

**Jollon v City of New York**

2014 NY Slip Op 32052(U)

April 11, 2014

Sup Ct, New York County

Docket Number: 106692/09

Judge: Geoffrey D. Wright

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

PRESENT: GEOFFREY D.S. WRIGHT

PART 62

*Justice*

DANIEL JOLLON,

INDEX #106692/09

Plaintiff/Petitioner

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. 003

THE CITY OF NEW YORK CITY,

MOTION CAL. NO. \_\_\_\_\_

Defendant/Respondent(s)

DECISION

The following papers, numbered 1 to 3 were read on this motion to/for reargue decision of July 2013, dismissing the complaint

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits

**FILED**

Replying Affidavits \_\_\_\_\_

APR 16 2014

Other

Cross-Motion: Yes  No

COUNTY CLERK'S OFFICE  
NEW YORK

Upon the foregoing papers, it is ordered that this motion/petition by the Plaintiff to reargue my decision of July 16, 2013, dismissing the complaint is granted to the extent of permitting such reargument, and upon reargument, I adhere to my prior determination, a/p/o.

GEOFFREY D. WRIGHT  
J.S.C.  
AJSC

April 11, 2014

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 62

-----X

DANIEL JOLLON,

Plaintiff-Petitioner(s),

-against-

THE CITY OF NEW YORK,

Defendant-Respondent(s),  
-----X

Index #106692/09

Motion Cal. #

Motion Seq. #

DECISION/ORDER

Pursuant To Present:

Hon. Geoffrey Wright

Judge, Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: reargue dismissal of the complaint

PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	2
Replying Affidavits & Exhibits Annexed	3
Other (Cross-motion) & Exhibits Annexed	
Supporting Affirmation	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The Plaintiff, a fire fighter, was injured during a refresher training exercise, which required the Plaintiff to rappel down the side of a building at the Fire Dept. training site on Randall's Island. The Plaintiff has successfully completed his first drop, and was injured during his second. In granting the defense motion, I found that the exercise was a known risk of his duties as a fire fighter, and thus he did not qualify for an exemption from the Fire Figher's rule [*NORMAN v. CITY OF NEW YORK*, 60 A.D.3d 830, 875 N.Y.S.2d 232, 2009 N.Y.

Slip Op. 01964, also citing Zanghi; see also *Rector v. City of New York*, 74 A.D.3d 771, 901 N.Y.S.2d 536, 2010 N.Y. Slip Op. 04761].

The Plaintiff was injured, as alleged pro and con in the papers, by a combination of the inattention of supervisory personnel, who did not secure a safety device, and the Plaintiff himself, who continued with the drill before receiving the go ahead from an instructor. After the Plaintiff's accident, the Defendant inspected the equipment, and found it to be in good working order. The Plaintiff himself does not challenge this finding.

A review of cases with similar fact patterns, weighs against the Plaintiff, both in opposing the prior motion to dismiss, as well as this motion for reconsideration. “[W]here some act taken in furtherance of a specific police or firefighting function exposed the officer to a heightened risk of sustaining the particular injury, he or she may not recover damages for common-law negligence. By contrast, a common-law negligence claim may proceed where an officer is injured in the line of duty merely because he or she happened to be present in a given location, but was not engaged in any specific duty that increased the risk of receiving that injury. For example, if a police officer who is simply walking on foot patrol is injured by a flower pot that fortuitously falls from an apartment window, the officer can recover damages because nothing in the acts undertaken in the performance of police duties placed him or her at increased risk for that accident to happen.” [*WADLER v. CITY OF NEW YORK*, 14 N.Y.3d 192, 925 N.E.2d 875, 899 N.Y.S.2d 73, 2010 N.Y. Slip Op. 0137, citing *Zanghi v. Niagara Frontier Transp. Commn.*, 85 N.Y.2d 423, 436, 626 N.Y.S.2d 23, 649 N.E.2d 1167 [1995], which held “[P]olice 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.” ]. In the *WADLER* case, *supra* the Plaintiff, a police officer, was injured when exiting a police parking lot. Another officer errantly flipped a switch controlling security device. The Plaintiff was not yet on duty at the time of the accident.

An employee's participation in an exercise “designed in part to mimic the type of physical activity that officers would encounter while in the field, exposed her to a heightened risk of injury.” [*SEXTON v CITY OF NEW YORK*, 32 AD3d 535 [2006]; *BRADY v CITY OF NEW ROCHELLE*, 296 AD2d 365 [2002].

Although General Municipal Law § 205–e(1) “creates a cause of action where a police officer is injured by another's failure “to comply with the requirements 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.” While this quoted language is expansive, the Court of Appeals has explained that “the statute cannot ‘reasonably be applied literally in accordance with its broad language’ ” ( *GALAPO v. CITY OF NEW YORK*, 95 N.Y.2d 568, 574, 721 N.Y.S.2d 857, 744 N.E.2d 685, quoting *Desmond v. City of New York*, 88 N.Y.2d 455, 463, 646 N.Y.S.2d 492, 669 N.E.2d 472; see *Kenavan v. City of New York*, 70 N.Y.2d 558, 565–567, 523 N.Y.S.2d 60, 517 N.E.2d 872). Consequently, as a

prerequisite to recovery pursuant to a General Municipal Law § 205-e cause of action, “a police officer must demonstrate injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties” ( Galapo v. City of New York, 95 N.Y.2d at 574, 721 N.Y.S.2d 857, 744 N.E.2d 685 [internal quotation marks omitted]; see Williams v. City of New York, 2 N.Y.3d at 364, 779 N.Y.S.2d 449, 811 N.E.2d 1103; \*\*565 Gonzalez v. Iocovello, 93 N.Y. 2d at 550, 693 N.Y.S.2d 486, 715 N.E.2d 489). [**GAMMONS v. CITY OF NEW YORK**, 109 A.D.3d 189, 972 N.Y.S.2d 559, 2013 N.Y. Slip Op. 05298].

Labor Law 27-a (3)(a)(1) provides “ a. 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. In applying this paragraph, fundamental distinctions between private and public employment shall be recognized.” There is no viable claim that the City did not comply with this statute, as the safety equipment was in god working order, and the drill itself had all required safety protocols in place, but for the momentary inaction of one individual.

The Industrial Code and other regulations dealing with equipment are inapplicable to this case, as there is no evidence that the equipment failed or was inappropriate to the task at hand. Human error in exigent circumstances, or mimicked exigence, was the cause of the accident. Even excusing the Plaintiff’s own alleged participation in the accident, there is no case to support the continuation of litigation under similar circumstances.

In the end, the accident here occurred while the Plaintiff in the furtherance of his duties as a fire fighter. Under these circumstances, the Plaintiff may not successfully invoke the Labor Law or the General Municipal Law, or various other codes and rules. He was engaged in a required activity of his employment that was conceived to improve his performance on the job, as well as other also engaged in the exercise. Under all controlling authority, the motion to reargue is granted solely to the extent of granting the reargument, and on such reargument, I adhere to my original determination.

This constitutes the decision and order of the court.

  
**GEOFFREY D. WRIGHT**  
**AJSC**

Dated: April 11, 2014

**FILED**

APR 16 2014

COUNTY CLERK'S OFFICE  
NEW YORK