

Farina v City of New York

2013 NY Slip Op 31393(U)

May 23, 2013

Sup Ct, Queens County

Docket Number: 24061/10

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X

Shane Farina and Kerryann Farina,

Index
Number: 24061/10

Plaintiffs,

- against -

Motion
Date: 5/14/13

The City of New York,

Motion
Cal. Number: 39

Defendant.

Motion Seq. No.: 2

-----X

The following papers numbered 1 to 9 read on this motion by defendant for summary judgment.

Papers
Numbered

Notice of Motion-Affirmations-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City for summary judgment dismissing the complaint is granted.

Plaintiff Shane Farina, a New York City Police Officer working plainclothes anti-crime duty at the time, was shot by a perpetrator he and his partner, Officer Jason Maass, were attempting to arrest on October 21, 2008 at the Queensbridge F-train subway station in Queens County. While said officers were attempting to handcuff the perpetrator, the perpetrator began to resist, a struggle ensued and the perpetrator acquired possession of Maass' off-duty firearm, a Glock 26, which he was required to carry, and shot Maass and plaintiff. Maass did not know whether his gun was removed from his holster by the perpetrator or whether it fell out of his holster onto the ground and picked up by the perpetrator. Maass was using a pancake holster with a retention strap secured by a snap. It was two-years old at the time of the incident. He testified in his deposition that he never had a problem with the holster, made any complaints about it, never had it repaired and was not aware of any other officers making any complaints about that type of holster.

It is undisputed that the suspect shot Maass and then shot plaintiff. Plaintiff was shot once, and the bullet entered the back of his upper right shoulder. Plaintiff testified that he was issued

a bullet-proof vest manufactured by Second Chance Body Armor while at the Academy and that he was fitted for the vest by employees of that company. Plaintiff testified that subsequently, he replaced the carrier of the vest by purchasing a new one. He also testified that there were gaps in the vest's panels and that the vest was attached at the top with velcro straps going across the shoulders. He testified that at the time of the incident, his vest was in good condition and had no complaints about it.

Sergeant Kenneth Granowski, research analyst for the NYPD's Personnel Bureau, was a member of the NYPD's Vest Committee and was involved in the NYPD's vest project which commenced in 2002 to determine whether and to what extent the then-issued Threat Level 2 vests issued to officers should be replaced. This was undertaken as a result of discovering through tests that some of the issued Level 2 vests were defective. He testified in his deposition and averred in his affidavit in support of the motion that since 2002, the NYPD has issued Level 3-a vests to all of its new uniformed officers. Following the murder of a police officer in the line of duty in 2006, the NYPD undertook research to determine the feasibility of improving body armor to better protect officers. The Vest Committee recommended to the Police Commissioner, based upon tests that determined that the regular vests had excellent performance and adequate coverage and based upon the recommendations of the National Institute of Justice, that new recruits would be issued vests with enhanced Threat Level 3-a maximum coverage protection instead of the regular Level 3-a vests, but that the non-enhanced coverage 3-a vests would not be replaced unless found to be unserviceable as a result of wear and tear because it was determined that there was nothing wrong with the current vests and that they provided adequate protection. The Police Commissioner approved the recommendation of the Vest Committee in 2006 and authorized the issuance of Level 3-a maximum coverage vests to all new recruits and to replace the 21,000 Level 2 vests that were still in use. Plaintiff was wearing a Level 3-a non-maximum level vest at the time of the incident.

Detective Patrick J. DeCanio, of the NYPD's Firearms and Tactics Section, whose duties include training, testing and providing input regarding the selection and use of equipment, testified in his deposition that NYPD guidelines require plainclothes officers to use pancake holsters on assignment. Said holsters are more concealable than regular holsters, in keeping with undercover plainclothes work, and that a thumb break strap with a snap has been determined to be sufficient to satisfy the requirement of the NYPD for a reliable retention device other than mere friction to prevent a plainclothes officer's gun from slipping out of the holster while the officer is running. He testified that it was determined by the Firearms and Discharge Review Board that Maass' holster was authorized and met the NYPD's specifications. He also testified that any enhancement of the pancake holster's retention capability would make removing the gun more difficult and

make the holster dangerous. Also, unlike with vests that are issued, officers are required to purchase their own holsters.

Plaintiff filed a notice of claim and thereafter commenced the present action alleging in his complaint and bill of particulars a cause of action for common law negligence for failure to provide plaintiff with an adequate, up-to-date vest and failure to provide his partner with a proper holster furnished with adequate retention features to prevent his weapon from becoming a dangerous instrumentality, a cause of action under Labor Law §27-a for failure to provide plaintiff with a safe place to work, the creation of a dangerous condition and notice of said dangerous condition (the vest and the holster), the failure to comply with "applicable laws and regulations" and a cause of action under §205(e) of the General Municipal Law for violation of "statutes, ordinances, codes, rules orders and/or requirements" of State and local laws and the Labor Law. Plaintiff contends that the City should have provided him with a maximum level 3-a vest and should not have approved the use by Maass of a pancake-style holster whose retention strap, after two years of use, became so stretched as to provide no protection against the unauthorized removal of the weapon from the holster or the falling of the gun out of the holster.

The City contends that it is entitled to summary judgment upon the grounds that the evidence presented establishes that the equipment at issue was reasonably suited for its intended purpose and, therefore, the City was not negligent, that the City is entitled to governmental immunity in that its selection of vests and holsters and determination regarding the replacement of vests were discretionary decisions, that an action against the City is precluded under the "firefighter's rule" pursuant to §11-106 of the General Obligations law and that plaintiff fails to establish a cause of action under §205-e of the General Municipal Law because it is improperly premised upon §27-a of the Labor Law which is not a proper predicate to an action under §205-e.

It is well-established that an employer is only required to furnish its employees with equipment that is "reasonably safe, in good repair and suitable for its intended use" (see McCormack v City of New York, 80 NY 2d 808, 810 [1992]). The City does not have the duty to provide its police officers with the best-known equipment to protect them and, therefore, does not breach its duty of care to them merely because the equipment it provided them was not state of the art and there may have existed more up-to-date devices that may have been safer (see id.).

The City has established a prima facie entitlement to summary judgment by proffering sufficient evidence in admissible form that plaintiff's vest and Maass' holster were not inadequate, defective or dangerous but that they provided a reasonable and proper level of protection. Plaintiff fails to raise an issue of fact in this

regard in opposition.

Even if, *arguendo*, there were a question of fact as to whether the NYPD selected appropriate equipment for its officers, it is well-established that a discretionary act of a governmental entity, as opposed to a ministerial act, may not form the basis of liability against it (see McLean v City of New York, 12 NY 3d 194 [2009]). The function of selecting police equipment is clearly a discretionary governmental function (see, e.g., Amodio v City of New York, 33 AD 3d 456, 457 [1st Dept 2006]). The selection of protective vests by the City for its police officers, based upon testing and evaluation by the NYPD's Vest Committee and recommendations of the National Institute of Justice, and the determination that Level 3-a vests (the type that plaintiff was wearing) provided adequate protection and did not need to be replaced by Level 3-a maximum coverage vests and that Level 3-a enhanced vests would be issued only to new recruits and to replace the remaining lesser Level 2 vests were clearly discretionary decisions that cannot be the subject of suit as a matter of law.

With respect to the so-called "firefighter's rule", that phrase was coined to refer to the common law rule followed in New York which barred firefighters from maintaining negligence actions for injuries sustained in the line of duty related to the risks they are expected to assume as part of their job (see Santangelo v State of New York, 71 NY2d 393 [1988]). That rule was later applied to police officers as well as firefighters (see *id.*; Cooper v City of New York (81 NY2d 584 [1993])). The City correctly notes that the common law "firefighter's rule" was statutorily superceded in 1996 by General Obligations Law § 11-106 which gives firefighters and police officers a negligence cause of action for line of duty injuries against any person or entity except the firefighters' or police officers' employer or co-employee (see L 1996, ch 703, § 5).

Since it is undisputed, and indeed plaintiff admits, that he was acting within the scope and course of his employment as a police officer, performing his official duties at the time of the incident, his common law negligence causes of action are barred by GOL §11-106 as a matter of law (see Giuffrida v Citibank Corp., 100 NY2d 72 [2003]; Link v City of New York, 34 AD 3d 757 [2nd Dept 2006]).

With respect to plaintiff's statutory cause of action under General Municipal Law § 205-e, as a prerequisite to recovery under that section for the negligent failure to comply with a statute, ordinance, rule, order or governmental requirement, a police officer must demonstrate an injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties (see Galapo v City of

New York, 95 NY2d 568 [2000]; Desmond v City of New York, 88 NY2d 455 [1996]; Link v City of New York, supra). To support a claim under GOL § 205-e, a plaintiff must identify the statute or ordinance with which the defendant failed to comply (see Williams v City of New York, 2 NY3d 352, 363 [2004]).

As a predicate to his claim under GML 205-e, plaintiff specifically alleges only a violation, generally, of §§27-a of the Labor Law. No specific subsections thereof are set forth by plaintiff, but the language of the notice of claim and complaint tracks the general duty language set forth in subsection 3(a).

The intent of the Legislature in enacting Labor Law §27-a, known as the Public Employee Safety and Health Act ("PESHA"), was to provide public employees with occupational safety and health standards comparable to those provided to private employees under OSHA, and the Commissioner of Labor was charged with the duty to implement such standards by, inter alia, adopting the OSHA safety and health standards. The reasoning of the Legislature was that there should not be a different standard of employee safety for public employees whose job functions are comparable to those performed by workers in the private sector (see Memorandum of the Assembly Rules Committee, 1980 NY Legis Ann, at 284-285).

Plaintiff does not specify either in his bill of particulars, complaint or affirmation in opposition what subsection(s) or workplace safety or health standards of §27-a or what applicable OSHA safety standards he is relying upon. However, it appears, based upon plaintiff's counsel's contentions and allegations set forth in the notice of claim, complaint and bill of particulars, that he is merely relying upon §27-a(3)(a), the general duty provision, which states, "Every employer shall: (1) furnish to each of its employees, employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees; and (2) comply with the safety and health standards promulgated under this section."

No evidence has been proffered, on this record, to raise an issue of fact as to whether the NYPD's selection of protective vests and pancake holsters presented a recognized hazard and plaintiff fails to cite any rule, regulation or statute requiring protective vests or holsters with greater safety features than those approved by the NYPD.

It is clear that the selection of bullet-proof vests and holsters, a discretionary decision of law enforcement professionals who have unique, specialized knowledge of the dynamics of police

work involving deadly combat situations, cannot be interpreted as a workplace safety or health hazard within the meaning of PESHHA or OSHA. "We hold that this provision does not cover the special risks faced by police officers because of the nature of police work. The judgments that must be made by police supervisors in minimizing the danger that police officers inevitably face, while at the same time protecting the public, are uniquely sensitive, difficult and important.... We think it highly unlikely that the Legislature intended the general language of section 27-a to authorize Department of Labor inspectors enforcing PESHHA to second-guess the decisions of police supervisors on matters like these...we rely on the judgment of those supervising the Police Department to do so - not on regulation and oversight by the Commissioner of Labor" (Williams, supra, at 368-369). This Court finds that the Commissioner of Labor is not qualified to determine what equipment is appropriate for use by police officers in combat scenarios. Thus, Labor Law §27-a is not a proper predicate for a cause of action under §205-e under the facts of this case.

Since the un rebutted evidence presented, on this record, is that the equipment at issue was adequate, that the City is, in any event, protected by governmental immunity for its clearly discretionary decisions regarding the equipment at issue, that plaintiff is barred from maintaining a common law negligence cause of action pursuant to GOL § 11-106 and that no applicable predicate has been presented to support his remaining cause of action under GML 205-e, the action must be dismissed, as a matter of law.

Finally, although plaintiff's counsel argues that the City was negligent in failing to properly inspect the plaintiff's vest and Maass' holster, no such claim has been asserted by plaintiff.

Accordingly, the motion is granted and the complaint is dismissed.

Dated: May 23, 2013

KEVIN J. KERRIGAN, J.S.C.