

Quintero v City of New York

2014 NY Slip Op 32007(U)

July 29, 2014

Supreme Court, New York County

Docket Number: 115901/2008

Judge: Kathryn E. Freed

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

PRESENT: FREED
HON. KATHRYN FREED Justice
JUSTICE OF SUPREME COURT

PART 5

QUINTERO, JANICE

INDEX NO. 115901/08

MOTION DATE _____

MOTION SEQ. NO. 07

MOTION CAL. NO. _____

- v -
THE CITY OF NEW YORK,
ET AL

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

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

FILED

AUG 01 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/29/14
JUL 29 2014


HON. KATHRYN FREED J.S.C.
JUSTICE OF SUPREME COURT

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: Part 5

-----X
JANICE QUINTERO,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY
POLICE DEPARTMENT, JEFFREY ROHE,
SAMUEL B. BORGER and CHAYA MALKA
BORGER,

Defendants.
-----X

DECISION/ORDER

Index No.: 115901/2008

Sequence No. 007

FILED

AUG 01 2014

COUNTY CLERK'S OFFICE
NEW YORK

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	1,2(Exs. A-K)
ANSWERING AFFIDAVITS.....3.....
REPLYING AFFIDAVITS.....
EXHIBITS.....
STIPULATIONS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Defendants The City of New York ("the City") and Police Officer Jeffrey D. Rohe ("P.O. Rohe") move, by order to show cause, for an order: 1) pursuant to CPLR 3126 (3) striking the amended verified complaint or precluding plaintiff from producing any testimony or evidence at the time of trial with regard to any future lost earnings claim for failure to submit to a vocational rehabilitation examination or, in the alternative, pursuant to 22 NYCRR § 202.21(d) and/or (e), vacating plaintiff's note of issue and compelling plaintiff to appear for a vocational rehabilitation

examination pursuant to CPLR 3124; and 2) pursuant to CPLR 3211(a)(7), dismissing the amended verified complaint against defendant P.O. Rohe for failure to state a cause of action due to plaintiff's failure to comply with General Municipal Law §§ 50-e and 50-k. Plaintiff Janice Quintero opposes the motion. After oral argument of the application, as well as a review of all relevant statutes and case law, this Court **denies** that branch of the motion seeking to dismiss the complaint or, alternatively, to preclude plaintiff from introducing evidence of her damages based on plaintiff's failure to appear for a vocational rehabilitation examination or to compel the plaintiff to appear for such an examination. This Court **grants** that branch of the motion seeking the dismissal of the complaint against P.O. Rohe based on plaintiff's failure to name him in her notice of claim.

Factual and Procedural Background:

This action arises from an incident on April 11, 2008 in which plaintiff Janice Quintero, an on-duty member of the defendant New York City Police Department ("NYPD"), was injured when the unmarked NYPD vehicle in which she was a passenger, operated by defendant P.O. Rohe, was struck from behind by a vehicle owned by defendant Chaya Malka Borger and operated by defendant Samuel Borger (collectively "the Borgers").

Plaintiff filed a notice of claim against the City of New York on May 15, 2008 alleging that the accident occurred on April 11, 2007. Ex. A.¹ The notice of claim was subsequently amended to reflect that the accident actually occurred on April 11, 2008. Ex. B.

On November 26, 2008, plaintiff commenced the captioned action against the City, the

¹Unless otherwise noted, all references are to the exhibits annexed to the order to show cause brought by the City and P. O. Rohe.

NYPD, P.O. Rohe, and the Borgers. Ex. C. In her complaint, plaintiff alleged, inter alia, that she had served a notice of claim on the City and the NYPD. Ex. C, at par. 2. Plaintiff did not allege that a notice of claim had been served on P.O. Rohe. Plaintiff claimed that she was injured by, inter alia, to the negligence of P.O. Rohe in operating the vehicle in which she had been a passenger, as well as by the negligence of Samuel Berger. Ex. C, at pars. 32, 37. The plaintiff further alleged in the complaint that, as a result of the accident, she was “prevented from attending [to] her usual vocation, duties and activities, and that her injuries are permanent in nature.” Ex. C, at par. 38.

The City thereafter joined issue by service of its answer. Ex. D.

On January 20, 2009, plaintiff filed an amended summons and verified complaint against the City, the NYPD, P.O. Rohe, and the Borgers. Ex. E. On March 19, 2009, the City, the NYPD, and P.O. Rohe served an answer to the amended complaint. Ex. F.

Plaintiff served a verified bill of particulars dated June 19, 2009 alleging, inter alia, that she was injured due to the negligence of the defendants. Ex. H, at par. 15. She further alleged that she was totally disabled as a result of the incident and that although she made “[n]o claim for lost earnings at [that] time”, she reserved the right to do so. Ex. H, at par. 7.

Plaintiff filed a note of issue and certificate of readiness on January 13, 2012. Ex. I.

On August 21, 2013, the Medical Board of the Police Pension Fund determined that plaintiff was “unable to perform the full duties of a New York City Police Officer” due to the injuries she sustained in the alleged incident. Ex. J.

Counsel for the movants represents that, on March 20 and 24, 2014, the City demanded that plaintiff appear for a vocational rehabilitation examination based on the finding of the Medical Board of the Police Pension Fund and that plaintiff has refused to appear for such an examination.

The motion papers are devoid of any indication that a written demand was made for plaintiff to appear for such an examination.

On March 25, 2014, the City served plaintiff with a "Post Accident Disability Retirement Notice for Discovery and Inspection". Ex. K.

The City and P.O. Rohe now move for an order: 1) pursuant to CPLR 3126 (3), striking the amended verified complaint or precluding plaintiff from producing any testimony or evidence at the time of trial with regard to any future lost earnings claim for failure to submit to a vocational rehabilitation or, alternatively, pursuant to 22 NYCRR § 202.21(d) and/or (e), vacating plaintiff's note of issue and compelling plaintiff to appear for a vocational rehabilitation examination pursuant to CPLR 3124; and 2) pursuant to CPLR 3211(a)(7), dismissing the amended verified complaint against defendant P.O. Rohe due to plaintiff's failure to comply with General Municipal Law §§ 50-e and 50-k. Plaintiff opposes the motion.

Positions of the Parties:

The City and P.O. Rohe argue that the complaint must be stricken pursuant to CPLR 3126(3) due to plaintiff's willful refusal to appear for a vocational rehabilitation examination. In the alternative, the City and P.O. Rohe assert that plaintiff must be precluded from introducing evidence of lost earnings given his failure to appear for such an examination. Should such relief not be granted, urge the movants, the note of issue should be vacated and plaintiff must be compelled to appear for a vocational rehabilitation examination. They assert that they are entitled to such discovery since the finding of the Medical Board of the Police Pension Fund that plaintiff is totally disabled, issued after the filing of the note of issue, constituted "unusual or unanticipated

circumstances” allowing for this discovery pursuant to 22 NYCRR § 202.21(e) despite the fact that the case was certified for trial.

The City and P.O. Rohe assert that the complaint must be dismissed against P.O. Rohe since he was not individually named in plaintiff’s notice of claim.

In opposition to the motion, plaintiff argues that the City is not entitled to a vocational rehabilitation examination because the note of issue has been filed, the case has been certified as ready for trial, and the City has failed to proffer any reason why such an examination is warranted.

Plaintiff further asserts that P.O. Rohe is not entitled to the dismissal of the complaint against him since she had no duty to name him individually in the notice of claim. Further, she maintains that there was no prejudice to the City arising from the failure to name P.O. Rohe in the notice of claim since the City was on notice of his identity immediately after the alleged incident and the notice of claim provided the City with facts sufficient to investigate the claim.

Conclusions of Law:

The Motion to Dismiss, Preclude Or Compel

That branch of the motion by the City and P.O. Rohe seeking dismissal of the complaint based on plaintiff’s alleged willful failure to appear for a vocational rehabilitation examination or, in the alternative, precluding plaintiff from introducing evidence of her damages or compelling plaintiff to appear for a vocational rehabilitation examination is denied. CPLR 3126(3) provides, inter alia, that if a party “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them . . . an order striking

out pleadings or parts thereof.” Here, however, plaintiff is not in violation of any court order. The movants have not annexed any such order to their papers. Nor do the movants annex to their papers any correspondence or formal demand seeking to conduct a vocational rehabilitation examination.

Further, this Court finds that a vocational rehabilitation examination does not fall within the realm of information which ought to have been disclosed herein. Although the Medical Board of the Police Pension Fund determined, after the filing of the note of issue, that plaintiff had a permanent disability (Ex. J), this finding did not constitute the “unusual or unanticipated circumstances” necessary to warrant further discovery pursuant to 22 NYCRR § 202.21(e) so as to avoid substantial prejudice to the movants. *Cf. Stock v Morizzo*, 92 AD3d 672 (2d Dept 2012). This is because plaintiff has not made a claim for lost wages. Indeed, plaintiff specifically stated in her bill of particulars that she did not assert a claim for lost wages. Ex. H, at par. 7. Although plaintiff reserved her right to assert a claim for lost wages, the motion papers are devoid of any indication that she has asserted such claim. While in certain cases a vocational rehabilitation examination may be material and necessary (*see Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 955 [1998]), such is not the case here. Since lost wages have not been asserted as an element of plaintiff’s damages, it is unnecessary for the City and P.O. Rohe to conduct a vocational rehabilitation examination at this time. *Cf. Wilkerson v Korbi*, 75 AD3d 470 (1st Dept 2010).

In support of their arguments, the movants rely on the case of *Karakostas v Avis Rent A Car Systems*, 306 AD2d 381 (2d Dept 2003). However, in that case, “[i]t was not until after the filing of the note of issue that the plaintiff served a supplemental response to discovery indicating for the first time that the plaintiff would call an expert to testify about the plaintiff’s disability and lost future earnings.” *Id.*, at 382. Thus, held the Appellate Division, “unusual or unanticipated

circumstances” existed which warranted a vocational rehabilitation examination. That case is distinguishable, however since, as noted above, no lost wages claim has been made herein.

In light of the foregoing, there is no basis upon which to dismiss the complaint, to preclude the plaintiff from introducing evidence, or upon which to compel plaintiff to appear for a vocational rehabilitation examination.

The Motion to Dismiss the Complaint As Against P.O. Rohe

P.O. Rohe correctly asserts that he is entitled to the dismissal of the complaint against him for failure to state a cause of action pursuant to CPLR 3211(a)(7) since plaintiff failed to name him individually in the notice of claim. *See* General Municipal Law § 50-e; *Cleghorne v City of New York*, 99 AD3d 443 (1st Dept 2012); *Tannenbaum v City of New York*, 30 AD3d 357 (1st Dept 2006). Since plaintiff never served a notice of claim on P.O. Rohe and the statute of limitations of one year and 90 days has expired, it is too late for plaintiff to assert a claim against P.O. Rohe at this time. *See* General Municipal Law § 50-e (5).

In arguing that P.O. Rohe is not entitled to the dismissal of the claims against him, plaintiff’s counsel argues that such dismissal would be manifestly unfair since the purpose of the notice of claim requirement is to enable a municipality to investigate an incident and the movants knew immediately after the accident alleged that P.O. Rohe was involved. In support of his argument, counsel relies, inter alia, on the case of *Chamberlain v City of White Plains*, 2013 U.S. Dist. LEXIS 174745 (SDNY 2013). In that case, the United States District Court for the Southern District of New York acknowledged that “[t]he appellate courts in New York are currently split as to whether a [n]otice of [c]laim must specifically name individual municipal officers or employees in order for

a plaintiff to subsequently maintain a lawsuit against them, and the Court of Appeals has not addressed the question.” *Id.* The District Court acknowledged the decision of the First Department in *Cleghorne, supra*, requiring that an individual defendant had to be named in the notice of claim.

However, the Southern District also cited to *Goodwin v Pretorius*, 105 AD3d 207 (4th Dept 2013), in which the Fourth Department stated that “courts have misapplied or misunderstood the law in creating, by judicial fiat, a requirement for notices of claim that goes beyond those requirements set forth in [the General Municipal Law]. If the legislature had intended that there be a requirement that the individual employees be named in the notices of claim, it could easily have created such a requirement.”

The Southern District concluded that, “[i]n the absence of more specific guidance, [it adopts] the *Goodwin* Court’s well-reasoned conclusion that there is no requirement that individual defendants be specifically named in the [n]otice of [c]laim.” *Id.* It further stated that, so long as the notice of claim contained enough information to enable a municipality to investigate a claim, “a failure to specifically name individual defendant employees should not bar the suit against them.” *Id.*

Although this Court agrees with the reasoning of the *Chamberlain* and *Goodwin* decisions, and agrees with plaintiff that the City knew, or should have known, of P.O. Rohe’s involvement in the alleged accident immediately after it occurred, it is nevertheless constrained to follow the holdings of the First Department in *Tannenbaum* and *Cleghorne*, as “the law as determined by an appellate court is controlling upon and is to be followed by an inferior court located within the judicial department over which the appellate court exercises supervisory jurisdiction.” *Shannon v Metropolitan Life Ins. Co.*, 146 Misc 903, 905 (Mun Ct New York County 1933); see *In re Greim’s*

Estate, 183 NYS 149 (Surr Ct Westchester County 1920).

Plaintiff's counsel also relies on the case of *Rodriguez v New York City Trans. Auth.*, 90 AD3d 552 (1st Dept 2011), which he asserts is "directly on point." Plaintiff's Aff. In Opp., at par. 21. In that case, however, the First Department held that the complaint *could not be dismissed against the defendant New York City Transit Authority* where the notice of claim provided sufficient detail to identify a conductor who was involved in an incident in the subway. That case is therefore distinguishable since, unlike here, it did not involve the dismissal of a claim against an individual employed by a municipality.

Given the above, the complaint, insofar as alleged as against P.O. Rohe, must be dismissed.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that that branch of the motion by defendants the City of New York and Police Officer Jeffrey D. Rohe seeking to strike the complaint or to preclude plaintiff from introducing evidence of damages at trial due to plaintiff's failure to appear for a vocational rehabilitation examination or, in the alternative, to compel plaintiff to appear for a vocational rehabilitation examination, is denied; and it is further,

ORDERED that that branch of the motion by defendants the City of New York and Police Officer Jeffrey D. Rohe seeking to dismiss the complaint as against Police Officer Rohe on the ground that he was not served with a notice of claim is granted, as this Court is constrained to hold based on the precedent of the Appellate Division, First Judicial Department, and the complaint is dismissed in its entirety as against Police Officer Rohe, with costs and disbursements to said

defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further,

ORDERED that the action is severed and continued against the remaining defendants; and it is further,

ORDERED that the caption be amended to reflect the dismissal of defendant Jeffrey D. Rohe, and that all future papers filed with the court bear the amended caption; and it is further,

ORDERED that counsel for Police Officer Rohe shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further,

ORDERED that this constitutes the decision and order of this Court.

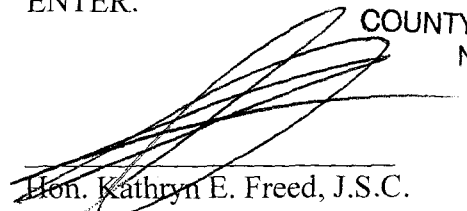
FILED

AUG 01 2014

DATED: July 29, 2014

ENTER:

COUNTY CLERK'S OFFICE
NEW YORK



Hon. Kathryn E. Freed, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**