SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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MATTHEW DELGAUDIO

Plaintiff,

-against-

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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Index No. 152574/2013
Motion Seq: 004

DECISION & ORDER

HON. ARLENE P. BLUTH

The motion by plaintiff for summary judgment on the issue of liability is granted.

Background

This action arises out of injuries suffered by plaintiff, a police officer, on April 12, 2012 while he was on duty at a premises operated by defendant located at 1390 Fifth Avenue, New York, New York. Plaintiff was a detective in the Queens Warrant Squad and received a call that an individual wanted by the police was at the subject premises. Plaintiff and two other officers entered the premises, apprehended the suspect, and exited the building. As plaintiff left the building, he fell down a staircase in front of the building. Plaintiff contends that he fell due to a defect on the stairs– a piece missing from the step. Plaintiff maintains that he suffered a torn meniscus in his right knee as a result of his fall and that this injury caused him to retire from the police department.

Plaintiff claims that he can seek damages against defendant pursuant to General Municipal Law § 205-e. Plaintiff argues that under this statute, a plaintiff must identify a statute

or ordinance with which a defendant failed to comply. Here, plaintiff insists that defendant failed to comply with Multiple Dwelling Law §§ 78 and 52, Multiple Residence Law § 174 and Administrative Code of City of NY §§ 27-2005 and 28-1012.9.

In opposition, defendant claims that plaintiff failed to meet his burden on a motion for summary judgment. Defendant argues that Multiple Residence Law § 174 is inapplicable because it does not apply to New York City and disputes the relevance of the Administrative Code § 28-1012.9. Defendant further argues that questions of fact exist relating to how the incident occurred and plaintiff's credibility. Defendant contends that plaintiff failed to submit an affidavit of an expert in the field of engineering or other evidence demonstrating when the premises was constructed. Defendant maintains that plaintiff has not shown whether the premises was subject to the codes and statutes cited by plaintiff.

In reply, plaintiff argues that he submitted a certificate of occupancy for the premises in his moving papers which demonstrates that certain statutes and ordinances are applicable and argues that there are no issues of fact. Plaintiff also argues that defendant only addresses the applicability of two of the five cited provisions– Multiple Residence Law § 174 and Administrative Code of City of NY § 28-1012.9.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima

facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"Common law barred a police officer from recovering in tort for injuries suffered in the line of duty. In 1989, the Legislature modified the common law by adding section 205-e to the General Municipal Law" (*Williams v City of New York*, 2 NY3d 352, 363, 779 NYS2d 449 [2004]). "To make out a claim under section 205-e, a plaintiff must [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 defendant's negligence directly or indirectly cause the harm" (*id.* [internal quotations and citation omitted]).

As an initial matter, there is no dispute over the facts of this case. Plaintiff testified at his deposition that he fell because there was a piece missing from the exterior steps of the premises

(NYSCEF Doc. No. 86 at 52-53). Plaintiff attaches photos identified by plaintiff at his deposition that depict the defect in the stairs (NYSCEF Doc. No. 89). The caretaker of the building, Mr. Robertson (defendant's employee), testified that the photographs depicted the steps on the date of plaintiff's accident (NYSCEF Doc. No. 91 at 65-66). There is no question that there was a chunk missing from one of the steps, which plaintiff says caused him to fall. Defendant has presented no evidence to contradict plaintiff's version of events. Despite the fact that defendant claims that plaintiff was the sole proximate cause of his accident, there is no support for that claim in the record.

Therefore, the question for this Court is whether plaintiff has met his burden to demonstrate that a statute or ordinance was violated so that he can recover under General Municipal Law § 205-e. Defendant insists that plaintiff needs an expert and it is not enough for plaintiff's attorney to merely identify statutes that were violated. Plaintiff argues that submitting the certificate of occupancy as an exhibit to his moving papers (*see* NYSCEF Doc. No. 94) and discussing the statutes and ordinances is sufficient.

The case relied on by defendant for the proposition that an expert is required, *Anderson v Creston Assocs.*, 59 AD3d 298, 874 NYS2d 47 [1st Dept 2009]), does not specifically state that a plaintiff must produce an expert in support of a motion for summary judgment. In fact, the decision from which the appeal was taken does not even hint that the plaintiff had an expert; the decision does, however, specifically state that it was the defendant in *Anderson* which submitted an expert affidavit (*see Anderson v Creston Assocs.*, 2007 WL 7134969 [Sup Ct, Bronx County 2007]).

Here, neither plaintiff nor defendant submitted an expert affidavit and, notably, defendant

only disputes whether Multiple Residence Law § 174 and Administrative Code of City of NY § 28-1012.9 apply. Defendant does not address the merits of the applicability of the remaining sections cited by plaintiff– instead, defendant makes the general argument that plaintiff has not met his burden.

The Court finds that plaintiff has met his burden to establish that Multiple Dwelling Law § 52, Administrative Code of City of NY § 27-2005 and Multiple Dwelling Law § 78 apply and were violated here. From the photographs authenticated by plaintiff at his deposition (and by a caretaker at the premises), it is clear that the steps had a defect. Defendant failed to raise an issue of fact in opposition– plaintiff submitted the certificate of occupancy in support of his moving papers, which establishes that this ordinance and these statutes apply. And, contrary to defendant's claim, plaintiff's deposition testimony need not be discounted simply because it supports plaintiff's case.

Summary

It may be that it is common practice (and likely the best practice) to submit expert affidavits regarding the applicability of certain statutes and ordinances in General Municipal Law § 205-e cases (*see e.g., Norman v City of New York*, 60 AD3d 830, 875 NYS2d 232 [2d Dept 2009]). Obviously, if a plaintiff does not submit an expert affidavit but a defendant does in opposition, it will be more difficult for a plaintiff to obtain summary judgment. But a typical litigation tactic does not necessarily create a binding precedent. And the legislative history and case law regarding General Municipal Law § 205-e does not demonstrate that a plaintiff must submit an expert affidavit in order to establish his or her burden on a motion for summary

judgment. The Court sees no reason to impose such a rule especially where, as here, defendant did not submit its own expert refuting plaintiff's claims, or even address the majority of the cited provisions.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on liability is granted.

This is the Decision and Order of the Court.

Dated: October 26, 2017
New York, New York

ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH