

Lachowski v City of New York
2016 NY Slip Op 30683(U)
March 8, 2016
Supreme Court, Bronx County
Docket Number: 308640/2010
Judge: Lizbeth Gonzalez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 10(e)

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Lynda J. Lachowski,

Plaintiff,

DECISION and ORDER

-against-

Index No 308640/2010

The City of New York,

Defendant.

-----X

Recitation pursuant to CPLR § 2219(a) of the papers considered in reviewing the underlying motion to dismiss:

Notice of Motion and annexed Exhibits.....	1
Affirmation in Opposition and annexed Exhibits.....	2
Reply Affirmation.....	3

Plaintiff Lachowski, a New York City Police Officer, alleges that the defendant’s negligence caused her to injure her right wrist and limb while she participated in a training exercise. Ms. Lachowski claims that defendant The City of New York (“City”) breached its duty by failing to provide proper safety equipment, safely execute the exercise and comply with Labor Law § 27-a(3) pursuant to General Municipal Law § 205-e.

Defendant City moves to dismiss the plaintiff’s complaint for failure to state a cause of action pursuant to CPLR 3211 and for summary judgment pursuant to CPLR 3212. The plaintiff opposes the motion. The defendant’s motion is denied for the reasons set forth below.

DISCUSSION

A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action. (CPLR 3211[a][7].) “If a cause of action can be spelled out from the four corners of the pleading, a cause of action is stated.” (Siegel, NY Prac § 208 [5th ed].) The Court’s role in deciding such motion is to determine whether the complaint states a valid cause of action on its face. (*Amaranth LLC v J.P. Morgan Chase & Co.l*, 71 AD3d 40 [1st Dept 2007].)

CPLR 3212 provides that summary judgment is warranted if the movant shows through the submission of admissible evidence that the opposing party has no defense to the cause of action or that the cause of action or defense has no merit. (CPLR 3212[b].)

In support of its motion, defendant City proffers the deposition testimony of the plaintiff and of Sergeant Anthony Lucas ("Sgt. Lucas").

Plaintiff Lachowski testified during her 3/28/12 deposition that she participated in Intac, a tactical training exercise that imitates real life scenarios, on three or four occasions where simulated gunfire was exchanged using "modified" Smith and Wesson firearms. She engaged in an Intac exercise on the 12/10/09 accident date, wearing a helmet and neck and groin protection. The scenario was a mock landlord/tenant dispute involving the exchange of simulation rounds; one eventually struck the plaintiff in her wrist. Ms. Lachowski has participated in Intac training twice since the accident date.

During his 8/17/12 deposition, Sgt. Lucas self-described as a certified Simuntion instructor who conducted Intac training from 2006-2011. Students and patrol officers annually undergo scenario-based training within a "tactical village," consisting of two buildings with multiple dwellings inside a gated or fenced area on a city street with vehicles, mailboxes and light poles. The requisite safety gear is helmets, neck protection, padded vests and groin protection. Jackets are required and provided if the officer lacks one. Shorts are not permitted. Gloves are not required but are available upon request; no other equipment to protect an officer's hands or wrists is required and there are no additional safety recommendations. There are typically four to seven pre-scripted scenarios performed by active police officers and supervised by instructors. The scenario in effect on 12/10/09, the date of the subject training, was approved by the police academy, the NYPD's legal division and the deputy commissioner of training. Sgt. Lucas was present along with the trainees, who were provided a helmet, padded vest and eye, groin and padded neck protection. Sgt. Lucas described the scenario in which the plaintiff was involved:

[I]t was a landlord/tenant dispute scenario...the officer in the scenario would respond to a radio run of a landlord tenant dispute. They would enter a building, when they entered the building after a very long room, down at the far end of the room would be a hallway and at the far end of the hallway would be two apartments. Our police officer actors would be portraying a landlord and a tenant engaged in a loud dispute. One of them would be yelling at the other, complaining that he was going to shoot the other, that he had just gotten out of prison, that he already had killed someone. The conversation was loud enough for the officers to hear when they entered the first room, and the intention of the training was to pay attention to what people say...they were supposed to...the officers in the scenario were

supposed to stay there and tell the people to approach them rather than put themselves into a narrow hallway and approach. If the officers didn't pay attention to what was being said, and continued forward, and put themselves in that narrow hallway where the landlord and tenant were disputing, the scenarios called for one of the parties to shoot the other, and then turn and shoot with the Simunition rounds at the officers, and then we saw how the officers reacted, if they tactically responded to the corners of the hallway.

General Municipal Law § 205-e

Plaintiff Lachowski alleges that the defendant failed to comply with Labor Law § 27-a(3) pursuant to General Municipal Law § 205-e which states the following in pertinent part:

1. In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury...occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing 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, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury...shall be liable to pay any officer, member, agent or employee of any police department injured...while in the discharge or performance at any time or place of any duty imposed by the police commissioner, police chief or other superior officer of the police department.

3. This section shall be deemed to provide a right of action regardless of whether the injury...is caused by the violation of a provision which codifies a common-law duty and regardless of whether the injury...is caused by the violation of a provision prohibiting activities or conditions which increase the dangers inherent in the work of any officer, member, agent or employee of any police department.

Labor Law § 27-a(3) provides the following in pertinent part:

(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...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.

Defendant City contends that the cause of the plaintiff's injury is not a "recognized hazard" and therefore, Labor Law § 27-a(3) is not a valid statutory predicate and cannot support a GML § 205-e claim. The City relies on a Court of Appeals decision, Williams v City of New York, to explain the intent of GML § 205-e and its applicability to actions involving police officers and to establish that Ms. Lachowski fails to identify the violated statute or ordinance.

Section 205-e(1) creates a statutory 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 language is seemingly limitless, it is well settled that the statute cannot reasonably be applied literally in accordance with its broad language. Rather, as a prerequisite for recovery, 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.

In order to recover under 205-e, a plaintiff must (1) identify a statute or ordinance with which the defendant failed to comply, (2) describe the manner in which the plaintiff was injured and (3) set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm. (*Williams v City of New York*, 2 NY3d 352, 364 [2004].)

The City posits that the "firefighter's rule" bars the plaintiff's second cause of action since she was injured while performing her official duties and within the scope of her employment. The defendant maintains that the assumption of risk is inherent in their profession; a police officer's job is fraught with danger. In support of its position, the defendant relies upon three Court of Appeals cases, Santangelo v State of New York, Zanghi v Niagara Frontier Transportation Commission and Cooper v City of New York, wherein the high court applied the firefighter's rule to police officers.

[T]he 'firefighter's rule,' a product of this State's long-standing common law, essentially precludes firefighter's and police officers from recovering damages for injuries caused by negligence in the very situations that create the occasion for their services. (*Zanghi v Niagara Frontier Transportation Commission*, 85 NY2d 423,438 [1995] (internal quotations omitted); *Cooper v City of New York*, 81 NY2d 584, 591 [1993]; *Santangelo v State of New York*, 71 NY2d 393, 397 [1987].)

[T]hese hazards often arise from negligence, and as a matter of public policy firefighters [and police officers] trained and compensated to

confront such dangers must be precluded from recovering damages for the very situations that create a need for their services. (*Santangelo v State of New York*, 71 NY2d 393, 397, *supra*.)

The common law action is barred “where the police officer’s or firefighter’s duties increased the risk of the injury happening [and] where 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. (*Zanghi v Niagara Frontier Transportation Commission*, 85 NY2d 423,438, *supra*.)

In asserting its immunity defense, the City must establish that the governmental action taken relative to the incident was discretionary. The defendant states that it is immune from liability because here, the Intac training scenario, the type of tactics used, the training room arrangement, the safety gear provided and the placement of the participants are actions that are inherently discretionary.

In opposition to the defendant’s motion, plaintiff Lachowski contends that the doctrine of “discretionary immunity” is inapplicable whereas Labor Law § 27-1[a] is applicable in this matter because the City failed to provide her with adequate safety or protective equipment and specifically failed to provide gloves. Ms. Lachowski, like the defendant, submits her own and Sgt. Lucas’ deposition testimony.

Plaintiff Lachowski testified that she has been employed as a New York City Police Officer since July 11, 2005. In December 2005, she was assigned to PSA7 as an “impact officer” for seven months. Her duties included responding to 911 calls, performing verticals in buildings, issuing summonses and making arrests. She was subsequently assigned to the 92nd Precinct, a part of PSA7, as a “target officer” and served in this capacity for approximately one year. In 2007, Ms. Lachowski worked as a patrol officer assigned to the domestic violence unit, before leaving for maternity leave. When she returned in December 2009, the plaintiff resumed her position as a patrol officer, performing direct patrol, answering jobs, conducting verticals and enforcing quality of life offenses.

On 12/9/09, the day she was injured, plaintiff Lachowski states that she appeared for Intac Training at Rodman’s Neck. She and her assigned partner were wearing helmets and crotch gear. After engaging in a simulated shoot-out, she experienced an adrenaline rush. Once everything calmed down, she felt wet, observed blood and realized that she had been struck by a paint ball that

was shaped like a real bullet. Ms. Lachowski testified that “the bullets [are] supposed to burst like a paint ball; they [are] not supposed to be solid.” Instead of exploding, the fake bullets and a solid piece of paint stuck to her right hand.

The plaintiff references specific portions of Sgt. Lucas’ deposition testimony wherein he testified that during his five years as an instructor he witnessed on “hundreds” of occasions, “if not thousands,” officers sustain hand and wrist injuries such as abrasions, black and blues and minor swelling. In these instances, some officers would request that a “Line-of-Duty Injury Report” be prepared. Plaintiff Lachowski posits that in light of these incidents, gloves and long sleeves should have been deemed requisite equipment; since Sgt. Lucas took no such action, defendant City violated Labor Law § 27-a[3].

CONCLUSION

The gravamen of plaintiff Lachowski’s motion is defendant City’s failure to require the use of gloves to ameliorate the recognized risks of role playing using simulated gunfire. There is no claim that the equipment deemed requisite, provided to officers and described by Sgt. Lucas as a helmet, a padded vest and eye, groin and padded neck protection, is deficient. Sgt. Lucas testified, however, that in his capacity as an Intac instructor, he has observed officers injure their hands and wrists on thousands of occasions.

Labor Law § 27-a(3) generally states that employers shall keep its employees free from recognized hazards that are likely to cause them serious physical harm and provide reasonable and adequate protection to their lives, safety or health. In this vein, defendant City argues that the training of police officers is not a recognized hazard.

The Court of Appeals has held that police officers are trained and compensated to confront hazards and dangers and are thus precluded from recovering damages for the very situations that create a need for their services. (*Santangelo v State of New York*, 71 NY2d 393, 397, *supra*.) Training, however, is not a “situation.” Training is a mechanism used to teach officers a skill or type of behavior in responding to hazards and inherent dangers.

Defendant City moves to dismiss the plaintiff’s complaint for failure to state a cause of action. It is well settled that “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Siegmund Strauss Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]; *Dollard v WB/Stellar IP Owner, LLC*, 96 AD3d 533 [1st Dept 2012]) or whether

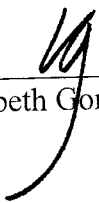
he or she may be successful on the merits. (*One Acre, Inc v Town of Hempstead*, 215 AD2d 359 [2nd Dept 1995].)

After careful review and consideration, the Court finds that Sgt. Lucas' repeated observations of hand and wrist injuries and his inaction to remedy the "recognized hazard" establishes the potential viability of the plaintiff's claim and creates a triable issue of fact. Defendant City's motion to dismiss and for summary judgment is accordingly denied.

Service of a copy of this Decision and Order with Notice of Entry shall be effected within 30 days.

Dated: March 8, 2016

So ordered,



Hon. Lizbeth González, JSC