

Vassallo v City of New York

2011 NY Slip Op 31266(U)

May 12, 2011

Supreme Court, New York County

Docket Number: 107594/08

Judge: Barbara Jaffe

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

BARBARA JAFFE
J.S.C.

PRESENT:

PART 5

Index Number : 107594/2008

VASSALLO, DOMENICK

INDEX NO. 107594/08

vs

CITY OF NEW YORK

MOTION DATE 3/15/2011

Sequence Number : 001

MOTION SEQ. NO. 001

DISMISS

MOTION CAL. NO. 130

CAL # 130

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

PAPERS NUMBERED

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

①

Answering Affidavits — Exhibits _____

②

Replying Affidavits _____

③

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

MAY 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/12/11
MAY 12 2011

[Signature]
BARBARA JAFFE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
DOMENICK VASSALLO and LISA VASSALLO,

Plaintiffs,
-against-

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

Defendants.

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

Index No.: 107594/08
Motion Date: 3/15/11
Motion Seq. No. 001
Motion Cal. No. 30

DECISION AND ORDER

FILED

MAY 13 2011

For plaintiffs:
Charles E. Green, Esq.
Friedman, Levy, Goldfarb & Green, P.C.
250 West 57th Street
New York, NY 10107
212-307-5800

For defendant:
~~NEW YORK~~
~~JESSICA WISNIEWSKI~~
~~COUNTY CLERK'S OFFICE~~
Michael A. Cardozo
Corporation Counsel
100 Church Street New
New York, NY 10007
212-788-0609

Defendants City and the New York City Police Department move pursuant to CPLR 3211(a)(7) and/or CPLR 3212 for an order dismissing plaintiffs' complaint. Plaintiffs oppose.

I. BACKGROUND

Plaintiff Domenick Vassallo is a New York City Police Department Detective who works at the 20th Precinct stationhouse, located at 120 West 82nd Street in Manhattan. (Affirmation of Jessica Wisniewski, Esq., dated Oct. 7, 2010 [Wisniewski Aff.], Exh. E). One or two weeks before November 12, 2007, plaintiff saw men working around, but not on, a slotted metal drain cover on the stationhouse's private driveway. (*Id.*). On November 12, 2007, plaintiff was assigned to Community Affairs, which required him to respond to "civil unrest." (*Id.*). At approximately 12:15 p.m. that day, plaintiff and his partner left the stationhouse to respond to a demonstration in front of the Beacon Hotel at the intersection of West 75th Street and Broadway

in Manhattan. (*Id.*). As they walked down the stationhouse's private driveway, plaintiff stepped on the drain cover and allegedly stumbled after the cover shifted beneath him, injuring his knee. (*Id.*).

Plaintiffs filed a notice of claim with defendants on January 23, 2008. (*Id.*, Exh. A). On February 26, 2008, Domenick was examined pursuant to General Municipal Law [GML] § 50-H. (*Id.*, Exh. D). On June 2, 2008, they commenced this action by filing a summons and verified complaint, dated May 29, 2008 and May 30, 2008, respectively, alleging that Domenick's trip, fall, and resulting injuries were caused by defendants' negligence and their violations of GML § 205-e, Labor Law § 27-a(3), Multiple Dwelling Law §§ 78 and 80, and New York City Administrative Code §§ 27-127 and 27-128. (*Id.*, Exh. B). Defendants joined issue by serving their answer, along with certain discovery demands, on June 25, 2008. (*Id.*, Exh. C). Plaintiffs responded to these discovery demands and served a verified bill of particulars on September 10, 2008. (Affirmation of Charles Green, Esq., dated Jan. 12, 2011, Exhs. A, B). On August 27, 2009, plaintiffs served a supplemental bill of particulars. (*Id.*, Exh. C). Depositions of Domenick and Ravi Jaminder, a City employee, were conducted on December 22, 2009. (Wisniewski Aff., Exhs. E, F.). Jaminder testified that there is no record of any construction work on or any complaints regarding the drain cover within the past two years, as reflected in a work order summary for the stationhouse. (*Id.*, Exhs. F, G).

II. CONTENTIONS

Defendants contend that the firefighter's rule bars plaintiffs' negligence claims because Domenick was injured while on duty. (*Id.*, Exh. E). They also assert that plaintiffs' claims under GML § 205-e predicated on defendants' alleged violations of Labor Law § 27-a(3) and/or

Multiple Dwelling Law §§ 78 and 80 are barred, as plaintiffs did not allege violations of these statutes in their notice of claim. (*Id.*, Exh. A). Even if these claims are not barred, moreover, defendants maintain that plaintiffs' GML § 205-e claims must fail, absent notice of the defect, and Labor Law § 27-a(3), New York City Administrative Code §§ 27-127 and 27-128, and Multiple Dwelling Law §§ 78 and 80 are not proper predicates to a 205-e claim. (*Id.*)

In opposition, plaintiffs deny that the firefighter's rule applies here as Domenick was not trained to confront the dangers of loose or otherwise defective slotted metal drain covers. (Memorandum of Law in Opposition, dated Jan. 12, 2011). They also argue that they were not required to specify the statutes or ordinances that defendants violated in their notice of claim, and even if they were, their claims under Labor Law § 27-a(3) and Multiple Dwelling Law §§ 78 and 80 do not fail because the verified complaint, bill of particulars, and testimony presented at the 50-H hearing provided defendants with notice of the nature of their claims. (*Id.*). Plaintiffs maintain that they need not show notice in order to establish a claim under GML § 205-e and that their claims under this section are properly predicated on defendants' violations of Labor Law § 27-a(3) and New York City Administrative Code §§ 27-127 and 27-128, as well. (*Id.*).

III. ANALYSIS

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition papers. (*Winegrad*, 64 NY2d 851, 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d 557, 562). The opposing party must “lay bare” its evidence (*Silberstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1st Dept 2003]); “unsubstantiated allegations or assertions are insufficient.” (*Zuckerman*, 49 NY2d 557, 562).

A. Common law negligence and the firefighter’s rule

To establish a *prima facie* case of negligence, a plaintiff must show a duty owed, a breach thereof, and proximate cause. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). When it is alleged that there exists a dangerous or defective condition on the premises, a duty arises from occupancy, ownership, control, or a special use of the premises. (*Balsam v Delma Engineering Corp.*, 139 AD2d 292 [1st Dept 1998], *lv denied* 73 NY2d 783).

The firefighter’s rule precludes a firefighter or police officer from recovering damages caused by negligence where his “duties increased the risk of injury happening, and did not merely furnish the occasion for the injury.” (*Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423, 436 [1995]). “The rule is grounded on the policy that- unlike members of the general public- firefighters [and police officers] are specially trained and compensated to confront hazards and therefore must be precluded from recovering damages for the very situations that create a need for their services.” (*Galapo v City of New York*, 95 NY2d 568, 573 [2000]).

Here, Domenick was injured while discharging an official duty, having tripped on the drain cover while responding to a protest pursuant to his assignment. However, as he was simply walking, his duty to respond to the protest did not increase the risk of injury, and this risk is not

the sort he was trained to confront as a police officer. Accordingly, the firefighter's rule does not bar plaintiffs' common law negligence claim. (*See Tighe v City of Yonkers*, 284 AD2d 325, 326 [2d Dept 2001] [rule not applied where police officer tripped over steel plate while walking back to patrol car after moving traffic barricade]; *Olson v City of New York*, 233 AD2d 488, 488-89 [2d Dept 1996] [rule not applied where firefighter getting out of fire truck slipped in a pothole]; *Siciliano v City of New York*, 16 Misc 3d 1129[A], 2007 NY Slip Op 51630[U], *3 [Sup Ct, Richmond County 2007] [rule not applied where police officer tripped in pothole while walking to patrol car after being ordered onto patrol]. *Cf Carter v City of New York*, 272 AD2d 498, 498-99 [2d Dept 2000] [rule applied where police officer tripped on sidewalk defect while issuing parking ticket]; *Simons v City of New York*, 252 AD2d 451, 451-52 [1st Dept 1998] [rule applied where police officer tripped over depression in roadbed while escorting party from courthouse to subway]).

B. GML § 205-e

1. Notice

Notice is material to recovery under section 205-e, although a plaintiff need not show actual or constructive notice as he would in asserting a common law negligence claim.

(*Terranova v New York City Tr. Auth.*, 49 AD3d 10, 17 (2d Dept 2007). Rather, all that is required is that “the circumstances surrounding the violation indicate that it was a result of neglect, omission, willful or culpable negligence on the defendant's part.” (*Id.*).

There is no record of work being performed on or complaints regarding the drain cover within the past two years, and neither Domenick's deposition testimony nor the photographs plaintiffs offer show that the cover was obviously defective. Thus, plaintiffs have failed to show

that the circumstances surrounding defendants' alleged statutory violations demonstrate that they were negligent in failing to maintain, repair, or replace the cover. (*See Alexander v City of New York*, 920 NYS2d 148, 2011 NY Slip Op 2337, *6 [2d Dept 2011] [no notice under section 205-e where plaintiff police officer, who accidentally shot himself while leaning back in chair to place gun in his waistband, failed to show that defendants knew about chair's defect prior to accident]; *Lustenring v 98-100 Realty*, 1 AD3d 574, 578 [2d Dept 2003] [no notice under section 205-e where plaintiff police officer, who sustained injuries while jumping over wall, failed to show that defendants created or knew of defect in wall]. *Cf Terranova*, 49 AD 3d at 18 [notice under section 205-e where plaintiff, who sustained injuries by slipping on debris behind door, presented evidence that defendants knew debris collected behind door]).

2. Statutory predicates and notice of claim

As defendants had no notice of the drain cover defect, whether plaintiffs' section 205-e claims predicated on Labor Law § 27-a(3) and/or Multiple Dwelling Law §§ 78 and 80 are barred because of plaintiffs' failure to list these predicates in their notice of claim and whether Labor Law § 27-a(3), New York City Administrative Code §§ 27-127 and 27-128, and Multiple Dwelling Law §§ 78 and 80 are proper predicates to a cause of action under GML § 205-e need not be considered.

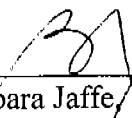
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is denied as to plaintiffs' common law negligence claim and granted as to plaintiffs' GML § 205-e claims; and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:



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

DATED: May 12, 2011
New York, New York

MAY 12 2011

FILED
MAY 13 2011
NEW YORK
COUNTY CLERK'S OFFICE