

Conrad v City of New York

2020 NY Slip Op 30610(U)

February 27, 2020

Supreme Court, New York County

Docket Number: 154550/2017

Judge: Laurence L. Love

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

PRESENT: HON. LAURENCE L. LOVE PART 62

Justice

-----X

ERIC CONRAD,

Plaintiff,

- v -

CITY OF NEW YORK, NYPD POLICE OFFICER ADOLFO PERALTA, NYPD SERGEANT MARK AMUNDSON, NYPD POLICE OFFICER KEVIN GLEASON

Defendant.

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INDEX NO. 154550/2017
MOTION DATE 12/19/2019
MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents,

The following documents read on defendants, THE CITY OF NEW YORK, NYPD POLICE OFFICER ADOLFO PERALTA, NYPD SERGEANT MARK AMUNDSON, and NYPD POLICE OFFICER KEVIN GLEASON'S, motion for summary judgment, per CPLR 3212, on the theory that the NYPD Police Officers used reasonable force in shooting decedent, who was charging at a uniformed Police Officer with a raised knife and refused to obey multiple commands to drop his weapon.

On May 18, 2016, Garry J. Conrad was shot and killed by NYPD Police Officer Adolfo Peralta and Sergeant Mark Amundson at the intersection of Eighth Avenue and 49th Street. Mr.

Conrad was inside a supermarket on 49th Street and Eighth Avenue where he was involved in a verbal altercation with employees, allegedly calling several people “niggers” and threatening to kill them. An employee sought assistance from Police Officer Kevin Gleason who was nearby on the street. Officer Gleason had a brief interaction with the decedent, who exited the store with Officer Gleason following. Further interaction occurred out on the street, which resulted in Officer Gleason taking Mr. Conrad to the ground. Street surveillance cameras of the incident show the take down as well as Mr. Conrad breaking free, brandishing a knife above his head and charging Police Officer Peralta, who, with gun drawn and backing into the street, along with Sergeant Mark Amundson shot and killed Mr. Conrad.

This action is brought by the estate of Garry J. Conrad and alleges assault, battery, wrongful death, pain and suffering, and respondeat superior to the City of New York.

On August 9, 2016, plaintiff served a notice of claim on the City of New York. Plaintiff commenced this action by filing a summons and verified complaint on March 17, 2017. The New York Law Department filed an answer on behalf of the City of New York on August 18, 2017. Bill of Particulars was served on the City on or about September 15, 2017, depositions occurred for Officer Kevin Gleason on January 18, 2018, for Officer Adolfo Peralta on April 23, 2018, and on Sergeant Mark Amundson on April 25, 2018. A note of issue was filed on August 27, 2019.

CPLR § 3212 (b) states that, the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (see *Glick & Dolleck Inc v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968]).

To survive summary judgment in a shooting case, a plaintiff must ‘raise a material question of fact as to whether [the officer’s] decision to use deadly force was ‘objectively reasonable,’ or in other words, whether he had ‘probable cause to believe that [the plaintiff] pose[d] a significant threat of death or serious physical injury to [himself] or others’” (see *Biggs v City of New York*, 2010 US Dist LEXIS 121332 [SDNY 2010]).

Through a review of the facts, evidence, and the documents presented, the most significant and central question before this court is a determination of whether Police Officer Gleason should have identified Mr. Conrad as an emotionally disturbed person (“EDP”) and proceeded according to various guidelines and protocols provided by the New York Police Department.

On summary judgment, “facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr Corp*, 18 NY3d 499, 503 [2012]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (see *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

Patrol Guide Procedure No. 216-05 guides a NYPD Police Officer’s interaction with a “mentally ill or emotionally disturbed persons,” requiring compliance with a series of steps to isolate and contain the person, including establishing a “zone of safety.” If an EDP does not pose an immediate threat of serious physical injury or death to himself or others, the Officer is trained to maintain the zone of safety until the arrival of a Patrol Supervisor, and Emergency Service Unit personnel. No attempt to take an EDP into custody is to be attempted without the specific direction of a Supervisor. If the EDP is unarmed, not violent and willing to leave voluntarily, a uniformed member of the service may take such person into custody.

The applicable provisions of the Patrol Guide provide discretionary language requiring police officers to use their judgment when determining if an individual qualifies as an EDP (see *Kinsey v City of New York*, 2015 NY Misc LEXIS 2064, at 19-20 [Sup Ct 2015]). In *Davila v City of New York*, the Second Department held that police officers had discretion in deciding whether to wait for Emergency Service Unit personnel before taking a known EDP into custody, and their discretionary decision ‘precluded liability for the allegedly negligent conduct of the officers’ (see *Davila v City of New York*, 130 AD3d 890, 894 – 895 [2d Dept 2016]).

The Eastern District of New York explained why the EDP policy must be discretionary given “the manifold circumstances that police officers routinely encounter,” that “police officers are required to protect the public at large and themselves as well as the EDP,” and that no policy can countenance what plaintiff proposes here, that a supposed EDP just be allowed “to escape and possibly cause injury to others, even if preventing him from leaving may cause him to become more agitated” (see *Cerbelli v City of New York*, LEXIS 109341 at 60 – 61, adopted by 2008 US Dist LEXIS 77335 (EDNY 2008)(*Scott v Harris*, 550 US 372, 385 [2007])).

Here, a review of the facts and circumstances clearly demonstrate that the Officer had no reason to view Mr. Conrad as an EDP from the outset of their interaction. There was no prior dispatch related to an EDP, or prior history known to the Officer. His limited information was that a verbal altercation was ongoing, and he observed Mr. Conrad attempt to vacate the store shortly upon his arrival on the scene. Officer Gleason was aware that Mr. Conrad had used racial slurs and threatened physical harm to store employees. He followed Mr. Conrad out of the store and Mr. Conrad used similar language towards the Officer who then made the decision to take him into custody by taking him down to the ground.

Plaintiff's counsel argues that the fact that plaintiff was angry, threatened violence and used racial slurs towards the Officer himself in and of itself was sufficient to view Mr. Conrad as an EDP. The Court cannot accept that interpretation. To do so would mean almost all Police interactions with irate individuals should be considered interactions with EDP's. All angry people are not EDP's and there must be some rational basis for an Officer to believe he is in the presence of an EDP. Here, Officer Gleason had no way of knowing Mr. Conrad's past medical history or mental state had risen to that level until the moment he brandished a knife and charged fellow Officers.

The remaining issues before the Court center on Defendants' argument that the shooting was justified under the circumstance, warranting the dismissal of this matter.

The Force Investigation Division conducted an investigation and deemed the firearm discharges by Sergeant Mark Amundson and Police Officer Adolfo Peralta were justified and within department guidelines. A Use of Force Board and the Deputy Chief of the Police Commissioner concurred with the findings of the Force Investigation Division, that there was no violation of departmental guidelines and that no corrective action should be taken against the two officers who discharged their weapons.

Also, any argument that defendants are liable for provoking Mr. Conrad, which then resulted in the shooting by the other two Officers, and that such conduct can form the basis for liability has been rejected by the United States Supreme Court in *City of Los Angeles v Mendez*, 137 S Ct [2016]). If a shooting or particular use of force was not unreasonable, the plaintiff is not permitted to 'look back in time' to see if there was some prior, potentially unreasonable use of force that provoked the plaintiff into the series of events that led to the lawful use of force (*Id* at 1547 – 1548). By conflating excessive force/battery claims with other theories of liability, "the

provocation [theory][would] permit excessive force claims that cannot succeed on their own terms,” which is the “wrong” approach, as it could lead to liability even where the use of force was ultimately reasonable (*Id* at 1547).

Furthermore, a Police Officer is entitled to the defense of qualified immunity as long as a reasonably competent Officer believed he was acting appropriately in using deadly force (see *Lennon v Miller*, 66 F3d 416, 421[2d Cir 1995]; *Estate of Jaquez v City of New York*, 104 F Supp 3d 414, 436 [SDNY 2015]). The decision by Police Officers to use lethal force, including discharging their firearms, is a discretionary act for which immunity applies when the shooting itself was not inconsistent with acceptable police practice (see *Johnson v City of New York*, 15 NY3d 676, 680 [2010]).

Officer Gleason’s decision to pursue and detain a suspect is a discretionary decision and is itself protected by the professional judgment rule, absent a cause of action for false arrest (see *Rodriguez v New York*, 189 AD2d 166, 177 [1st Dept 1993]).

Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable (see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]).

Through an application of the facts to the applicable Patrol Guides, there does not appear to be a violation or improper implementation by the police officers involved in this litigation. The broad language of New York Police Department Patrol Guide, Procedure No. 216-05, Mentally Ill or Emotionally Disturbed Persons, does not pose liability on the police officers. The applicable case law provides a police officer with discretion in how to interact with an Emotionally Disturbed Person and as was addressed above by the Court under these circumstances there is simply no basis to even view Mr. Conrad as an EDP.

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

2/27/2020

DATE



LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE