

Guglielmo v City of New York

2011 NY Slip Op 33383(U)

December 8, 2011

Sup Ct, NY County

Docket Number: 107628/09

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART 52

Index Number : 107628/2009
GUGLIELMO, NICHOLAS
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 107628/09
MOTION DATE _____
MOTION SEQ. NO. 01

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

FILED

DEC 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/9/11

CK
_____, J.S.C.
CYNTHIA S. KERN

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
NICHOLAS GUGLIELMO,

Plaintiff,

Index No. 107628/09

-against-

THE CITY OF NEW YORK, THE NEW YORK
CITY FIRE DEPARTMENT and JOHN DOE
(a fictitious name of the unknown operator of a
motor vehicle),

Defendants.
-----X

FILED

DEC 16 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action to recover damages for injuries he allegedly sustained resulting from a collision involving two New York City Fire Department ("FDNY") vehicles. The City now moves for summary judgment on the grounds that plaintiff's common-law claims are barred by the "firefighter's rule" and that plaintiff fails to cite a proper statutory predicate for his claim pursuant to General Municipal Law ("GML") §205-a. For the reasons set forth more fully below, the City's motion is granted.

The relevant facts are as follows. On November 22, 2008, at or around 6:00 p.m.

plaintiff, who is a New York City firefighter, was finishing responding to a call on Washington and Perry Street. Another call came in with a report of a possible gas leak at 86 Grove Street. Plaintiff considers a gas leak to be an emergency situation. Plaintiff, who is the driver of an FDNY fire engine, began driving to 86 Grove Street. He headed south on Washington Street, then turned left onto West 10th Street, proceeding in an easterly direction. The fire engine had its lights and sirens on. At the intersection of West 10th Street and Seventh Avenue, his vehicle collided with another FDNY vehicle, which had been heading south on Seventh Avenue. Plaintiff testified that he had a green light as he entered the intersection and that the other vehicle had a red light. The other FDNY vehicle was driven by Thomas Corrado. At the time, Corrado was responding to an emergency call as well. His lights and sirens were also on. He testified that he had a green light as he entered the intersection. Both lights could not have been green at the same time. Plaintiff also testified that he was traveling at about 30 miles per hour as he approached the intersection and estimated Corrado's speed as about the same. Corrado, however, estimates that he was traveling at no more than 10 to 15 miles per hour.

For purposes of this motion, plaintiff has conceded that he cannot establish that defendant's conduct was reckless pursuant to VTL section 1104(a). VTL section 1104(a) provides that the driver of an authorized emergency vehicle, when involved in an emergency operation, may exercise certain privileges such as proceeding past a steady red signal and exceeding maximum speed limits as long as his conduct is not reckless. When VTL 1104(a) is applicable, the standard to be applied is recklessness rather than ordinary negligence. In the instant case, the plaintiff states that he is not attempting to proceed based on any actions covered by VTL 1104(a) such as running a red light or driving in excess of the speed limit.

The City's motion for summary judgment dismissing plaintiff's common-law claims is granted. Plaintiff does not oppose defendants' motion to dismiss these claims in his papers. Moreover, plaintiff's common-law claims are barred by the "firefighter's rule," which states that "police and firefighters may not recover in common-law negligence for line-of-duty injuries resulting from risks associated with the particular dangers inherent in that type of employment." *Wadler v City of New York*, 2010 N.Y. Slip Op 01373, 2 (2010). Since a vehicular accident while responding to an emergency is a risk inherent in being a firefighter, plaintiff's common-law negligence claims are barred.

Plaintiff brings his other claim pursuant to GML §205-a. General Municipal Law §205-a provides that:

In addition to any other right of action or recovery under any other provision of law, in the event any accident causing injury, death or a disease which results in death, occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirement of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any fire department injured, or whose life may be lost while in the discharge or performance at any time or place of any duty imposed by the fire commissioner, fire chief or other superior officer of the fire department...

This provision creates an exception to the common-law rule which barred recovery for injuries sustained in the line of duty, the risks of which police officers and firefighters are expected to assume as part of their job. *See Galapo v City of New York*, 95 N.Y.2d 568, 573 (2000). GML §205-a provides a cause of action for firefighters where injury results from negligent failure to comply with laws, regulations and other provisions. There is a nearly identical provision which

applies to police officers, GML §205-e and, to the extent practical, the analysis of one is applicable to the other. *See Desmond v City of New York*, 88 N.Y.2d 455, 463 (2000). The Court of Appeals has held that, despite the expansive nature of GML §205-a, a plaintiff must show noncompliance with a requirement found in a “well-developed body of law and regulation” that imposes “clear duties.” *See id.* at 463-64. This provision does not permit firefighters or police officers to sue for ordinary negligence.

The court now turns to plaintiff’s GML §205-a claim. In his opposition papers, he asserts that only one provision of the Vehicle and Traffic Law (“VTL”), Section 1140, provides the predicate for his GML §205-a claim. That provision, entitled “Vehicle approaching or entering intersections” has been held to apply only to intersections uncontrolled by traffic lights or stop signs. *See Crespo v New York City Housing Auth.*, 2222 A.D.2d 300 (1st Dept 1995); *Maliza v Puerto-Rican Transp. Corp.*, 2008 N.Y. Slip Op 02975, 2 (2nd Dept 2008). Since it is undisputed that the intersection at which this accident took place was governed by traffic lights, this provision cannot supply the predicate for plaintiff’s GML §205-a claim.

Plaintiff does not assert any other predicate statutes in his opposition papers but in his complaint he cited a variety of VTL provisions. This court will address each one in turn. VTL §1111 requires that motorists obey traffic signals and VTL §1180 regulates motorists’ speed. Both of those provisions are superseded by VTL §1104 which permits emergency vehicles to run red lights and operate in excess of speed limits as long as they act safely. VTL §1111-a simply permits municipalities to impose penalties for not complying with traffic signals. VTL §1142 applies only to intersections governed by a yield sign or stop sign. This intersection was controlled by traffic lights. VTL §1144 which requires that ordinary vehicles yield to emergency

vehicles does not apply to this situation which involves two emergency vehicles. Accordingly, none of these can supply the predicate for plaintiff's GML §205-a claim.

The only provisions that possibly provide a predicate here are VTL §1212 and VTL §1146. VTL §1212 prohibits reckless driving and therefore imposes a recklessness standard. Since plaintiff concedes that defendants did not act recklessly, even if this statute provides a predicate for his GML §205-a claim, the City is entitled to summary judgment on such a claim.

That leaves only VTL §1146 which requires that drivers exercise "due care." However, this claim is also insufficient to constitute a predicate for a GML §205-a claim. The intent of GML §205-a was to create a very limited exception to the "firefighters' rule" and allow firefighters to sue only when a statute or other provision had been violated. Firefighters are still prohibited from suing based on ordinary negligence. VTL §1146 which requires only that drivers exercise "due care" is simply a codification of the common-law standard that drivers should drive in a non-negligent manner. If it were an adequate statutory predicate for a GML §205-a claim, GML-§205-a would be eviscerated and plaintiffs would be, in essence, allowed to sue based on common-law negligence. Plaintiff cannot make an end-run around GML §205-a by using VTL §1146 as a statutory predicate. Therefore, the City is entitled to summary judgment on this claim as well.

Accordingly, the City's motion for summary judgment is granted and plaintiff's complaint is dismissed. This constitutes the decision, judgment and order of the court.

Dated: 12/8/11

FILED

DEC 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.