Abdalla v City of New York
2021 NY Slip Op 31872(U)
June 3, 2021
Supreme Court, New York County
Docket Number: 158635/2017
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **IAS PART 62**
Justice

---X
AHMED ABDALLA,

Plaintiff,

- against -

THE CITY OF NEW YORK,

Defendant.

---X

INDEX NO. 158635/2017

MOTION DATE 04/08/2021

MOTION SEQ. NO. 001

DECISION + ORDER

The following e-filed documents, listed by NYSCEF Document Numbers 16-43

were read on this MOTION to/for Dismiss 3211/3212 .

This decision is based on this court's review of all of the aforementioned documents as well as the oral arguments heard before this court on April 8, 2021.

On December 30, 2016, plaintiff Ahmed Abdalla, a police officer, was on duty with another officer and a trainee. Around 10:25 pm, a call came in from officers seeking help nearby. The officers drove their vehicle to the area in question, the 57th – 58th Street block on the west side of Seventh Avenue in Manhattan. Plaintiff spotted the officer who was in distress and saw that a perpetrator was on top of him. He also noticed that metal barriers had been set up and attached to each other, blocking the entire sidewalk. He ran toward the officer in question and attempted to leap over the metal barriers to reach him. According to plaintiff, until he reached the barriers, he did not notice that inches behind the metal barrier was a concrete one. Plaintiff placed

his left foot on the metal barrier and tried to jump over both barriers. When his left foot reached the top of the barrier, he tripped on the metal barrier and fell. When he fell, the barriers did not tip over or move, but remained stationary. He felt the full weight of his fall on his right elbow. During his deposition (NYSCEF Doc. No. 25), plaintiff indicated that he fell when his left leg hit the concrete barrier, and that he landed on the sidewalk on his elbow after the fall. He broke his elbow and spent two months at home and two months on desk duty, before he returned to his usual job.

Plaintiff timely filed a notice of claim (NYSCEF Doc. No. 20). The notice stated that plaintiff sustained injuries, including a fractured right radial head, and that he continued to suffer from ongoing pain and physical disabilities. In addition, plaintiff stated that he had lost several thousand dollars in overtime pay. A hearing, pursuant to General Municipal Law (GML) section 50-h (50-h hearing) took place on September 25, 2017 (NYSCEF Doc. No. 21). Subsequently, plaintiff filed the summons and complaint, alleging negligence on the part of the defendant City in the placement of the barriers (NYSCEF Doc. No. 22). The complaint set forth two causes of action, one for common law negligence and one under GML §205-e.

After issue was joined, the parties engaged in discovery. In addition to plaintiff's deposition, defendant produced nonparty Officer Thomas Serino as a witness on its behalf (NYSCEF Doc. No. 26). Officer Serino worked in the barrier division of the Police Department. According to Officer Serino, for the job in question, "[t]he chiefs and the commissioners [determined where to place the barriers], being that [New Year's Eve is] such a large scale event, millions of people showing up" (*id.*, p 15, lines 21-24). Officer Serino explained that for the event, there would be "thousands upon thousands upon thousands" of barriers (*id.*, p 16, lines 18-19). He also explained the difference between "nesting," in which the barriers are placed together for later

use as "pens," and "lining up," in which the barriers would interlock and then line the sidewalk. Consistent with police department practice, a placement sheet directed the five officers on the job where to place the barriers and whether to nest them or line them up along the sidewalk

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<u>The Firefighter's Rule and General Municipal Law §205-e</u>

Plaintiff filed the note of issue on June 5, 2020 (NYSCEF Doc. No. 16). Shortly thereafter, defendant filed this motion to dismiss pursuant to CPLR §3211(a)(7) and CPLR §3212 (NYSCEF Doc. No. 17). The motion revolves around the applicability of the firefighter's rule and GML § 205-e. Pursuant to the firefighter's rule, firefighters cannot recover damages in common-law negligence when their injuries result from the performance of a police function that increases their chance of injury (*Wadler v City of New York*, 14 NY3d 192, 194 [2010]). This rule exists because these injuries occur as the direct result of "the very situations that create a need for their services" (*Santangelo v State of New York*, 71 NY2d 393, 397 [1988]).

In *Gammons v City of New York* (24 NY3d 562, 568 [2014]), the Court of Appeals noted that *Santangelo*, which extended the firefighter's rule to common law negligence claims by police officers, had been superseded in large part by GML §205-e.[1] This provides a statutory basis for lawsuits by officers if their deaths or injuries are in the line of duty and are "the 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 . . . federal, state, county, village, town or city governments," including those promulgated by the departments, bureaus, and divisions of these governments (GML §205-e[1]). Further, GML §205-

[1]The firefighter's rule still bars actions against a firefighter or police officer's employer in situations in which the governmental employer did not violate a statute, law, rule, order, or requirement.

e applies regardless of whether the officer's injury or death would be barred under the firefighter's rule (*see* GML § 205-e [3]).

Analysis

1. Common Law Negligence.

Defendant argues that dismissal is warranted because plaintiff fails to state a claim under the firefighter's rule, which defendant contends applies in emergency and non-emergency situations if the danger is related to the nature of the officer's official duties. Here, defendant argues that plaintiff was injured in the course of his duties and, therefore, the firefighter's rule bars his common law claim.

In opposition, plaintiff quotes *Zanghi v Niagara Frontier Transp. Commn.* (85 NY2d 423, 440 [1995]), which explains that a police officer or firefighter may proceed in negligence "where [the] officer is injured in the line of duty merely because he or she happened to be present in a given location, but was not engaged in any specific duty that increased the risk of receiving that injury." Here, plaintiff argues that he was merely "trying to traverse a sidewalk," and thus his injury is not barred by the firefighter's rule (NYSCEF Doc. No. 33, ¶ 14). Plaintiff's argument however, is belied by the record.

Contrary to plaintiff's claim, the record establishes that plaintiff rushed over to and climbed the barrier because he was trying to reach an officer in distress and that he was injured "in furtherance of a specific police function" (*Wadler*, 14 NY3d at 196). Here, plaintiff's action – trying to jump the barrier to aid a fellow police officer and arrest a perpetrator – created a heightened risk of injury (*see id.*; compare with *Genova v City of New York*, 165 AD3d 486 [1st

Dept 2018] [negligence claim was viable where plaintiff tripped on uneven asphalt after he exited a police van, as his official duties did not increase the risk of injury].

Further, and contrary to plaintiff's contention, General Obligations Law (GOL) §11-106 does not provide a basis for liability. Rather, GOL That law gives police officers and firefighters a right of recovery in negligence when they sustain injuries in the discharge of their duties due to the "conduct of any person or entity *other than that police officer's or firefighter's employer or co-employee*" (emphasis added). "[W]hile a police officer can assert a common-law tort claim against the general public, liability against a fellow officer or employer can only be based on the statutory right of action in General Municipal Law §205-e" (*Matter of Diegelman v City of Buffalo*, 28 NY3d 231, 239-240 [2016 [internal quotation marks and citation omitted]). The firefighter's rule therefore bars a GOL §11-106 claim against defendant (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 78 [2003]; *Rodriguez v County of Rockland*, 43 AD3d 1026, 1028 [2d Dept 2007]).

GML §205-e

Defendant also argues that plaintiff's GML §205-e causes of action must be dismissed. To assert a viable claim under GML §205-e, plaintiff must show that defendant violated a statute, ordinance, rule, order, or requirement. Here, plaintiff's bill of particulars asserts alleged violations of New York City Administrative Code (Administrative Code) §28-301.1, and Labor Law §27-a (3) (NYSCEF Doc. No. 24, ¶ 30), and his notice of claim also asserts alleged violations of New York City Charter §2903(b)(2); The Rules of the City of New York (RCNY) §2-07(b)(1)(2); Administrative Code §§19-152 and 7-201(c)(2) (NYSCEF Doc. No. 20). In opposition, defendant argues that the cited provisions are inapplicable to the facts of this case and that the only

conceivable GML §205-e claim is one under the Public Employee Safety and Health Act (PESHA), (Labor Law §27[a]).

PESHA states in relevant part that:

> "[e]very 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 death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees."

Defendant argues first that plaintiff's injuries were the result of an accident unrelated to any failure on the part of defendant and secondly, that plaintiff did not allege or establish that defendant owed him a special duty, which is a prerequisite to liability. Furthermore, defendant contends that even if a special duty had existed, the placement of the barriers was a discretionary government function and therefore governmental immunity applies (citing *Williams v City of New York*, 2 NY3d 352, 368 [2004]). Finally, defendant argues that the barrier was an open and obvious danger and notes that plaintiff saw the barrier before he tried to climb over it, thus defeating plaintiff's GML §205-e claims.

In opposition, plaintiff argues that the documentary evidence, including the Serino deposition transcript, shows that defendant "created the condition of placing [240] metal and concrete barriers blocking" the 57th to 58th Street sidewalk on 7th Avenue (NYSCEF Doc. No. 33 [Aff in Opp], ¶ 3). He describes the metal and concrete barriers as defects and obstructions that defendant negligently placed on the sidewalk in an unsafe manner, and that this left him no alternative but to jump over the barriers. He notes that the injury occurred on December 30th, the day before New Year's Eve, and he intimates that it was negligent to place the barriers on the sidewalk so far in advance. Plaintiff also points out that he usually saw barriers on New Year's Eve in the Times Square area rather than in the area in question, and he suggests that it was improper to place them there. Additionally, plaintiff mentions that defendant's witness, Officer

Serino, did not know whether barriers were normally placed in the area on New Year's Eve, whether it was normal practice to put out the barriers the day before the event, or whether the avenue was closed.

Next, plaintiff argues that defendant incorrectly relies on arguments that are inapplicable to GML § 205-e claims. He argues that a plaintiff need not prove notice of the violation if his or her injury results from the defendant's neglect, omission, or negligence that is willful or culpable (citing, *e.g.*, *Lusenskas v Axelrod*, 183 AD2d 244, 248 [1st Dept 1992]). Further, plaintiff argues that defendant has not shown that it lacked constructive notice of the problem, and thus it has failed to satisfy its evidentiary burden on this issue. He points out that contributory negligence and assumption of risk are not valid affirmative defenses to GML § 205-e claims, and therefore defendant's arguments that the alleged defect was open and obvious and that plaintiff assumed the risk of injury have no bearing. Moreover, he states, the concrete barrier was hidden by the metal barrier and thus it was not an open and obvious hazard. Moreover, plaintiff claims that the provisions upon which he relies are valid predicates for a cause of action.

Plaintiff rejects defendant's argument that PESHA is inapplicable. According to plaintiff, the fact that the metal and concrete barriers were not defective is not dispositive. Citing a plethora of cases, plaintiff notes the broad remedial purpose of GML §205-e and stresses that this requires courts to apply the law expansively (*e.g.*, *Gonzalez v Iocovello*, 93 NY2d 539, 539 [1999]). He contends that defendant violated PESHA because it left only a dangerous avenue of approach, and he rejects defendant's position that the barriers were placed on the sidewalk for crowd control. Further, plaintiff states that Labor Law §27-a(3) applies here and defendant's argument to the contrary lacks merit. According to plaintiff, defendant premises this argument on its contention that the law is inapplicable where, as here, plaintiff sustained his injuries while he performed his

job, and where the risk was unique to his work as an officer. He contends that defendant's reliance on *Williams* is misplaced, as plaintiff does not challenge a discretionary decision by his supervisors. He states that for this reason as well, defendant cannot assert immunity from suit.

In reply, defendant reiterates that plaintiff has not shown that defendant violated a statute, ordinance, or regulation. Defendant further argues that plaintiff's effort to describe this as a case about a defective roadway or sidewalk is misplaced, because the barriers in question were not part of the road or the sidewalk and were not defective. Moreover, defendant reiterates that in placing the metal barriers as it did, defendant made a discretionary determination and is immune from liability.

Further, defendant states that plaintiff misconstrues its arguments as to the applicability of Labor Law §27-a. Contrary to plaintiff's position, defendant acknowledges that the law is an appropriate basis for a GML §205-e claim. Instead, defendant explains, its argument is that a police barrier is not a recognized hazard within the meaning of the Labor Law. Moreover, plaintiff did not show that the barriers were defective. Instead, plaintiff's attempt to jump the barrier caused his accident. Defendant argues that plaintiff has overstated the extent of the waiver of the notification requirement, as there must be at least constructive notice of a defect, and the cases upon which plaintiff relies support defendant's position. Further, defendant concedes that contributory negligence or assumption of risk do not apply where there is a statutory violation, but argues that, whereas here, there is no violation, GML §205-e is inapplicable and the court may consider assumption of risk and comparative negligence.

Defendant also asserts that plaintiff has misconstrued the facts of the case. For example, plaintiff's suggestion that the barriers were "left on the sidewalk" is incorrect (NYSCEF Doc. No. 43 [Reply Aff], ¶ 23). According to defendant, plaintiff's argument that there were 240 barriers at

the site also is incorrect. Instead, Officer Serino's testimony was that defendant brought 90 to 120 barriers to the block, around 50 of which were placed on the west side. Moreover, plaintiff testified that the barriers were lined up along the block and interlocked. Defendant states that although plaintiff is correct that there was no event on December 30th itself, it was appropriate to set up the barriers the day before New Year's Eve. To the extent that plaintiff challenges the wisdom of setting up barriers early and setting them up on the block in question, defendant argues that these were discretionary governmental functions and governmental function immunity applies. Defendant additionally reiterates that plaintiff has failed to establish the existence of a special duty. According to defendant, a contrary determination would be improper because it would afford plaintiff greater rights under GML §205-e than a private citizen would have under negligence law (*citing Galapo v City of New York*, 95 NY2d 568, 575 [2000]). Finally, defendant argues that because the purported danger was open and obvious, it had no duty to warn.

After careful consideration of all of the above arguments, this court concludes that plaintiff does not have a viable cause of action under GML §205-e. As defendant correctly argues, New York City Charter §2903(b)(2) and Administrative Code §19-152, which apply to defective sidewalks, are inapplicable (*see Gonzalez*, 93 NY2d at 552-553). The former makes the City responsible for repairing sidewalks, streets, bridges, and tunnels, while the latter relates to the duty of property owners with respect to sidewalk flags that abut their properties. Thus, the provisions both relate to the condition of the sidewalk rather than to objects that are on the sidewalk. Plaintiff's arguments to the contrary is also without merit. Moreover, even if the barriers could be deemed part of the sidewalk, there is no evidence that the barriers were defective.

The other provisions upon which plaintiff relies also do not apply. Administrative Code §28-301.1 sets forth the obligation of building owners to maintain "buildings and all parts thereof and all other structures . . . in a safe condition." Additionally, the provisions of the Rules of the City of New York, upon which plaintiff relies, do not apply here. Section 2-07(b)(1) of the RCNY, does not apply as it imposes a duty upon "[t]he owners of covers or gratings on a street" to "monitor[] the condition of the covers, gratings and concrete pads" for a distance of twelve inches from the perimeter of the hardware. Similarly, section 2-07(b)(2) of the RCNY is inapplicable, as it requires owners to replace or repair defective covers and gratings. Moreover, Administrative Code §7-201, upon which plaintiff also relies, is inapplicable, as that provision "generally imposes liability for injuries resulting from negligent sidewalk maintenance *on the abutting property owners*" (*see Storper v Kobe Club*, 76 AD3d 426, 427 [1st Dept 2010] [emphasis added] [finding that RCNY section 207(b)(1) placed liability on the Metropolitan Transit Authority, which owned the grating]). Furthermore, as defendant notes, RCNY section 2-07(b)(1) and (2) relate to the condition of covers, gratings, and concrete pads and a building owner's duty to replace or repair those which are defective (*see Storper*, 76 AD3d at 427). There are no covers, gratings, or concrete pads here.

The only other alleged statutory violation that remains is PESHA, and plaintiff failed to establish a violation of the Labor Law in this instance. Although plaintiff argues that there were nested barriers on the block, plaintiff failed to show that the barrier in question, which had been placed curbside and linked with other barriers in order to provide crowd control during the next day's New Year's Eve festivities, was negligently placed. Rather, plaintiff repeatedly confirmed that he tripped on an interlocked barrier rather than a nested one.

Furthermore, while plaintiff correctly argues that courts expansively apply GML §205-e "to favor recovery by police officers whenever possible" (*Gammons*, 24 NY3d at 569 [quoting *Williams*, 2 NY3d at 364), a claim only exists under the provision when there is a violation of a clear statutory or regulatory duty (*see Gammons*, 24 NY3d at 571; *Estate of Enchautegui v City of New York*, 192 AD3d 404, 405 [1st Dept 2021]). Moreover, "a municipal defendant generally is immune from liability for conduct involving the exercise of discretion and reasoned judgment" (*Johnson v City of New York*, 65 AD3d 476, 477 [1st Dept 2009], *affd* 15 NY3d 676 [2010]). To determine whether immunity applies, courts must distinguish between a governmental authority's proprietary functions, which are actionable, and its governmental functions, which are not (*see Feldman v Port Auth. of N.Y. & N.J.*, 194 AD3d 137, 140 [1st Dept 2021]).

Lastly, as defendant aptly notes, the First Department has found, in particular, that the placement of barriers at public events to "manag[e] pedestrian and vehicular traffic . . . in furtherance of public safety" is a discretionary act and municipal liability does not lie (*Devivo v Adeyemo*, 70 AD3d 587, 587 [1st Dept 2010]). Accordingly, plaintiff's challenges to defendant's decision to place barriers on the block in question and to set up the barriers on December 30th rather than on December 31st are dismissed, as those determinations are discretionary.

This court has considered all of the parties' remaining arguments, whether expressly stated herein, and find them unavailing. For all of the aforementioned reasons,

IT IS HEREBY ORDERED that the motion is granted and the case is dismissed.

This is the Decision and Order of this Court

SO ORDERED:

DATED: June 3, 2021

HON. J. MACHELLE SWEETING, J.S.C.