

Ferriolo v City of New York

2008 NY Slip Op 30671(U)

March 6, 2008

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: **EILEEN A. RAKOWER**

J.S.C.
Justice

PART **Part 5**

Index Number : 105667/2004

FERRIOLO, VINCENZO

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 004

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1, 8

2, 3

4

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

MAR 11 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 6, 2008



EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

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

-----X
VINCENZO FERRIOLO,

Plaintiff,

- against -

THE CITY OF NEW YORK and
POLICE OFFICER KIEN GIAN,

Defendants.

HON. EILEEN A. RAKOWER

Index No.
105667/04

DECISION
and ORDER

FILED
MAR 11 2008
NEW YORK
COUNTY CLERK'S OFFICE

This court denied defendants' motion for summary judgment and plaintiff's motion for partial summary judgment, by decision dated August 3, 2007. Defendants now move pursuant to CPLR §§2221(d), (e) to re-argue and re-new, stating that the court misapprehended certain matters of law and facts in deciding the motion and, shortly after this court's decision, the First Department decided *Foley v. City of New York*, (43 AD3d 702 [1st Dept. 2007]) which clarifies the law and is germane to this matter. Plaintiff opposes the motions to re-argue and re-new.

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.

The undisputed facts, as recounted in the court's August, 2007 decision, are that plaintiff was already dressed in his police uniform and was talking to a fellow officer when Gian walked in and proceeded to his locker to change into uniform. Gian had previously taken his Sig Sauer 9mm semi automatic weapon out of his storage locker to be inventoried. On the date of the incident, Gian was holding the gun, it discharged and the bullet shattered plaintiff's femur bone.

Plaintiff states that, at the point of the shooting, Gian "called out my name, and he had the gun pointing at me, and a round went off." 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.

Plaintiff has brought a cause of action for common law negligence, and two causes of action pursuant to General Municipal Law § 205-e, one predicated on violations of Penal Law and one predicated on a violation of Labor Law. The Court now grants defendants' motion to re-argue.

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]).

Defendants assert that they are entitled to summary judgment because plaintiff is precluded from bringing a common law negligence cause of action 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 maintains that he may not be denied common law recovery in a situation where he was merely present in a locker room talking to a fellow officer. He states that his particular circumstance is an exception to the "firefighters' rule" because, at the time of the incident, he was not performing specific duties that increased his risk of being shot but rather his being in the locker room merely furnished the occasion for his injury. However, the injured plaintiff was exposed to a particular danger that police officers face as part of their duties as he was in the precinct locker room where guns are routinely stored. Gian, like all other officers, had

been required to present his guns to the Sergeant for annual gun inspection. Thereafter, Gian was returning his guns to his storage locker. This act, which officers undertake in performance of their duty, "place the injured plaintiff at increased risk for this accident to happen." (*Olsen v. City of New York*, 233 AD2d 488 [2nd Dept. 1996]). Additionally, while General Obligations Law § 11-106 permits police officers a cause of action where they are injured by another's negligence, (*Grogan v. City of New York, et al.*, 259 AD2d 240 [1st Dept. 1999]) it does not "expand . . . the existing liability of an employer or co-employee at common law . . . for injuries or death sustained in the line of duty by any police officer . . ." (General Obligations Law § 11-106(2)). "Thus the statute specifically precludes the assertion of a common law negligence cause of action against the employee's municipal employer." (*Grogan v. City of New York, supra*, at 242). Therefore, plaintiff's common law negligence cause of action against City must be dismissed.

Plaintiff's other two causes of action are based upon an exception to the "firefighters' rule," General Municipal Law (GML) § 205-e which creates a cause of action in the event of any accident causing injury as a result of the negligence of a person failing to comply with any statutes or rules of any federal, state or city government or that of their departments and bureaus. (*See*, GML § 205-e; *Williams v. City of New York*, 2 NY3d 352 [2004]). Additionally, General Obligations Law (GOL) § 11-106 permits police officers to bring tort claims for many injuries that occur in the line of duty. (*See*, GOL § 11-106; *Williams v. City of New York, supra*).

Violations of Penal Law sections that prohibit specific acts are proper predicates for liability under GML § 205-e. (*Williams v. City, supra*, at 365). Plaintiff argues that his un-rebutted testimony and the record establishes that, as a matter of law, Gian violated Penal Law §§ 120.25, 120.20, 120.05(4) and 120.00(2),(3). Defendants assert that there is no compelling evidence here "demonstrating a material question of fact as to whether the conduct was criminal . . ." (*Id.* at 367) and this cause of action must be dismissed.

The record establishes that this incident was investigated by the District Attorney's Office and no criminal charges were brought against Gian. "[W]here no criminal charges have been brought against a section 205-e defendant, a rebuttable presumption exists that the Penal Law has not been violated. A defendant who has not been charged with a crime is entitled to summary judgment on a section 205-e claim predicated on the Penal Law where a reasonable view of the evidence supports the conclusion that no prohibited conduct took place . . ." (*Id.* at 366). It is plaintiff's

[* 5]
burden to produce “compelling evidence demonstrating a material question of fact as to whether the conduct was criminal . . .” (*Id.* at 367). Moreover, this burden is “substantial” where, as here, there is no prosecution or conviction for provisions of the law which, to have been violated, require proof beyond a reasonable doubt. (*Id.* at 365-66).

Plaintiff states that his “compelling evidence” is Gian’s testimony:

Q: Did you point the gun in any particular direction before it discharged?

A: It got to be pointed toward him. I mean, I don’t remember, but the gun had to be pointed that way.

...

Q: Did you actually squeeze the trigger when it discharged?

A: I must have. I don’t recall, but.

At the 50-h hearing and in his deposition testimony regarding the shooting, plaintiff states:

Police officer Gian called out my name, he said “Vinny,” had the gun pointed at me and shot.

...

[Gian] just called out my name, and he had the gun pointing at me, and a round went off.

Upon reconsideration, the court finds that neither Gian’s nor plaintiff’s testimony is sufficiently compelling evidence to meet plaintiff’s substantial burden to provide “proof that the fellow officer acted with the requisite intent to constitute any violation of the Penal Law.” (*Warren v. City of New York*, 16 AD3d 491 [2nd Dept. 2005]). Moreover, notwithstanding his curriculum vitae, the court’s former reliance on plaintiff’s expert was unwarranted. He is not a ballistics expert and apparently has no greater expertise in firearms training or the law than any other retired Police Sergeant which would permit him to opine that Gian’s actions were legally reckless.

Plaintiff’s reliance on *People v. Licitra* (47 NY2d 554 [1979]), as being factually “almost identical to . . . this case” is also unavailing. The parties in *Licitra, supra*, were civilians, not Police Officers or City employees in their place of business. The defendant in that case was charged with a crime, indicted and the testimony at trial regarding the firearm in question was given by a ballistics expert. Such is not the

case here. Lastly, with respect to the Penal Law predicates for GML § 205-e, the court's imprudent use of the phrase "gun play" should not interject into this proceeding any such scenario, or issue of fact as it was not argued by plaintiff in either his original motion or in his opposition here.

General Obligations Law § 11-106 permits police officers a cause of action where they are injured by another's negligence, (*Grogan v. City of New York, et al.*, 259 AD2d 240 [1st Dept. 1999]) but it does not "expand . . . the existing liability of an employer or co-employee . . . under sections two hundred five-a and two hundred five-e of the general municipal law for injuries or death sustained in the line of duty by any police officer . . ." (General Obligations Law § 11-106(2); (*Grogan v. City of New York, et al., supra*).

Even affording the plaintiff every inference that may be drawn from the facts, plaintiff's position that the Penal Law has been violated is speculative and conclusory (*Williams v. City of New York, supra*, at 367). Here, both plaintiff and Gian testified that they had a cordial relationship, had partnered together on occasion and had socialized outside of work a few times. Where a "reasonable view of the evidence supports the conclusion" that no criminal conduct took place, defendant is entitled to summary judgment. (*Williams v. City of New York, supra*, at 366). Plaintiff has not met his burden of providing any proof that Gian violated the Penal Law and the GML § 205-e cause of action predicated on Penal Law statutes must be dismissed.

Plaintiff's second GML § 205-e cause of action is predicated on Labor Law § 27-a and Section 204-08 of the New York City Patrolman's Guide. GML § 205-e is to be read expansively; but, plaintiff must show non-compliance with a "well developed body of law and regulation that imposes clear duties." (*Galapo v. City of New York*, 95 NY2d 568, 574 [2000]). Defendants note that "the New York City Police Department Patrol Guide is not part of a duly enacted body of law or regulation that gives rise to civil liability under General Municipal Law § 205-e." (*Id.*, at 575). Defendants also argue that this cause of action must be dismissed because Labor Law § 27-a cannot serve as a statutory predicate where a gun was discharged in a police locker room and plaintiff does not allege a physical or environmental hazard. (Citing *Williams, supra*).

Labor Law § 27-a, enacted to provide the same protection for public sector employees that OSHA (Occupational Safety and Health Administration) provides for private sector employees, governs environmental hazards in the workplace. It requires

an employer to promulgate and implement workplace safety standards. (29 USCA § 651; 12 NYCRR 800.3). In *Williams, supra*, the court held that Labor Law § 27-a “does not cover the special risks faced by police officers because of the nature of police work . . . [and] police supervisors must decide, among other things, how police officers should use and store their weapons . . .” (*Id.* at 368). In his July 23, 2007 reply memorandum of law, plaintiff states that *Williams, supra*, is inapplicable with respect to his Labor Law § 27-a claim because his case “is based entirely upon the reckless use and handling of a loaded handgun which made plaintiff’s workplace completely unsafe.” As plaintiff’s allegation is directed at Officer Gian rather than the City’s responsibility to provide a healthful workplace, his GML §205-e cause of action, predicated on Labor Law § 27-a, must be dismissed. The court misapprehended the law with respect to the “firefighters’ rule” and GML § 205-e in its decision dated August 3, 2007. Upon re-argument, it is clear that defendants’ motion for summary judgment must be granted. Wherefore, it is hereby

ORDERED that defendants’ motion to re-argue is granted; and it is further

ORDERED that defendants’ motion for summary judgment dismissing all claims is granted, and the Clerk is directed to enter judgment in favor of defendants; and it is further

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

All other relief requested is denied. This constitutes the decision and order of the court.

DATED: March 7, 2008



 EILEEN A. RAKOWER, J.S.C.

FILED
 MAR 11 2008
 NEW YORK
 COUNTY CLERK'S OFFICE