

Ospina v City of New York

2009 NY Slip Op 30966(U)

April 29, 2009

Supreme Court, New York County

Docket Number: 115862/06

Judge: Karen S. Smith

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

PRESENT: KAREN S. SMITH
Justice

PART 62

LUIGI OSPINA,

Plaintiff,

- v -

THE CITY OF NEW YORK and CONSOLIDATED
EDISON COMPANY,

Defendants.

INDEX NO. 115862/06

MOTION DATE 4/23/09

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read with this motion to/for summary judgment

Notice of Motion — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Reply Affirmation _____

Supplemental Reply Affirmation _____

PAPERS NUMBERED

1

2

3

FILED
APR 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers and upon oral argument of 4/23/09 (Court Reporter: Eric Allen 646-386-3060), it is ORDERED that this motion by defendants City of New York (hereinafter "City") for summary judgment dismissing plaintiff's complaint as against it pursuant to CPLR § 3212, is granted for the reasons stated below.

Plaintiff, an officer in the NYPD, brought this action to recover for injuries he allegedly sustained on June 23, 2006, when he fell to the ground while he was pursuing a suspect on West 116th Street in New York, New York. Defendant City now moves for summary judgment dismissing plaintiff's complaint against it, contending that plaintiff's common law negligence action is barred against the City by the Firefighter's Rule, and further that plaintiff's GML §205-e claim must be dismissed because plaintiff cannot prove that the City had prior written notice of the subject roadway condition.

In support of its motion, the City submits: 1), the deposition of the plaintiff, dated March 19, 2008, 2) plaintiff's demand for admission by Con Ed that they owned the grating in the area where the alleged injury took place, 3) the deposition of Abraham Lopez, employee of the New York City Department of Transportation Office of Litigation Services, dated July 9, 2008, 4) Building Operation Permits, 5) the affidavit of Christian Onyechi, employee of the New York City Department of Design and Construction, dated December 11, 2008, and further, in its reply 6) this Court's discovery order dated 9/11/08, and 7) the affidavit of Cynthia Howard, employee of the New York City Department of Transportation Office of Litigation Services and Records

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

Management.

Plaintiff opposes the City's motion and submits the Note of Issue filed July 29, 2008.

The City moves for summary judgment dismissing the plaintiff's complaint as against it, contending 1.) that plaintiff's common law cause of action is barred by the firefighter's rule as articulated in *Santangelo v. State of New York* 71 NY 2d 393(1988), and *Cooper v. City of New York*, 81 NY 2d 584 (1993); and 2.) that plaintiff's General Municipal Law §205-e claim fails because he is unable to satisfy the prior written notice requirement of §7-201 of the Administrative Code of the City of New York or any predicate statutory violation required to maintain a GML 205-e claim.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Traditionally, New York courts have followed the "firefighter's rule," which bars recovery in negligence for injuries sustained by a firefighter in the line of duty (see *Giuffrida v. Citibank Corp. et al* 100 NY2d 72, 76 [2003]). This bar was imputed to police officers in *Santangelo v. State of New York* 71 NY 2d 393(1988), which reasoned that "[l]ike firefighters, police are experts engaged, trained, and compensated by the public to deal on its behalf with emergencies and hazards often created by negligence" 71 NY2d at 396. And while this bar has been largely superceded by the legislature in enacting GML 205 and General Obligation Law 11-106, giving a statutory cause of action to firefighters and police officers for negligence, the firefighter's rule remains a bar on any common law negligence claims for injuries sustained by an officer in the performance of his duty. In *Foley v. City of New York*, Ad3d 702 (2007), the Appellate Division, First Department found that there was no common law cause of action for an officer who was injured when she allegedly tripped and fell on a stairway outside the rear exit of her precinct. In *Simons v. City of New York*, 252 AD2d 451 (1st Dept 1998) the court found no common law cause of action for a police officer who was injured while escorting a complainant to the subway when he allegedly tripped and fell on a metal plate in the road bed as he was stepping off a curb.

General Municipal Law §205-c ("GML §205-e") permits a police officer to recover for injuries sustained in accidents caused by a municipality's failure to comply with any statute, ordinance, or other laws (*Simons* 252 AD2d at 452). As a predicate to maintaining this type of action, a plaintiff must rely on an underlying violation (*Zanghi v. Niagara Frontier Transp. Commn.*, 85 NY 2d 423, 441), regardless of whether it codifies a common-law duty or the alleged defect increases the dangers inherent in police work. (GML §205-c[3]) Plaintiff must additionally set forth facts from which it may be inferred that the defendant's negligence directly or indirectly caused harm to him or her (*Quinto v New York City Tr. Auth.*, 7 AD3d 689, 689-690; see *Williams v City of New York*, 2 NY3d 352, 363; *Galapo v City of New York*, 95 NY2d 568, 574).

Administrative Code §7-201 ("§7-201"), also known as the "pothole law," provides that an action for damages arising out of a defective street or sidewalk cannot be maintained unless the City had prior written notice of the defect, and failure to plead and prove prior written notice

requires a dismissal of the complaint against the City (*Longo v. American Golf Co.* 256 Ad2d 387 [1st Dept 1999]). It has been specifically held in *Montalvo v. City of New York* 46 AD3d 772 (2d Dept 2007) that the prior written notice requirement of §7-201 applies to lawsuits brought by police officers pursuant to GML §205-e. Therefore, a threshold matter for the plaintiff police officer to maintain a GML §205-e action against the City for an injury resulting from a defective roadway is to show that the City had prior written notice of the defect.

Neither records indicating the issuance or work permits, nor records indicating citizen phone complaints (“FITS” reports) will be sufficient to satisfy the prior written notice requirement of §7-201, *DeSilva v. City of New York*, 15 AD3d 252 (1st Dept 2005) (citing *Gee v. City of New York*, 304 AD2d 615, 617,[2003]; *Levbarg v. City of New York*, 282 AD2d 239, 241-242, 723 [2001]; *Meltzer v. City of New York*, 156 AD2d 124 [1989]). Maps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc. and filed with the Department of Transportation serve as prior written notice of defective conditions depicted thereon, but proper notice requires referencing the most recent Big Apple map on file prior to the accident (*Katz v. City of New York*, 87 N.Y.2d 241 [1995]). If the most recent map does not depict the defect in the area in question, there is deemed to be no prior written notice, and dismissal is required (*Id.*; *Frank v. City of New York*, 240 A.D.2d 198).

Here, the City has shown its *prima facie* entitlement to summary judgment dismissing the plaintiff’s common law negligence claim. Both the complaint and the plaintiff’s testimony make clear that the alleged injury occurred while the plaintiff was on duty, pursuing a suspect who appeared to be holding a firearm heading west on W 116th Street. As such, plaintiff’s common law claims for negligence are barred by the firefighter’s rule.

The City has also met its *prima facie* burden regarding plaintiff’s GML §205-e claim by demonstrating that it did not have prior written notice of the defective condition. The City submits the deposition of Abraham Lopez of the Department of Transportation (“DOT”), who testified that a search was performed for permit applications, maintenance and repair records, contracts, and milling/resurfacing records for the area in question, and from which twenty five permits and one “FITS” report were found. Of these permits, ten were issued to JLJ Enterprises in connection with a contract with the City’s Department of Design and Construction (DDC). This was known as DDC contract HWM1667W. The City submits the affidavit of the DDC Engineer in Charge for that project, Christian Onyechi, who attested that the work performed pursuant to DDC contract HWM1667W included areas on Manhattan Avenue, and extended onto West 116th Street for approximately 50 feet west of Manhattan Avenue, which is on the other side of the block from the location of the alleged accident.

The City also submits copies of the Big Apple Maps for the location in question. Corporation Counsel’s affirmation indicates that these maps were served on DOT on October 23, 2003, and that they are the most recent maps served upon the City prior to the plaintiff’s alleged accident. Because the maps do not indicate any defects in the crosswalk, nor contain any markings for a “pothole or other hazard” in the subject location, plaintiff cannot claim prior written notice upon the city for the alleged hazardous condition (see *D’Onofrio v. City of New York* 11 NY3d 581).

Because it has tendered sufficient evidence in admissible form indicating that there are no relevant DOT records nor any relevant markings on the Big Apple map indicating notice to satisfy

the requirements of §7-201, the City has met its *prima facie* burden for summary judgment.

In opposition, plaintiff argues that the City's motion for summary judgment is both untimely and devoid of merit as factual issues exist which mandate denial of the motion. Plaintiff goes to great length in laying out the rule from the Court of Appeals decision *Brill v. City of New York*, 2 NY3d 648 (2004) and its progeny which explains the CPLR 3212(a) provision governing the "good cause" requirement for filing late motions, ultimately concluding that the instant motion should be denied for being untimely, as it was filed on December 22, 2008, more than 60 days after the filing of the Note of Issue, dated July 29, 2008. Plaintiff's arguments in this regard are rendered moot, however, by this Court's order, dated September 11, 2008, which states that: "(6) the parties have until 12/31/08 to move for S/J." The deadline for summary judgment motions was moved to December 31, 2008, and therefore the instant motion is timely.

Plaintiff further opposes on the grounds that the deposition of DOT employee Abraham Lopez is insufficient to make a *prima facie* showing for summary judgment because the testimony was not based on personal knowledge, and relies on *McNeill v. City of New York* 40 AD3d 823 (2d Dept 2007). The *McNeill* court held that the deposition testimony of the DOT employee used to show the lack of prior written notice was insufficient to establish its entitlement to summary judgment because that employee did not actually conduct the search of records of work done at the site of the accident. However, in its Reply Affirmation, the City submitted the affidavit of Cynthia Howard, who actually conducted the search of the location in question, and who attests to finding the exact same information that Mr. Lopez testified to.

Lastly, plaintiff argues that there remain material issues of triable fact, including the testimony of the City's deposition witnesses regarding numerous written records such as Corrective Action Reports ("CAR") and Notices of Violations ("NOV") pertaining to potholes in and around the area of plaintiff's accident, DOT employee Lopez' lack of knowledge about the afore mentioned CARs and NOVs, and his lack of familiarity with the forms he produced at deposition.

However, the City's reply affirmation clarifies that there were no NOVs on the DOT report, and the two CARs related to 363 and 365 West 116th Street, which is in the middle of the block, and not near the location of the alleged accident, which plaintiff has established as being ten feet from the intersection of Morningside Avenue and West 116th Street.

Because plaintiff has not raised a triable issue of material fact, the City is entitled to judgment as a matter of law.

Accordingly, it is


ORDERED that this motion for summary judgment dismissing plaintiff's complaint as against the City of New York, is granted; it is further

ORDERED that defendants City of New York serve a copy of this decision and order, with notice of entry, upon all parties and upon the Clerk of the Court (60 Centre St.), the Clerk of the Trial Support Office (60 Centre St.), and the Clerk of the DCM Part (80 Centre St.), within 15 days of entry hereof.

The foregoing constitutes the decision and order of the Court.

FILED
APR 29 2009
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NEW YORK

Dated: 4/24/09


Hon. Karen S. Smith, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST