

Voss v City of New York
2014 NY Slip Op 32369(U)
August 15, 2014
Supreme Court, Bronx County
Docket Number: 300883/2011
Judge: Betty Owen Stinson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 8

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ROBERTA VOSS,

Plaintiff,

INDEX № 300883/2011

-against-

DECISION/ORDER

THE CITY OF NEW YORK and POLICE OFFICER
JASON FITZSIMMONS,

Defendants.

-----X

HON. BETTY OWEN STINSON:

This motion by the defendant City of New York ("City") for either dismissal or summary judgment dismissing the complaint is granted to the extent the complaint against the City is dismissed. ✓

The following facts are not in dispute. On February 13, 2010, around 2:00 A.M. in the muster room of the 46th Precinct, Probationary Police Officers Roberta Voss ("Voss" or "plaintiff") and Jason Fitzsimmons ("Fitzsimmons") were turning in their radio batteries at the end of a shift. By all accounts the two were friends. Plaintiff remembered defendant Fitzsimmons behind her saying, "This is how you take someone out" (deposition of Roberta Voss, May 22, 2013 at 49). Fitzsimmons then effected a takedown maneuver on plaintiff which he characterized as "friendly horseplay" (Fitzsimmons affidavit, September 16, 2011), but which plaintiff complains caused a complete tear of her right knee ACL, requiring two reconstructive surgeries.

Plaintiff did not file a Line of Duty Injury Report until three days later, signing a statement saying that she fell because she had tripped over another officer's leg. She blamed the delay on

supervisors who allegedly discouraged her from filing the report, and who then pressed her to say only that she had tripped. Fitzsimmons provided a witness statement that the plaintiff had tripped “over another officer’s foot” and fallen. In any event, both plaintiff and Fitzsimmons eventually amended the report and witness statement to acknowledge what they now agree actually happened. Because of the inconsistencies in the official departmental documents they provided, both lost their probationary employment with the New York City Police Department. Plaintiff lost an Article 78 petition challenging her dismissal from the police force.

Plaintiff commenced this action against Fitzsimmons and the City, alleging that the City was negligent in that it did not provide her with a safe place to work, allowed an assault and battery on her person by Fitzsimmons, did not warn of dangerous conditions or take precautionary measures, and failed in Fitzsimmons’ hiring, training and supervision. Plaintiff filed her Note of Issue on October 29, 2013 certifying that discovery was complete. The City then made the instant motion for dismissal for failure to state a cause of action or, in the alternative, for summary judgment dismissing the complaint.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party opposing a motion for summary judgment must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

A party moving for summary judgment has the initial burden of establishing *prima facie* that it is entitled to judgment as a matter of law by submitting sufficient admissible evidence to demonstrate that there are no triable issues of fact (*Bush v St. Clare’s Hospital*, 82 NY2d 738

[1993]). Only if that burden is met does the burden shift to the non-moving party to present evidence of an issue of fact for trial (*Winegard v NYU Medical Center*, 64 NY2d 851 [1985]). If the moving party fails to meet its burden, the motion must be denied regardless of the sufficiency of the non-moving party's opposition (*id.*).

Pursuant to common law, an employer may be held vicariously liable under the doctrine of *respondeat superior* for a tort committed by an employee in the course of the performance of his or her duties, even if such duties are carried out in an irregular fashion or with disregard of instructions (*Adams v New York City Transit Authority*, 211 AD2d 285 [1st Dept 1995]). The employer may be liable for the employee's negligent or intentional acts as long as the tortious conduct is generally foreseeable and a natural incident of the employment (*Judith M. v Sisters of Charity Hospital*, 93 NY2d 932 [1999]) or if it can be reasonably said to be necessary or incidental to such employment (*Davis v Larhette*, 39 AD3d 693 [2nd Dept 2007][defendant's activities in stopping for dinner and driving back to his motel while on business trip were incidental to furtherance of his employer's business interests when motor vehicle accident occurred]).

Firefighters and police officers generally have no common law right of recovery for injuries due to the dangers inherent in their respective occupations. A statutory remedy for police officers injured due to dangers over and above those normally associated with the inherent dangers of their employment is provided by General Municipal Law ("GML") § 205-e. That statute provides, in relevant part, that

[i]n addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury . . . as a result of any . . . negligence of any person or persons in failing

to comply with the requirements of any of the statutes, ordinances, rules . . . of the federal, state . . . or city governments . . . , the person or persons guilty of said . . . negligence at the time of such injury . . . shall be liable to pay any officer . . . injured . . . while in the discharge or performance . . . of any duty imposed by the police commissioner, police chief or other superior officer of the police department . . . a sum of money . . . not less than one thousand dollars

A police officer seeking to recover under § 205-e must identify a statute or ordinance with which the defendant failed to comply and must set forth facts from which it may be inferred that the defendant's negligence directly or indirectly caused harm to him or her (*Gover v Mastic Beach Property Owners Association*, 57 AD3d 729 [2nd Dept 2008]). Proving that the defendant's violation of a statute or ordinance was an indirect cause of a police officer's injury requires only a practical or reasonable connection between the violation and the injury (*Cerrati v Berrios*, 61 AD3d 915 [2nd Dept 2009]).

Labor Law § 27-a imposes a general duty upon public sector employers to provide their employees with a place of employment free from recognized hazards likely to cause death or serious physical harm. A violation of Labor Law § 27-a may be a predicate for a claim under GML § 205-e (*Gammons v City of New York*, 109 AD3d 189 [2nd Dept 2013])[lack of rear railing on flatbed truck on which police officer was assigned to load police barriers was type of occupational hazard § 27-a was designed to address]; *Campbell v City of New York*, 31 AD3d 594 [2nd Dept 2006])[horse provided to police officer assigned to mounted unit presented recognized hazard to officer because defendant was aware of at least three incidents of horse's dangerous behavior before horse bolted and collided with double-parked car, injuring police officer]).

Whether a particular act occurred "while in the discharge or performance" of a duty imposed by the actor's employer, in other words, whether it was within the scope of his

employment, is ordinarily one for a jury, except where the plaintiff is unable to advance any interpretations of the facts to indicate the employer's interest was advanced (*see Judith M.*, 93 NY2d 932 [hospital not liable for sexual assault of patient by hospital employee where hospital established it exercised reasonable care in hiring employee]; *see also Adams*, 211 AD2d 285 [sudden, inexplicable assault by token booth clerk could not have been controlled by employer and was outside any possible definition of scope of her employment]). If an employee, for purposes of his own, departs from the line of his duty so that for the time being his acts constitute an abandonment of his service, his employer is not liable (*Judith M.*, 93 NY2d 932).

In support of its motion, the City offered copies of the pleadings, the plaintiff's 50-h hearing testimony, her deposition testimony, her notice of claim and bill of particulars, the deposition testimony of Police Officer Rafael Ortiz ("Ortiz") and the Police Department's recommendation to terminate Fitzsimmons' probationary employment. The bill of particulars alleged Fitzsimmons' acts against the plaintiff amounted to violations by the City of Labor Law 27-a and Penal Law §§ 120.00; 120.05; 120.15; 120.20; 240.20 and 240.26 (Menacing, Harassment, Reckless Endangerment, Assault in the 2nd and 3rd degrees and Disorderly Conduct).

The essential facts of the subject incident are as set forth above. Ortiz also provided a witness statement that plaintiff had tripped and fallen. He later testified that he assumed plaintiff had tripped, but actually only turned in time to see her fall and what appeared to be Fitzsimmons reaching out to help her, not what led up to her fall (deposition of Rafael Ortiz, May 29, 2013 at 28-29, 42-45). He helped get plaintiff a chair and then left the room to go home.

The Police Department memorandum recommending termination of Fitzsimmons' employment reported that Fitzsimmons graduated from the Police Academy with a grade point

average of 91.75 and received no department cards or command disciplines against him. His termination was recommended because he knowingly falsified department records and thus “does not possess the judgment or integrity required of a New York City Police Officer”.

In opposition to the City’s motion, plaintiff offered her own affidavit; her Line of Duty Injury Report; an Injury and Illness Incident Report; the witness statements by Ortiz, Fitzsimmons and a Police Officer Victoriano who only saw that plaintiff fell to the floor; plaintiff’s amendment to her Line of Duty Injury Report; her 10-Day Letter Addressing Recent Modification (answering the recommendation for her termination); the recommendation to terminate her employment; the deposition and 50-h testimony of plaintiff and deposition testimony of Ortiz; and an affidavit by Fitzsimmons wherein he alleged the subject incident was the result of “friendly horseplay”.

Plaintiff argued through her attorney that the City was negligent in its failure to provide her with a safe place to work because supervisors were not present in the muster room to prevent Fitzsimmons’ behavior. She argued that Fitzsimmons’ actions were within the scope of his employment because he was on duty, in uniform, conducting a demonstration, and within the precinct muster room full of police officers, all of which together gives rise to an inference that such behavior was acceptable and would not be punished.

In her affidavit, dated May 8, 2014, plaintiff stated that she and Fitzsimmons enjoyed a “cordial professional relationship” prior to the subject incident. She believes Fitzsimmons thought he was merely attempting to offer assistance to other officers, including herself, by demonstrating how to take someone down when he “contacted me, assaulted me and seriously injured me in the name of performing a demonstration”.

The City has established its entitlement to summary judgment dismissing the complaint

against it. The history of Fitzsimmons' employment as related in the contemporaneous document recommending his termination, that he was still a probationary police officer who did well in the Academy and had no prior disciplinary problems, establishes a complete lack of evidence of negligent hiring or retention by the City. Fitzsimmons' termination was based on his filing of a false document with the Department. Since he was still a probationary hire at the time of the subject incident, the Department was not finished with the process of evaluating his suitability for the position. The fact that the documented reason for his termination did not include the subject incident does not, as plaintiff claims, amount to ratification of his actions toward her.

Fitzsimmons' actions do not satisfy the requirements of § 205-e if he was not acting while in the discharge or performance of a duty imposed by his employer. Fitzsimmons was not acting within the scope of his employment if he intentionally caused plaintiff injury by performing the physical maneuver "in the name of" offering a demonstration. The penal law sections cited by plaintiff require some intent to either harass, alarm, annoy, cause injury or place her in fear of injury, or at least engage in reckless conduct likely to cause injury. Fitzsimmons was not carrying out an arrest or furthering any business of his employer when he took plaintiff down if his intent was to harm her or place her at risk of harm. This would certainly constitute a departure from the line of duty on his part (*see Judith M.*, 93 NY2d 932). Intentionally or negligently causing injury to other officers at the end of their shifts would not further the work of the Police Department by any stretch of the imagination.

Plaintiff also argues alternatively that Fitzsimmons was acting within the scope of his employment because he was *not* intending to hurt her, but was instead negligently carrying out a demonstration for the benefit of other officers or even for her benefit. There is no evidence to

support this theory. All the officers present in the room were there to turn in their radio batteries before leaving the precinct, a time and place completely inconsistent with a departmentally sanctioned instructional demonstration. It was similarly inconsistent with any inference that Fitzsimmons intended to provide an informal teaching moment for the plaintiff since she insists she was taken down by surprise and without her consent. For his part, Ortiz testified that he did not hear Fitzsimmons say anything and was not even aware that Fitzsimmons caused the plaintiff to fall, let alone that Fitzsimmons could have been demonstrating a physical maneuver.

Although there is a potential issue of fact as to scope of employment, it is immaterial. If Fitzsimmons *was* acting within the scope of his employment, plaintiff would not be able to seek recovery against the City under a common law negligence theory as her injury would just constitute one of the dangers inherent in her work. Instead she would have to look to GML § 205-e and show how the City violated Labor Law § 27-a by its failure to provide her with a safe place to work. Plaintiff has not offered any evidence to support the theory that Fitzsimmons or the muster room itself constituted a “recognized hazard” (*see Campbell*, 31 AD3d 594) from which her employer should have protected her by providing supervision to forestall injury inflicted upon her by other officers.

Even assuming the common law doctrine of *respondeat superior* were available to the plaintiff, negligent or intentional torts against fellow police officers are not “natural incidents of employment” or “generally foreseeable”, thus subjecting the City to liability (*see Judith M.*, 93 NY2d 932). Plaintiff and Fitzsimmons were probationary employees still being evaluated for the maturity and discretion expected of them in their charge to protect the public. It was not generally foreseeable that such maturity would require enforcement by constant supervision while the two

were merely turning in their batteries at the end of their shift.

The action as against the City of New York is, therefore, dismissed. Movant is directed to serve a copy of this order on the Clerk of Court who shall amend the caption deleting the City of New York as a party defendant. ✓

This constitutes the decision and order of the court.

Dated: August 15, 2014
Bronx, New York


BETTY OWEN STINSON, J. S.C.