SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS KAHN, III** **PART** **32**

Justice

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JUNMEI ZHANG,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, ACACIA NETWORK HOUSING, INC.,BASIC HOUSING INC.,

Defendant.

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INDEX NO. 157088/2015

MOTION DATE

MOTION SEQ. NO. 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 432, 433

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion and cross-motion are determined as follows:

This action arises out of an incident that occurred on February 17, 2015, when Plaintiff, a New York City Police ("NYPD") officer, was accidently shot in the foot by his partner, a fellow officer, non-party Philip Longo ("Longo"), when an unattended dog charged toward the officers. Plaintiff claims the incident occurred when he and Longo responded to a call at a building owned by Defendant City of New York ("City") and operated by Defendants New York City Department of Homeless Services ("NYCDHS"), Acacia Network Housing, Inc. ("Acacia"), and Basic Housing, Inc. ("Basic").

Plaintiff commenced this action and pled causes of action alleging negligence, negligent hiring, training and retention, strict liability for an animal with vicious propensities and under General Municipal Law §205-e.[1] After all Defendants appeared and answered, a protracted discovery process began which is still unresolved over seven years later. Much of this fracas has centered on Plaintiff's demand for a deposition of Longo and production of his personnel file and disciplinary records from the New York City Police Department.

By order of this Court, dated June 1, 2020, the branch of Plaintiff's motion to compel Longo to appear for a deposition was granted. This Court reasoned that Longo "as primary agent of this unfortunate occurrence and an employee for whom Defendant City is ostensibly vicariously liable, possesses a unique perspective of the subject events and his testimony is not only material and necessary, but essential, to the prosecution of this case." However, this Court denied Plaintiff's demand

[1] This action was originally only commenced against Defendant City. Plaintiff commenced another action against the other Defendants (NY Cty Index No 158952) which was consolidated herein by order of Justice Arlene Bluth (NYSCEF Doc No 60).

for production of Longo's NYPD personnel file and disciplinary records based upon the application of Civil Rights Law §50-a and the cases interpreting same.

After Civil Rights Law §50-a was convincingly repealed as part of a package of law enforcement reforms that became effective on June 12, 2020, this Court, by order dated November 5, 2020, granted Plaintiff's motion for renewal and reargument and directed production of Longo's NYPD personnel file and disciplinary records without an *in camera* review. This Court also directed Longo be produced by Defendants for a deposition before January 29, 2021. Defendant City produced Longo for a deposition on February 4, 2021, but did not produce the disputed NYPD records. The Appellate Division, First Department affirmed this Court's order in its entirety (*see Junmei Zhang v City of New York*, 198 AD3d 504 [1st Dept 2021]). The First Department also rejected Defendant City's attack on the sufficiency of Plaintiff's pleading and held:

> To the extent that the City defendants' argue that the officer was acting within the scope of his employment, and therefore plaintiff's claims of respondeat superior foreclose any claims based on negligent hiring, retention, or training, City defendants should have, but did not, move to dismiss these claims.
>
> (*id.* at 505 [citations omitted).

After the First Department issued its decision, Plaintiff's pending motion (Motion Seq No 9) to compel a further deposition of Longo and production of the NYPD records was resolved by stipulation, and so-ordered by this Court on October 26, 2021 (NYSCEF Doc No 385). Therein, the parties agreed Defendants would "comply with the Court's Order dated November 9, 2020 and the Appellate Division Order dated October 14, 2021withwithin 45 days including Police Officer Longo's personnel file; disciplinary records; civilian complaint records and evaluation records" and to produce Longo for a further deposition on or before January 14, 2022.

In lieu of complying with the stipulation, Defendants City and NYCDHS moved pursuant to CPLR §3211[a][7] to [1] dismiss Plaintiff's causes of action in negligence and negligent hiring, training and retention, [2] dismiss Defendant NYCDHS from this action and [3] issue a protective order directing Longo and his NYPD records are not discoverable. Plaintiff opposed the motion and cross-moved for an order [1] striking Defendant City's answer pursuant to CPLR §3126 and [2] to amend the complaint to substitute Defendant City in the place and stead of NYCDHS. Defendants opposed the cross-motion.

As for the branch of Defendants' motion to dismiss Plaintiff's causes of action sounding in negligence and negligent hiring, training and retention, a motion pursuant to CPLR §3211[a][7] may be made at any time (*see* CPLR §3211[e]; *M&E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 6 [1st Dept 2020]). On such a motion, the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see eg. Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]; *M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]). In determining such a motion, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*298 Humboldt, LLC, v Torres*, 197 AD3d 1081, 1083 [2d Dept 2021], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

In certain situations, however, the presumption falls away when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted by the Defendant

(*see Guggenheimer, supra*; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). When in the uncommon circumstance the evidence reaches this threshold (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]), the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller, supra*; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

Defendants' claim that the causes of action against it based in negligence, including the claim of negligent hiring and retention fail to state a claim. General Obligations Law §11-106 provides that a police officer who "while in the lawful discharge of his official duties" sustains an injury due to the "neglect" of another may recover against the responsible party "other than that police officer's . . . employer or co-employee". "Thus, while 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 (*see Williams v City of New York,* 2 NY3d 352, 363 [2004]). In this procedure context, the claims may be dismissed "upon a proper evidentiary showing that the officers were acting within the scope of their official duties" (*see Chavez v City of New York,* 99 AD3d 614, 615 [1st Dept 2012]). Here, since Plaintiff affirmatively pleads in his complaint that he was acting within the scope of his employment when he was injured and the deposition testimony of Longo confirms, as a matter of law, he was as well, Plaintiff's negligence causes of action fail against Defendant City (*see Ferretti v Village of Scotia*, 200 AD3d 1243 [3d Dept 2021][Plaintiff, a police officer, shot by an officer from a different police force were co-employees under GOL §11-106 thereby barring a negligence claim]; *see also Plunkett v Emergency Med. Servs. Corp.*, 260 AD2d 193, 194 [1st Dept 1999]).

Even if the claim were not statutorily barred, a cause of action for negligent hiring and retention would fail. City was Longo's employer when the incident occurred, and therefore responsible for his actions, and Longo is not a party in this action. Thus, all claims are grounded on a theory of respondeat superior (*see Karoon v N.Y. City Transit Auth.*, 241 AD2d 323, 659 N.Y.S.2d 27 [1st Dept 1997]; *Sugarman v Equinox Holding, Inc.*, 73 AD3d 654, 901 N.Y.S.2d 615 [1st Dept 2010]). Plaintiff's reliance on *Haddock v City of New York*, 75 NY2d 478 [1990] and *Gonzalez v City of New York*, 133 AD3d 65 [1st Dept 2015] is misplaced as neither of those cases involved municipal co-employees.

Given Defendant City has established that Plaintiff and Longo were co-employees acting within the scope of their employment when the incident occurred and that the negligent hiring and retention claims fail as a result, the personnel records of Longo are not discoverable as the documents are not relevant to any issue before the Court (*see Fong v New York City Tr. Auth.,* 83 AD3d 642 [2d Dept 2011]; *Neiger v City of New York*, 72 AD3d 663 [2d Dept 2010]; *Trainer v City of New York*, 41 AD3d 202 [1st Dept 2007]). Nevertheless, nothing in this decision affects whatever statutory rights Plaintiff may have to seeks such information apart from this litigation.

The above decision is reached with reluctance and significant exasperation. The flaw in Plaintiff's causes of action for negligence and negligent hiring, training and retention should have been patently obvious to the City *years* ago, yet it failed to act until the First Department stuck the issue right under its nose. This colossal blunder, to put it mildly, has resulted in a monumental waste of judicial resources and has caused Plaintiff to make and defend motions related to discovery as well as defend an appeal. This abject lack of diligence warrants fixation of an appropriate monetary sanction (*see generally Gordineer v Gallagher*, 160 AD2d 672, 673 [2d Dept 1990]). As such, Defendant City shall pay Plaintiff for all expenses in attempting to obtain discovery of Longo's NYPD personnel records,

including but not limited to, attorney's fees and all costs associated with Defendants' appeal of this Court's order dated November 5, 2020.

The branch of the cross-motion to strike Defendants' answer denied, but if the expenses set by the Court are not timely paid, Defendants' answer shall be stricken. The branch of Plaintiff's motion to amend the complaint is granted.

Accordingly, it is

ORDERED that Defendants' motion pursuant to CPLR §3211[a][7] is granted and Plaintiff's negligence claims, including those based on a theory of negligent hiring and retention, against Defendant City of New York are dismissed, and it is

ORDERED that this Court's order dated November 5, 2020, is modified to the extent that Defendant City of New York is granted a protective order and Plaintiff's demand for disclosure of Philip Longo's NYPD personnel file, disciplinary records, civilian complaint records and evaluation records is stricken, and it is

ORDERED that Plaintiff may file and serve an amended pleading in the form annexed to the moving papers, subject to the rulings made herein, and it is

ORDERED that Plaintiff shall, within 45 days of efiling of this order, submit an affirmation of legal services containing an itemized account of the attorney's fees and all expenses incurred in relation to discovery of Longo's NYPD personnel records, and it is

ORDERED that Defendant may submit any response to Plaintiff's affirmation of legal services within 20 days after efiling of same, and it is

ORDERED that if the Court finds it necessary, it will order a hearing on the issue of attorney's fees and expenses, and it is

ORDERED that if Defendant fails to timely pay the fees and expenses set by the Court or fails, in the determination of the Court, to act in good faith in the calculation of same, its answer will be stricken upon efiling of an affirmation of non-compliance by Plaintiff's counsel.

7/15/2022
DATE

FRANCIS KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE