C, is completed by the officer applying for line-of-duty designation, Sgt. Wadler, and is signed by plaintiff and dated October 31, 2005.

The remaining question is whether the firefighter's rule precludes recovery for Sgt. Wadler's injuries as against the City and the New York City Police Department under the circumstances presented. The firefighter rule applies to injuries sustained

while acting in furtherance of a specific police function. (*Zanghi* at 436). No cause of action to recover damages based on common-law negligence will lie “ where some act taken in furtherance of a specific police or firefighting function exposed the officer to a heightened risk of sustaining the particular injury. (*Id.* at 439).

General Obligations Law §11-106 was passed in 1996, which abrogated the firefighter’s rule to a certain extent. This section applies where the injury is proximately caused by the negligent or culpable conduct of any person or entity, other than that police officer's or firefighter's employer or co-employee. Essentially §11-106 allows police officers to sue private entities for injuries which occurred as a result of their negligence.

The Appellate Division, First Department, in *Grogan v. City of New York*, 259 AD2d 240 (App Div 1st Dept., 1999), emphasized that the firefighter’s rule continues to bar such claims as against an employer or co-employee, not just claims against the employer in its capacity as such. There, while the injured officer may have had a valid claim sounding in negligence as against the owner of adjoining property for his slip and fall under General Obligations Law § 11-106, where the owner happened to be the municipality, the action was barred. The fact that the officer sued the City, not in its capacity as his employer, but rather in its capacity as owner of the premises abutting the sidewalk on which the officer was injured, did not remove the City from the employer/co-employee exception to the statute. The Court relied on the fiscal concerns implicated by the abolition of the firefighter’s rule.

Further, it cannot be said that Sgt. Wadler was not engaged in an activity in furtherance of a specific police function. He was driving a police department vehicle; he was entering a restricted zone; and his vehicle was permitted entrance into the secured area based on his presentation of police identification.¹

Wherefore it is hereby

¹See also, *Melendez v. City of New York*, 271 A.D.2d 416[2nd Dept. 2000]), where the court found that the firefighter rule barred recovery by a police officer that was involved in a motor vehicle accident where she was acting as a “recorder” in a patrol car. There, the court found that the officer was performing a specific police function which put her at an increased risk of being injured in a motor vehicle accident. (*Id.* at 417).

[* 6]
ORDERED that plaintiff's motion for partial summary judgment on the issue of liability is denied; and it is further

ORDERED that defendants the City of New York and the New York City Police Department's cross-motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: February 28, 2008


EILEEN A. RAKOWER, J.S.C

FILED
MAR 03 2008
NEW YORK
COUNTY CLERKS OFFICE