SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND Part C-2

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JAY ABRAMS and KELLI ABRAMS, HIS WIFE,

Plaintiffs,

-against-

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

Defendants.

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Present:
Hon. Thomas P. Aliotta

DECISION AND ORDER

Index No. 100070/2010
Motion No. 382-004

The following papers numbered 1 to 5 were fully submitted on the 9th day of May, 2013:

Notice of Motion and supporting papers (dated January 25, 2013)	1
Affirmation in Opposition and supporting papers (dated April 4,2013)	2
Affirmation in reply (dated May 1, 2013)	3
Letter Brief (dated May 15, 2013	4
Letter Supplemental Submission (dated May 20, 2013)	5

Upon the foregoing papers, plaintiffs motion, designated as a motion to reinstate and renew the complaint and to amend the reinstated complaint to add a cause of action under the Freedom of Information Law (FOIL), is disposed as indicated.

BACKGROUND

This action has its genesis in an incident that occurred on November 3, 1997, which resulted in personal injuries to plaintiff Jay Abrams, when a co-worker discharged a firearm at premises owned by one Suzanne Berelson (not a party herein). Plaintiff Kelli Abrams sues derivatively.

The Related Case of *Abrams v. Berelson*

As set forth by the Appellate Division in *Abrams v. Berelson*, (94 AD3d 782 [2nd Dept 2012], *appeal dismissed*, 19 NY3d 949), the facts are as follows:

> Defendant [Berelson] hired the plaintiff Jay Abrams (hereinafter the injured plaintiff) and his coworker, Michael Torres, through their employer, to clean

> the carpets of a house that she owned and that, until her mother's death two months earlier, had been occupied exclusively by her mother. According to the plaintiffs [Jay and Kelli Abrams], the defendant instructed the injured plaintiff and Torres that any remaining property in the house could be kept by them, discarded as trash, or donated to charity. The plaintiffs [further] alleged that, in the course of performing the work, Torres discovered a loaded rifle in one of the closets he was cleaning, and accidentally shot the injured plaintiff.

(94 AD3d at 782-783).

Shortly after the shooting, Jay and Kelli Abrams commenced an action against Berelson (*Abrams v. Berelson*, Richmond County Index No. 11379/98), who then moved for summary judgment dismissing the complaint. In support of her motion, Berelson submitted an affidavit in which she averred that she was not aware that there was a rifle in the house. At the time that the defendant's summary judgment motion was made, the plaintiffs were unable to locate Torres and, thus, could not obtain an affidavit from him regarding the circumstances surrounding the discovery of the gun and its subsequent discharge.

In an order dated August 30, 2000, the Supreme Court (Ponterio, J.) granted summary judgment and dismissed the complaint, concluding that the defendant had met her prima facie burden and that the plaintiffs failed to raise a triable issue of fact as to defendant's actual or constructive notice. In doing so, the motion court noted that, even under the most favorable view of the then-available evidence (*i.e.*, in the absence of any evidence from Torres, and given the reported destruction of the subject rifle by the police department), there was no evidence to support plaintiff's action.

The Appellate Division affirmed Justice Ponterio's order (*see Abrams v. Berelson*, 283 AD2d 597 [2nd Dept 2001]), holding, inter alia, that the "defendant established that she did not have actual or constructive notice of the presence of the rifle in the closet. In response, the plaintiffs only

speculated that the defendant had notice of the rifle" (283 AD2d at 598).

More than nine years later, the plaintiffs moved, pursuant to CPLR 5015(a)(2), to vacate the order on the ground of newly-discovered evidence, which the Supreme Court (Maltese, J.) treated as one pursuant to CPLR 2221 for leave to renew the plaintiffs' opposition to the defendant's motion for summary judgment dismissing the complaint (*Abrams v. Berelson*, 28 Misc3d 1227[A]).

In support of the motion to renew, the plaintiffs submitted, among other things, an affidavit from the now-located Torres, wherein he averred that, in the course of his work at the defendant's house, he saw a box leaning against the back wall of a closet, labeled "Daisy air rifle b.b. gun," and that it was "impossible" for a person looking into the closet to fail to see the box. Torres further averred that "[i]n the box, and, in plain sight, was a rifle."[1]

In addition to the availability of Michael Torres to now offer testimony, the plaintiffs submitted a letter dated July 30, 2009, from Daniel M. Donovan, Jr., the Richmond County District Attorney, confirming that the police had not destroyed the evidence in the case as was once believed.

On the basis, *inter alia*, of this new evidence, Justice Maltese granted the plaintiffs' motion to renew their opposition to the defendant's summary judgment motion, vacated the prior order, and denied the defendant's motion. In doing so, the Supreme Court stated:

> It is the finding of this court that the plaintiffs exercised all due diligence in presenting the newly discovered evidence to this court for reconsideration. Here, Michael Torres, a key witness by his own admission, actively concealed his whereabouts from both the plaintiffs and the defendant. Furthermore, in originally considering the defendant's motion for summary judgment the court and the parties proceeded on the assumption that the rifle at issue had been destroyed by the police. As the rifle has become

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[1] Although Torres's affidavit was originally written to indicate that the rifle was found outside the box and leaning against it, Torres inserted handwritten changes to the affidavit to clarify that the gun was inside the box.

> available for examination by the parties and Michael Torres is available to be deposed, the interests of justice require that the prior determination of the court granting summary judgment must be vacated.

The Appellate Division reversed on two grounds: (1) "the plaintiffs, who did not move to vacate the judgment until six months after locating Torres, failed to meet their 'heavy burden' of showing due diligence in presenting the new evidence to Supreme Court once it was obtained;" and (2) "[E]ven if the plaintiffs had demonstrated the requisite reasonable justification, denial of the motion would have been warranted because the allegedly new facts offered would not have changed the prior determination" (94 AD3d at 784).

In elaborating on this second ground, the Appellate Division stated:

> Torres' affidavit would not have changed the result of the summary judgment motion because, contrary to the plaintiffs' contention, it did not raise a triable issue of fact as to the defendant's constructive notice of a dangerous condition.
>
> A defendant has constructive notice of a dangerous condition when the condition "is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected" [citations omitted]. Although the presence of a *loaded* gun [emphasis in original] may constitute a dangerous condition, under the circumstances of this case, the mere presence of a gun in the defendant's house was not sufficient to establish, as a matter of law, the defendant's liability founded on the presence of a dangerous condition, absent proof that the defendant had actual or constructive knowledge that the gun was loaded [citations omitted]. Thus, to establish the defendant's liability, the plaintiffs ultimately would be required to show not only that the defendant had constructive notice of the presence of the rifle, but constructive notice that the rifle was loaded [citations omitted].
>
> The plaintiff failed to raise a triable issue of fact in that regard. Torres' affidavit merely established that there was a box in the closet labeled "Daisy air rifle B.B. gun," which contained a .22 caliber rifle, and that one could not look into the closet without noticing the box. Even if Torres's affidavit, along with the defendant's deposition testimony that, when she was a child, her father owned a gun which she knew about, was sufficient to establish a triable issue of fact as to the defendant's constructive notice that the box contained a rifle, there was no evidence that the defendant knew or had any reason to know that the rifle in the box was loaded [citations omitted].

> Further, under the circumstances of this case, involving the injured plaintiff and Torres, adults who were no less able to assess and appreciate the danger of a weapon than the defendant, and the need to treat a weapon with the utmost of care, we decline to impose upon the defendant a duty to personally inspect the contents of the box to assess whether any weapon contained therein was loaded so that she could so warn the injured plaintiff and his co-worker [citations omitted].

Accordingly, the Appellate Division reinstated Justice Ponterio's order of August 30, 2000, dismissing the complaint.

The Instant Action

The present action was commenced on or about December 8, 2009, against the City of New York and the New York City Police Department (NYPD) Plaintiffs herein (the same plaintiffs as in *Abrams v Berelson*), allege that during the pre-trial discovery stage in *Abrams v. Berelson*, they served a subpoena upon the NYPD, in response to which the NYPD advised them that the subject rifle had been destroyed, and that it was not until September 15, 2008, that they learned that the rifle was still in police custody.

Shortly after Justice Maltese granted plaintiffs' motion to renew and restored *Abrams v Berelson* to the trial calendar, this Court granted the City's motion for summary judgment in the instant matter and dismissed the complaint "without prejudice to any further action plaintiffs may be advised to commence following disposition of *Abrams v. Berelson*." At the same time it denied as academic plaintiffs' cross motion to strike defendants' answer.

On June 28, 2012, the Court of Appeals dismissed plaintiffs' appeal of the Appellate Division's order (*Abrams v. Berelson* , 19 NY3d 949 [2012]), as a result of which Justice Ponterio's order dismissing the complaint in *Abrams v. Berelson* remains extant. Plaintiffs thereafter moved by Notice of Motion dated January 25, 2013, to "reinstate or renew" their complaint in the instant

case pursuant to CPLR 2221(e), and upon reinstatement to add a cause of action under the Freedom of Information Law.[2]

For the reasons stated below, the motion is denied.

DISCUSSION

To the extent relevant here, CPLR 2221(e) provides that a motion for leave to renew "shall be based on new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination."

Here, plaintiffs point to the most-recent decision by the Appellate Division in *Abrams v. Berelson* as a source of both new facts and a change in the law of the case that warrants re-examination of the City's motion for summary judgment.

In essence, plaintiffs argue that since their claims against Berelson are no longer viable, this Court now should deny dismissal of their complaint against the City of New York and the NYPD, which is grounded in the failure of those defendants to safeguard the evidence, and in particular, to make the rifle available for timely discovery and inspection in the prior action. The gravamen of plaintiffs' complaint is that they "were unduly denied a fair day in court" due to the City defendants' negligent inability to locate the evidence in question in time to avoid the August 2000 dismissal by Justice Ponterio, which dismissal now has been reinstated by the Appellate Division.

However, plaintiffs' analysis misreads the import of the appellate decision. The Appellate Division held, *inter alia,* that to establish Berelson's liability, plaintiffs ultimately would be required to show not only that the defendant had constructive notice of the presence of the rifle, but

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[2] Although denominated a "Motion to Reinstate or Renew,' in substance this is an application for leave to renew pursuant to CPLR 2221(e), and shall be treated as such.

constructive notice that the rifle was loaded (94 AD3d at 785):

> Although the presence of a *loaded* gun may constitute a dangerous condition, under the circumstances of this case, the mere presence of a gun in the defendant's house was not sufficient to establish, as a matter of law, the defendant's liability founded on the presence of a dangerous condition, absent proof that the defendant had actual or constructive notice that the gun was loaded (emphasis in original)."

Nothing in plaintiffs' present application, or in their presentation on the motion before this Court in 2010, establishes that the production of the weapon by the City defendants in 2000 would have had a substantial impact on their ability to meet that burden either then or now.

Indeed, plaintiffs concede that the Appellate Division in *Abrams v. Berelson* specifically determined that "denial of the CLR 2221 motion [before Justice Maltese] would have been warranted because the allegedly new facts offered would not have changed the prior determination" (94 AD3d at 784). That is, in the absence of any logical connection between the physical evidence and Berelson's actual or constructive notice of the purported dangerous condition, neither the Torres affidavit nor the production of the rifle would have had a substantial impact on the outcome. In this regard, plaintiff's "logical inference . . . that a probability does exist that Suzanne Berelson's fingerprints could have been on the rifle" is both speculative and immaterial to the issue of notice.

Thus, plaintiff's conclusion that the City's conduct "constitutes spoliation of evidence (*i.e.* fingerprints)" is unavailing.

Accordingly, so much of plaintiff's application as seeks to reinstate their complaint is without merit. In addition, given this determination, so much of the application as seeks relief under the Freedom of Information Law is academic.[3]

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[3] Although not necessarily determinative in and of itself, the Court notes that the extent of plaintiffs' delay in moving for renewal in this case exceeds the time found to be unacceptable

Accordingly, it is

ORDERED that so much of the plaintiffs' motion as seeks leave to renew the prior motion is granted; and it is further

ORDERED that, upon renewal, the motion to reinstate the complaint in this action is denied in all respects; and it is further

ORDERED that the complaint is dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

ENTER

Dated: September 10, 2013

/s/
Hon. Thomas P. Aliotta,
J.S.C.

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by the Appellate Division in *Abrams v. Berelson* (94 Ad3d at 784).