

Sagarese v City of New York
2017 NY Slip Op 31662(U)
August 4, 2017
Supreme Court, New York County
Docket Number: 156846/2014
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHANPART 33*Justice*-----X
FRANK SAGARESE, ELIZABETH SAGARESEINDEX NO. 156846/2014

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

THE CITY OF NEW YORK,

DECISION AND ORDERDefendant.

-----X

The following e-filed documents, listed by NYSCEF document number MS1 - 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 71, 72, 73, 74, 75, 81, 82; MS2 - 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54.

were read on this application to/for

SUMMARY JUDGMENT

Plaintiff Frank Sagarese, a former member of the New York Police Department Harbor Unit (NYPDHU), commenced this action under General Municipal Law § 205-e (GML) alleging violation of 46 U.S.C. § 30104 (the Jones Act), and common law negligence for injuries he sustained when he tripped and fell while working on March 26, 2014, at the Northeast Gangway at Harbor Launch #9, North Dock at One Randall's Island in the City, State and County of New York. His wife, co-plaintiff Elizabeth Sagarese, brings a derivative claim for loss of services. Defendant City of New York moves to dismiss the complaint under CPLR 3211[a][7] and 3212 in motion sequence 1 (MS1). Plaintiff moves under CPLR 3212 for partial summary judgment on liability in motion sequence 2 (MS2). The motions are respectively opposed.

As a backdrop, plaintiff worked as a diesel mechanic for the NYPDHU. According to his testimony, he tripped and fell as he was "walking from the bulkhead area to a gangway that leads to a floating dock" (MS1-Bruno aff at ¶ 3 and exh B at 8: 15-18). Specifically, as plaintiff described in his affidavit:

“As I was “bringing [a 60-pound aluminum] “surge tube” to the vessel[,] I tripped and fell over the raised edge of the gangway leading to said vessel. The edge of the gangway was raised approximately 7-10 inches above the walking surface creating an unsafe condition. The gangway spans the water and leads to a floating dock where the vessel I was working on was moored.” (MS1: Sagarese aff in opp at ¶¶ 6-7).

As both parties move for summary judgment, they, as movants, must make “a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). The evidentiary proof tendered must be in admissible form (*Friends of Animals v Assoc. Fur Manufacturers*, 46 NY2d 1065, 1067 [1979]). Once met, this burden shifts to the opposing party to demonstrate the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

THE FIREFIGHTER'S RULE

Defendant's motion (MS1) contends that dismissal of plaintiff's tort claims is warranted based on the firefighter rule, which precludes firefighters or police officers from recovering for injuries sustained in the performance of their duties (*see Zanghi v Niagara Frontier Transp. Com'n*, 85 NY2d 423, 436 [1995] [The firefighter rule bans common-law negligence claims for police and firefighters “for line-of-duty injuries resulting from risks associated with the particular dangers inherent in that type of employment”].). Since, at the time of the accident, plaintiff was a police officer, and was injured at work while performing his duties, defendant concludes that plaintiff's negligence claim is barred by the firefighter rule (MS1: Deft's Mot, Bruno Aff at 13-14). Indeed, although plaintiff was a diesel mechanic assigned to the NYPDHU, he was nonetheless considered a police officer because his duties were not limited to repairing the boat. His role as a member of NYPD included patrols and directing communications (MS2: Pltf's Mot, exh F – Frank Sagarese tr at 11).

Plaintiff offers no countervailing arguments to the firefighter's rule, but asserts, in his opposition to defendant's motion and in his own motion for partial summary judgment (MS2), that General Municipal Law 205-e provides a right of action for him to recover damages for the injuries he sustained in the line of duty.

GENERAL MUNICIPAL LAW 205-e

GML 205-e allows police officers to recover for injuries sustained on “premises wherein the owner or other person in control negligently failed to comply with the requirements of some statute, ordinance, or rule respecting the

maintenance and safety of such premises” (*Kenavan v City of New York*, 70 NY2d 558, 567 [1987]). A cause of action may be maintained under GML 205-e if plaintiff can (1) identify the statute or ordinance with which the defendant failed to comply, (2) describe the manner in which the [police officer] was injured, and (3) set forth those facts from which it may be inferred that the defendants’ negligence directly or indirectly caused the harm” (*Williams v City of New York*, 2 NY3d 352, 363 [2004] quoting *Giuffrida v Citibank Corp.*, 100 NY2d 72, 78 [2003]). The statute or ordinance plaintiff claims that defendant violated is the Jones Act (MS1: Bruno aff, exhs A – Notice of Claim, C – Complaint, E – Bill of Particulars, and F – Supplemental Bill of Particulars). The Jones Act is a maritime law that provides relief to those who are exposed to the “perils of the sea” (*Chandris Inc. v Latsis* 515 US 347, 354 [1995]).

Plaintiff argues that he is a seaman by the mere fact that he is a member of the NYPDHU. Simply, he was working on a NYPD launch that was docked in the water at the NYPDHU repair facility. He asserts that he need not be engaged in navigation on a vessel to be considered a seaman. Relying on *Chandris Inc. v Latsis*, he claims that all he needs to show is that his duties “contribute to the function of the vessel or to the accomplishment of its mission” and that he has “a connection to a vessel in navigation . . . that is substantial in terms of both its duration and its nature” (*Chandris*, 515 US at 354). Plaintiff points out that the *Chandris* Court considers a worker to be a seaman if more than 30% of the worker’s time was spent aboard a vessel (MS1: Pltf’s Memo of Law in Opp at p 5). Plaintiff avers that he “typically spend[s] a little less than half of [his] work time repairing NYPD vessels in waters. . . (MS1: Sagarese aff in opp at ¶ 4).

Defendant argues that the Jones Act is inapplicable here because plaintiff is not a seaman. Defendant concedes that plaintiff’s function in repairing vessels may satisfy the “contribute to the function” of the vessel prong set forth in *Chandris*. However, plaintiff’s function does not meet the second prong, which is working on a “vessel in navigation that is substantial in terms of both its duration and its nature” (*id.*). Defendant reiterated plaintiff’s testimony that he tripped and fell on “solid land” – the gangway connected to the bulkhead (MS1: Bruno aff at ¶ 4 quoting exh H - Sagarese tr. at p 15:11-12).

While plaintiff’s repair duties may contribute to the function of a seagoing vessel, he has not shown his connection to the vessel when it is in navigation, or how his work exposes him to the “perils of the sea” (*Chandris, supra*). Plaintiff relies on *Oxley v New York* (923 F2d 22 [2d Cir 1991]) for the proposition that he is a seaman merely because he is a member of the NYPDHU. Like plaintiff in the instant case, the plaintiff in *Oxley* was an engineer who worked on NYPD vessels. However, unlike plaintiff, *Oxley* was working in a launch that was at sea transporting correction officers from Hart Island to City Island in “hazardous” weather conditions “with strong winds, below freezing temperatures” and icy conditions (*id.* at 24). And unlike *Oxley*, plaintiff was on land walking from the

repair shop when he tripped on the gangway that connects the floating dock to the vessel (MS1: Bruno aff, exh H, p 15-16). Whether the plaintiff in *Oxley* was a seaman was not an issue for the *Oxley* court as *Oxley* was injured in a vessel in navigation and was exposed to the perils of the sea. Here, neither the floating dock nor the gangway on which plaintiff fell is part of the vessel. Floating structures not used for transportation are not vessels (see *Lee v. Astoria Generating Company, L.P.*, 13 NY3d 383, 391 [2013]). In sum, plaintiff sustained his injuries on land or a floating structure that is not a vessel in navigation. He is not a seaman. Hence, the Jones Act is inapplicable here.

Other Statutory/Code Violations

The remaining alleged statutory violations predicated plaintiff's GML 205-e claim were not in plaintiff's Bill of Particulars but were added in his June 1, 2016 Further Supplemental Bill of Particulars (MS2 – Pltf's mot, Jaros aff, exh D). Defendant objects to plaintiff's supplemental assertion of statutory violations because it raises a new theory of liability (MS2 – Deft's Opp, Bruno aff at ¶¶ 4-5).

Plaintiff asks this court to take judicial notice of the statutes listed in his Further Supplemental Bill of Particulars; this court declines to do so. A bill of particulars may amplify a pleading, but cannot raise a new theory or cause of action not in the complaint (see *Pattera v Arc Development LLC*, 136 AD3d 474, 475 [1st Dept 2016]). Plaintiff's Bill of Particulars mentioned only one code violation – the Jones Act – as predicate for his claim under GML 205-e. The additional code violations raise new theories of liability. Indeed, a few alleged code violations introduce allegations, such as obstructions on the gangway under 29 CFR § 1915.74 (a)(10) and § 1918.22 (h). These allegations appear nowhere in plaintiff's notice of claim, complaint, bill of particulars, supplemental bill of particulars, testimony or affidavits. The Further Supplemental Bill of Particulars was served on June 1, 2016. Plaintiff filed the Note of Issue on May 5, 2016. Supplemental bill of particulars may be treated as a nullity when a plaintiff serves it after the note of issue and without leave of court (see *Wolfer v. 184 Fifth Ave. LLC*, 27 AD3d 280, 280-281 [1st Dept 2006]; *Gaisor v Gregory Madison Avenue, LLC*, 13 AD3d 58, 59-60 [1st Dept 2004]). Plaintiff's June 1, 2016 Further Supplemental Bill of Particulars, served after the filing of the Note of Issue, without leave of court, is a nullity. The branch of plaintiff's motion for partial summary judgment based on the alleged statutory violations in his June 1, 2016 Further Supplemental Bill of Particulars is denied.

In any event, the newly asserted statutory violations do not warrant summary judgment in plaintiff's favor. These alleged statutory violations are OSHA regulations for “fail[ure] to provide a safe means of access . . .”; 29 CFR § 1915.74 (a)(4) and § 1918.22 (c), because the gangway was not kept properly level; 29 CFR § 1915.74 (a)(10) and § 1918.22 (h) pertaining to “obstructions . . . on or across the gangway” (*id.*); and New York Labor Law § 27-a (3)(a)(1) requiring employers to furnish to their employees a work place free from recognized hazards (MS2 - Pltf's

Mot, Jaros aff at ¶ 24; Chambers aff at ¶¶ 18 and 19). While some are irrelevant, none are supported. The only evidence proffered was plaintiff's expert, Jim Chambers, who asserts, in four sentences, that defendant violated these statutes and the Jones Act. Chambers does not explain how any of the facts or allegations tie into these statutory requirements or how they were violated. It is not for this court to guess how a gangway is "kept trimmed at all times" as required by 29 CFR § 1915.74 (a)(4) and § 1918.22 (c). As Chambers' affidavit is conclusory on all accounts, and his curriculum vitae is inconclusive on his expertise in this matter, his opinion is accorded little to no weight.

CONCLUSION

Plaintiff's cause of action under GML 205-e predicated by the Jones Act is dismissed as plaintiff is not a seaman working on a vessel in navigation and exposed to the perils of the sea. Plaintiff's common law negligence cause of action is barred by the firefighter's rule. Plaintiff Elizabeth Sagarese's derivative claim for loss of services stemming from plaintiff's injury is dismissed as it is dependent on plaintiff Frank Sagarese's negligence claim. Accordingly, it is

ORDERED that defendant The City of New York's motion for summary judgment in motion sequence 1 is granted; and it is further

ORDERED that plaintiff Frank Sagarese's motion for partial summary judgment in motion sequence 2 is denied; and it is further

ORDERED that plaintiff Elizabeth Sagarese's derivative action is dismissed; and it is further

ORDERED that the complaint is dismissed; the Clerk of the Court is directed to enter judgment in defendant's favor, as written.

8/4/2017

DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

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SETTLE ORDER

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DO NOT POST

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NON-FINAL DISPOSITION

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GRANTED IN PART

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SUBMIT ORDER

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FIDUCIARY APPOINTMENT

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OTHER

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REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: