

Strong v City of New York

2012 NY Slip Op 30280(U)

February 2, 2012

Sup Ct, NY County

Docket Number: 110470/09

Judge: Cynthia S. Kern

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

PRESENT: _____
Justice _____

PART _____

Index Number : 110470/2009
STRONG, KEVIN
vs
CITY OF NEW YORK
Sequence Number : 004
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

E
2-6-12
[Signature]

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

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...
Answering Affidavits – Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision.

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

Cynthia Kern
It is a motion to re-argue

RECEIVED

FEB 7 2012

FILED

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

FEB 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/02/12

[Signature] _____
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----x
KEVIN STRONG,

Plaintiff,

-against-

THE CITY OF NEW YORK, MATTHEW PEACOCK
and GERALDO FALCON,

Defendants.

-----x
HON. CYNTHIA KERN, J.S.C.

Index No. 110470/09

FILED

FEB 07 2012

NEW YORK
COUNTY CLERK'S OFFICE

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.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Kevin Strong commenced this action for personal injuries he allegedly sustained when a police car driven by defendant police officer Matthew Peacock ("Officer Peacock") mounted the sidewalk and struck plaintiff and other pedestrians. Defendants the City of New York and Officer Peacock (hereinafter "defendants") now move to reargue certain portions of plaintiff's prior motion which, among other things, sought to strike defendants' affirmative defenses founded upon culpable conduct, assumption of the risk and Vehicular and Traffic Law ("VTL") §§ 1103 and 1104 and to compel defendants' to provide certain discovery. Plaintiff cross-moves to reargue that portion of its prior motion seeking to strike defendants' affirmative defense founded upon VTL §§ 1103 and 1104 and to strike said affirmative defense based on

additional grounds. For the reasons set forth below, defendants' motion to reargue is granted in part and denied in part and plaintiff's cross-motion is denied in its entirety.

The relevant facts are as follows. On June 30, 2009, Officer Peacock alleges that he and his partner were parked on the northeast corner of Avenue D and East Houston Street, New York, New York when he heard a transmission come over his portable radio which sounded like a dispute was taking place at a pool post nearby. Officer Peacock further alleges that moments later, the voice of Deputy Inspector Dennis Dequatro, the Commanding Officer of the 9th Precinct came over the portable radio and ordered units to the pool. Officer Peacock alleges it was at that point that he engaged his vehicle's emergency lights, used the manual siren and headed toward the Dry Dock Pool. While en route to the pool, Officer Peacock's police vehicle came into contact with a vehicle driven by Mr. Falcon. Officer Peacock's police vehicle then mounted the sidewalk and struck several pedestrians including plaintiff Kevin Strong, Miguel Carasquillo and De Fa Chen. Mr. Strong, Mr. Carasquillo and Mr. Chen each commenced separate actions. The Carasquillo, Strong and De Fa Chen actions have all been ordered consolidated for trial.

In or around May 2011, plaintiff moved to preclude defendants from offering any particulars at trial in support of their affirmative defenses of culpable conduct, assumption of the risk and VTL §§ 1103 and 1104. In its decision dated September 16, 2011, this court held that defendants were precluded from offering particulars at trial in support of their affirmative defenses of culpable conduct and assumption of the risk. However, this court declined to strike defendants' affirmative defense founded upon VTL §§ 1103 and 1104 and instead precluded defendants from introducing testimony as to what was on the radio run audio recording as that recording was destroyed by the City. Defendants now seek to reargue that portion of plaintiff's

prior motion which sought to preclude defendants from offering particulars at the trial in support of their affirmative defenses of culpable conduct and assumption of the risk. Defendants are also challenging that portion of this court's decision which precluded them from introducing testimony as to what was on the radio run audio recording at trial.

Finally, plaintiff cross-moves for leave to reargue his prior application seeking an order striking defendants' affirmative defense founded upon VTL §§ 1103 and 1104 based on defendants' alleged spoliation of evidence. Additionally, plaintiff seeks to strike defendants' affirmative defense founded upon VTL §§ 1103 and 1104 on the grounds that the City failed to comply with this court's decision and order of September 16, 2011 and that Officer Peacock was not engaged in an emergency operation as a matter of law.

On a motion for leave to reargue, the movant must allege that the court overlooked or misapprehended matters of fact or law. CPLR 2221(d)(2). Here, defendants argue that this court misapprehended certain facts when it precluded the City from introducing testimony as to what was on the radio run audio recording at trial. In its September 16, 2011 decision, this court imposed spoliation sanctions against the City for its destruction of the radio run audio recording. That portion of this court's decision was based on the court's understanding that there had been a previous Order to Show Cause ordering the City to preserve the audio recordings with which the City failed to comply. However, the court has now been made aware that the Order to Show Cause is invalid as it was withdrawn by the movant. In plaintiff's prior motion, plaintiff moved to compel defendants to produce the radio run audio recordings showing evidence of the emergency operation in question. In their response to plaintiff's motion, defendants stated that the audio recording at issue was destroyed as it was requested by plaintiff over 180 days after the

accident and it is defendants' policy to destroy this evidence if not requested within 180 days of an incident. In plaintiff's reply in further support of his motion, plaintiff alleged that his predecessor attorney served an Order to Show Cause on the New York City Police Department ("NYPD") to preserve audio recordings related to this case within 180 days of the date of the accident. However, defendants were not given the opportunity to properly respond to plaintiff's spoliation argument and thus the court was not aware that the Order to Show Cause was not, in fact, valid. Therefore, reargument of that issue is granted.

Upon reargument of that issue, the court reverses its decision and finds that the spoliation sanctions imposed upon defendants are lifted. Plaintiff provided no proof with his motion papers that the Order to Show Cause was ever served on the NYPD. There is no affirmation of service attached as part of the Order to Show Cause and thus, plaintiff failed to show that the NYPD was on notice that such audio recording may be relevant to a forthcoming lawsuit. Furthermore, plaintiff failed to prove that a judicial determination ever resulted from his predecessor attorney's Order to Show Cause. It appears that the Order to Show Cause was withdrawn by the movant prior to a required hearing. Therefore, plaintiff's Order to Show Cause was an improper basis for this court's finding of spoliation of the radio run audio recording. Thus, upon reargument of that issue, the spoliation sanctions imposed upon defendants are hereby lifted.

Additionally, the City alleges that this court misapprehended certain facts when it precluded the City from offering evidence in support of its affirmative defenses of culpable conduct and assumption of the risk at trial. Specifically, this court's September 16, 2011 decision stated that "defendant City has conceded that its affirmative defenses of culpable conduct and assumption of the risk are not at issue. Accordingly, the City is hereby precluded

from offering any evidence as to these affirmative defenses.” The City asserts that it never intended to withdraw those affirmative defenses as they were present in the City’s Answers and in the City’s Response to Plaintiff’s Demand for a Bill of Particulars as to Affirmative Defenses. However, the City’s argument is without merit. In both the City’s opposition papers and at oral argument, the City failed to oppose that portion of plaintiff’s motion to preclude these affirmative defenses at trial. The City has not shown that the court misapprehended the facts with regard to this issue. Therefore, the City’s motion for leave to reargue that portion of this court’s decision is denied.

The court now turns to plaintiff’s cross-motion for leave to reargue his prior application to strike defendants’ affirmative defense founded upon VTL §§ 1103 and 1104 due to defendants’ spoliation of evidence and to strike said affirmative defense on other grounds. On a motion for leave to reargue, the movant must allege that the court overlooked or misapprehended matters of fact or law. CPLR 2221(d)(2). Plaintiff argues that this court misapprehended certain facts when it failed to strike defendants’ affirmative defense grounded in VTL §§ 1103 and 1104 based on the spoliation of the radio run audio recording and instead merely precluded the City from presenting evidence of said audio recording at trial. However, the cross-motion for reargument is denied as this court has already found in this decision that there was no spoliation of the radio run audio recording by the City as there was no valid Order to Show Cause requiring the City to preserve said recording.

Additionally, plaintiff cross-moves to strike defendants’ affirmative defense founded upon VTL §§ 1103 and 1104 on the ground that defendants wilfully and contumaciously failed to comply with this court’s September 16, 2011 order which compelled them to provide certain

discovery regarding the emergency to which Officer Peacock was allegedly responding. This court, however, declines to strike defendants' affirmative defense founded upon VTL §§ 1103 and 1104 on that ground. In its decision, this court ordered that defendants were to "produce *to the extent they exist*, unredacted memoranda, records and reports regarding the emergency Peacock was allegedly responding to at the time of the accident, including unredacted department incident reports within 30 days of the date of [the] Order. If such items cannot be found or do not exist, the City is ordered to submit an affidavit describing the search undertaken for such items and the results" (emphasis added). In response to this court's order, defendants allege they undertook an intensive investigation to determine the facts leading up to the accident and sent their response on October 3, 2011. Defendants included an affidavit from Police Officer Joanna Lopez in which Officer Lopez averred that no emergency took place at her pool post, the location where Officer Peacock was headed at the time of the accident. Defendants also included an affidavit from Officer Peacock who averred that shortly before the accident, Deputy Dequatro issued a 10-85 (officer needs assistance) radio call. Officer Peacock asserted that the 10-85 radio call was made because an anonymous radio transmission came over their portable radios that sounded like a dispute at Officer Lopez's solo pool post. Although it was believed by Officer Peacock that there was an emergency at the pool, there was no emergency. Therefore, defendants cannot be compelled to provide an incident report or conduct a search for records related to that emergency. Thus, the court finds that defendants have fully complied with this court's September 16, 2011 order and their affirmative defense grounded in VTL §§ 1103 and 1104 will not be stricken on that ground.

Finally, plaintiff cross-moves to strike defendants' affirmative defense founded upon

VTL §§ 1103 and 1104 on the ground that Officer Peacock was not engaged in an emergency operation as a matter of law. This court, however, declines to strike defendants' affirmative defense founded upon VTL §§ 1103 and 1104 on that ground. VTL § 114-b provides that an "emergency operation" of a police vehicle includes "[t]he operation, or parking, of an authorized emergency vehicle, when such vehicle is engaged in...pursuing an actual or suspected violator of the law, or responding to, or working or assisting at the scene of the accident, disaster, police call, alarm of fire, actual or potential release of hazardous materials or other emergency." In the instant case, Officer Peacock was responding to what he thought was an emergency based on the 10-85 radio call from Deputy Dequatro over his portable radio. This situation fits squarely within the meaning of VTL § 114-b. *See also Criscione v. City of New York*, 97 N.Y.2d 152 (2001) ([t]he "reckless disregard" standard of liability applied to NYPD police officers' conduct because they were involved in an "emergency operation" when responding to a "10-52" radio call from a dispatcher"); *see also McCarthy v. City of New York*, 250 A.D.2d 654 (2d Dept 1998) (Police Officer responding to radio call from driver of another police vehicle was engaged in "emergency operation" as defined by VTL § 114-b). Plaintiff's reliance on *Rusho v. State of New York*, 76 A.D.3d 783 (4th Dept 2010) is misplaced as that case involved a parole officer colliding with the plaintiff's vehicle while the parole officer was engaged in an investigatory role and was not in pursuit of an actual or suspected absconder. Thus, this court declines to strike defendants' affirmative defense founded upon VTL 1103 and 1104 on that ground.

Accordingly, the City's motion to reargue is granted in part and denied in part. Upon reargument, the court's imposition of spoliation sanctions against the City is reversed but the court adheres to that portion of its decision that precluded the City from offering any evidence as

