

Veras v City of New York

2011 NY Slip Op 31119(U)

April 27, 2011

Supreme Court, New York County

Docket Number: 103846/08

Judge: Barbara Jaffe

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

DECEMENT. JAFFE BARBARA JAFFE
J.S.C.

PART 5

Index Number : 103846/2008

VERAS, ERIKA

vs
CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

CAL #131

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

1
2
3

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):

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

FILED

MAY 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/27/11
APR 27 2011

[Signature]
BARBARA JAFFE 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
ERIKA VERAS,

Index No.: 103846/08

Plaintiff,

Mot. Date: 3/1/11
Mot. Seq. No.: 001

-against-

DECISION AND ORDER

CITY OF NEW YORK AND NEW YORK CITY POLICE
DEPARTMENT,

Defendants.

-----X
BARBARA JAFFE, J.S.C.:

For plaintiff:
Lloyd F. Goldstein, Esq.
30 Vesey St., 2nd Fl.
New York, NY 10007
212-871-0821

FILED
MAY 02 2011

For defendants:
Peter C. Lucas, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., 4th Fl.
New York, NY 10007
212-788-0466

NEW YORK
COUNTY CLERK'S OFFICE

By notice of motion dated September 22, 2010, defendants move pursuant to CPLR 3212

for an order dismissing the complaint against them. Plaintiff opposes.

I. BACKGROUND

On July 8, 2007, plaintiff was allegedly injured while riding her motorcycle at 12:15 a.m. on West 190th Street between Audobon and Amsterdam Avenues in Manhattan when she collided with a police barricade on the street. (Affirmation of Peter C. Lucas, ACC, dated Sept. 22, 2010 [Lucas Aff.], Exh. A). On or about September 24, 2007, plaintiff served her notice of claim on defendants, alleging that at the time of her accident, the street was dark and unlit, the barrier was not illuminated, and there were no signs or notices warning about the barrier. (*Id.*).

An NYPD accident report filled out on July 8, 2007 reflects that plaintiff was injured on West 190th Street at its intersection with Audobon Avenue, that she had been traveling eastbound

on Audobon Avenue before hitting the barrier, and that police barriers were placed at that intersection. (Affirmation of Lloyd F. Goldstein, Esq., dated Dec. 13, 2010 [Goldstein Aff.], Exh. B). An EMS report from that day also reflects that the accident took place on West 190th Street and Audobon Avenue. (*Id.*, Exh. D).

On or about March 13, 2008, plaintiff served her summons and complaint on defendants, and on or about April 14, 2008, defendants served their answer. (Lucas Aff., Exhs. B, C).

At an examination before trial held on March 24, 2010, Miguel Soto, an NYPD police officer, testified that police barriers are generally set up by precinct personnel or the NYPD Barrier Unit, that the NYPD's 34th precinct had set up approximately five barriers on Amsterdam Avenue and West 190th Street to block the traffic flow in order to curb illegal activity at that location, that the barriers were visible as there were streetlights at the location, and that he investigated plaintiff's accident on July 8, 2007 and did not recall seeing any reflectors or warning devices on the barrier with which plaintiff collided. (*Id.*, Exh. F).

II. CONTENTIONS

City first argues that as the NYPD is not a separate entity from City, it may not be sued separately and thus any claims against it must be dismissed as a matter of law. It contends that as the barriers were set up as part of its governmental function of regulating traffic, which involves the exercise of discretion, it is immune from liability here, and that even if the placement of the barriers is deemed a ministerial act, City maintains that it may not be held liable absent a special relationship between it and plaintiff, which plaintiff neither alleges nor proves. (Lucas Aff.).

In opposition, plaintiff asserts that Soto's testimony is insufficient to establish that the particular barrier with which she collided was placed by the NYPD at the location of her accident

to control the flow of traffic, as Soto testified that the barriers used to control traffic flow were placed at Amsterdam Avenue at or near the corner of West 190th Street. Plaintiff observes that the NYPD accident report and EMS report both reflect that her accident occurred on Audobon and not Amsterdam Avenue, and argues that in any event, City is not entitled to summary judgment as it did not address her allegation that City was negligent in providing inadequate lighting at the location or that it created an unsafe condition. (Goldstein Aff.).

In reply, City contends that plaintiff does not dispute that no special relationship existed between her and City or that the placement of police barriers is a discretionary governmental function, and denies that it had a duty to maintain street lighting at the location of her accident. (Reply Affirmation, dated January 10, 2011).

III. ANALYSIS

As plaintiff does not oppose the dismissal of her claims against the NYPD, and absent any dispute that the NYPD may not be sued separately, the complaint is dismissed as against the NYPD.

Moreover, as all of evidence submitted indicates that the barrier with which plaintiff collided was placed at West 190th Street and Audobon Avenue, Soto's testimony regarding NYPD barriers placed at West 190th Street and Amsterdam Avenue is immaterial. Thus, absent any evidence demonstrating the purpose or function of the barrier placed at the location of plaintiff's accident, City has failed to establish that it is immune from liability here. City also fails to address plaintiff's allegations that the street was unsafe due to inadequate lighting or that it created an unsafe condition by its placement of the barrier. (*See eg Petty v Dumont*, 77 AD3d 466 [1st Dept 2010] [City may be held liable for negligent placement of unmarked barriers in

street as "a municipality's negligence in failing to provide adequate warning of a known roadway hazard has been held to be a concurrent cause" of accident]; 15 NY Prac, New York Law of Torts § 17:61 [2010] [governmental entity has duty to warn of dangerous conditions, including care and maintenance of barriers]).

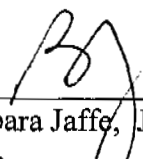
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted solely to the extent of dismissing the complaint against defendant New York City Police Department with costs and disbursements to defendant New York City Police Department, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of New York City Police Department; and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: April 27, 2011
New York, New York
APR 27 2011

FILED

MAY 02 2011

NEW YORK
COUNTY CLERK'S OFFICE