

Brown v Turner
2022 NY Slip Op 35115(U)
August 5, 2022
Supreme Court, Bronx County
Docket Number: Index No. 31843/2018E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Index No.: 31843/2018E

Mot. Seq. No. 002

Motion Date: 6/6/2022

-----x
FRANKLIN BROWN,

Plaintiff,

-against-

MICHAEL TURNER,

Defendant.
-----x

DECISION/ ORDER

Present:

Hon. Wilma Guzman

Justice Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion:

Papers

Numbered

Notice of Motion, Affirmation in Support, Exhibits

Thereto 1

Notice of Cross-Motion, Affirmation in Support and in

Opposition, Exhibits Thereto 2

Affirmation in Opposition and in Further Support 3

Motion by Plaintiff FRANKLIN BROWN (hereinafter referred to as "Plaintiff") moves by **NOTICE OF MOTION**, and all papers in connection therewith, pursuant to CPLR §§ 3212 seeking an Order granting Plaintiff summary judgment pursuant to General Municipal Law §205-e.

Cross-Motion by Defendant MICHAEL TURNER (hereinafter referred to as "Defendant") cross-moves by **NOTICE OF CROSS-MOTION**, and all papers in connection therewith seeking dismissal of Plaintiff's Complaint pursuant to CPLR §215(3) and in opposition to Plaintiff's Motion. Opposition having been filed thereto, upon due deliberation having been had, the Motions are decided as follows:

Plaintiff commenced this action by the filing of a Summons and Complaint, alleging that on December 5, 2015 in the course of his duties as a Correction Officer assigned to Riker's Island correctional facility, Bronx, New York, Defendant, an inmate housed in the George R. Vierno Center facility, set his cell on fire. Plaintiff alleges that he was assigned to a team to respond to the cell, and upon the opening of the cell door, Defendant intentionally assaulted and battered Plaintiff, causing Plaintiff to sustain serious physical injuries. Plaintiff now moves for summary judgment pursuant to CPLR §3212, and Defendant opposes and cross-moves for dismissal pursuant to CPLR §215(3).

Plaintiff's Motion for Summary Judgment

The proponent of a Motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986) and *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. The party opposing a Motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp*, 153

A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). It is well settled that issue finding is the key to summary judgment. *Rose v DaEcib USA*, 259 A.D. 258, 686 N.Y.S.2d 19 (1st Dept. 1999). Summary judgment will only be granted if there are no material triable issues of fact. *Sillman v Twentieth Century-Fox Film Corp*, 3 N.Y.2d 385, 144 N.E.2d 498 (1957). If the movement meets this burden, the opponent must rebut the *prima facie* showing by submitting evidence in admissible form demonstrating the existence of factual issues needing to be determined by a trier of fact. *See Zukerman v. City of New York*, 49 NY.2d 557 (1980). Otherwise, the Motion must be denied, regardless of the sufficiency of the opposition. *Winegrad*, 64 N.Y.2d at 853.

The evidence proffered by Plaintiff in support of his Motion consists of the pleadings (NYSCEF Doc. No. 43) and Plaintiff's deposition transcript (NYSCEF Doc. No. 44). Plaintiff testified that he is a Correction Officer at the Riker's Island correctional facility with approximately 7 years of experience as of the day of his deposition. Plaintiff testified that during his assigned duty shift, he and a team of other Correction Officers were alerted to an incident occurring in Defendant's cell, and that they donned helmets, elbow, knee pads, and other necessary equipment to respond to the Defendant's cell. Plaintiff testified that he has been trained in situations to control unruly inmates, and that upon arrival at Defendant's cell, Plaintiff observed smoke emanating from the cell and a standard inmate-issued green mattress blocking the door's window, preventing the team from seeing inside the cell. He testified that when the door was opened, Defendant emerged, and started punching Plaintiff and other officers on his team. While being assaulted, Plaintiff wrapped his arms around Defendant's body in a control hold, and brought Defendant to the floor. Plaintiff testified that because of the Defendant's assault and battery, he suffered serious physical injuries. (NYSCEF Doc. No. 44).

Plaintiff's first cause of action contained within the Complaint claims that "on or about December 5, 2015, while the plaintiff was lawfully and rightfully present at the aforesaid Rikers Island facility in the course of his employment, the defendant *intentionally battered and assaulted* the plaintiff..." (NYSCEF Doc. No. 1, ¶ 5) (emphasis added). Further, contained within Plaintiff's Bill of Particulars, the incident in question was referred to as an "accident," (NYSCEF Doc. No. 43) and in Plaintiff's moving papers, Plaintiff argues entitlement to summary judgment in that he suffered an injury "as a result of the *Defendant's negligence in assaulting Plaintiff*..." (NYSCEF Doc. No. 42, P. 3) (emphasis added). The issue at bar is one of a cause of action sounding in intentional tort versus one sounding in negligence.

Plaintiff's Complaint clearly states a cause of action based on the Defendant intentionally assaulting and battering the Plaintiff, while Plaintiff's affirmation in support of his motion claims a cause of action pursuant to General Municipal Law §205-e based on Defendant's "negligence in assaulting Plaintiff." (NYSCEF Doc. No. 42, P. 3) "It is well settled that once intentional offensive contact has been established, the actor is liable for assault and not negligence inasmuch as there is no such thing as a negligent assault." *Caglisotro v. Madison Square Garden*, 73 A.D.3d 534 (1st Dept. 2010), quoting *Smiles v. North Gen. Hosp.*, 59 A.D.3d 179, 182 (2009); see also, *Trott v. Merit Dept. Store*, 106 A.D.2d 158 (1st Dept. 1985) (holding that the Special Term properly treated Plaintiff's cause of action for "negligent assault" as an assault and not negligence); *Barreto v. Kotaj*, 1 N.Y.S.3d 727 (1st Dept. 2014); *Wrase v. Bosco*, 271 A.D.2d 440, 441 (2d Dept. 2000) ("It is well settled that no cause of action to recover damages for negligent assault exists in New York").

The instant action is one sounding in intentional assault and battery, and not negligence. Plaintiff's Motion for summary judgment claims a timely and properly pled claim pursuant to General Municipal Law §205-e and CPLR §214. CPLR §214 subject claims to recover damages for personal

injury to a three-year statute of limitations. “To establish a cause of action under General Municipal Law §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 *defendants’ negligence* directly or indirectly caused the harm.” *D’Andrea v. Bond*, 141 A.D.3d 682 (2d Dept. 2016) (emphasis added). While statutory causes of action for injury of police officers extends to injuries resulting from violations of the Penal Law, the underlying causes of action must sound in negligence. *Galapo v. City of New York*, 219 A.D.2d 581 (2d Dept. 1995) (violation of the New York City Police Department Patrol Guide procedures concerning use of firearms may serve as a basis of an action seeking recovery pursuant to General Municipal Law §205-e); *Baiamonte v. Buongiovanni*, 207 A.D.2d 324 (2d Dept. 1994) (police officer injured when defendant escaped from custody asserted causes of action sounding in common-law negligence and seeking damages pursuant to General Municipal Law §205-e); *Malasky v. Towner*, 196 A.D.2d 532 (2d Dept. 1993) (Plaintiff police officer injured by errant driver’s vehicle commenced negligence action against driver Defendant).

Plaintiff’s arguments in support of his entitlement to summary judgment pursuant to General Municipal Law §205-e are unsupported by the evidence presented to the Court. Plaintiff’s Complaint alleges that the statutes violated as a predicate to their General Municipal Law §205-e claim differ than those alleged in his Motion papers and Plaintiff’s own testimony. According to the Complaint, Defendant was convicted on June 6, 2016, of attempted assault in the first degree pursuant to Penal Law §110/120.10, *robbery in the first degree* pursuant to Penal Law §160.15, and attempted assault in the second degree pursuant to Penal Law §110/120.05 and was subsequently sentenced to 12 years imprisonment thereon (emphasis added). (NYSCEF Doc. No. 1, ¶ 6, 7). However, Plaintiff’s Motion submissions attribute Defendant’s liability to the completed crimes of assault in the second degree pursuant to Penal Law §120.05(1), assault in the first degree pursuant to Penal Law §120.10(1), and *arson in the second degree* pursuant to Penal Law §150.15 (emphasis added) (NYSCEF Doc. No. 42, p. 3-4). Plaintiff testified at his deposition that he never spoke with anyone at the District Attorney’s Office about the incident in question and was unaware if any charges were brought in relation to this incident (NYSCEF Doc. No. 44). Therefore, it is unclear if charges were brought against the Defendant by Plaintiff; all crimes included in Plaintiff’s Complaint are crimes of requisite intent, not of criminal negligence, and Defendants’ claimed conviction for robbery in the first degree does not comport to the facts as alleged. It is further unclear if the Defendants’ conviction was based upon the charges alleged against Plaintiff, or those for other crimes for which he was incarcerated when the incident occurred; the Complaint lacks a Criminal Court or Supreme Court, Criminal Division index or indictment number nor date of offense, nor does it reference in any way that the crimes for which he was convicted had any relation to the Plaintiff’s alleged claims.

“[A]s a prerequisite to recovery, a police officer must demonstrate injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duty” *Williams v. City of New York*, 2 N.Y.3d 352, 364 (2004). While a Plaintiff may predicate claims upon alleged violations of Penal Law provisions relating to assault, homicide, reckless endangerment and manslaughter, the negligence requirement of General Municipal Law §205-e implies that any such assault be committed in a “reckless” or “criminally negligent” manner. *Id.*, 366-367).

As mentioned above, “To establish a cause of action under General Municipal Law §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 defendants’ negligence directly or indirectly caused the harm.” *D’Andrea*,

supra. Plaintiff's complaint identifies Penal Law violations for which Defendant was convicted but fails to show a required nexus that the resulting injury was allegedly caused by Defendant's failure to comply with said violations. Further, Plaintiff's Complaint describes the nature of Plaintiff's injuries, but does not "describe the manner in which the police officer was injured," nor does it "set forth those facts from which it may be inferred that defendant's negligence directly or indirectly caused the harm." *Williams v. City of New York, supra*.

An action for damages pursuant to General Municipal Law §205-e must be predicated on action based upon negligence; Plaintiff's intentional assault and battery claims constitute an improper underlying predicate action to allege such an action; as such, Plaintiff's motion for summary judgment pursuant to General Municipal Law §205-e is denied.

Cross-Motion to Dismiss the Action

Defendant cross-moves to dismiss the instant action as barred by the one-year statute of limitations imposed pursuant to CPLR §215(3). CPLR §215(3) states, in pertinent part, "The following actions shall be commenced within one year: an action to recover damages for... assault, battery..." As discussed above, Plaintiff's cause of action sounds in intentional assault and battery; thus, CPLR §215(3) applies to Plaintiff's action, and is thus subject to the one-year statute of limitation. *Wrase, supra; Trott, supra, Cagliostro, supra, see also, Engelman v. Rofe*, 2019 N.Y. Slip. Op. 21679 (Sup. Ct. N.Y. County, 2019). The assault occurred on December 5, 2015; thus, the statute of limitations expired on December 5, 2016. Plaintiff filed his Summons and Complaint on October 17, 2018, 681 days after the expiration of the applicable one-year statute of limitations.

As such, Defendant's Motion to dismiss the Plaintiff's cause of action as untimely pursuant to CPLR §215(3) is hereby granted, and the action is hereby dismissed.

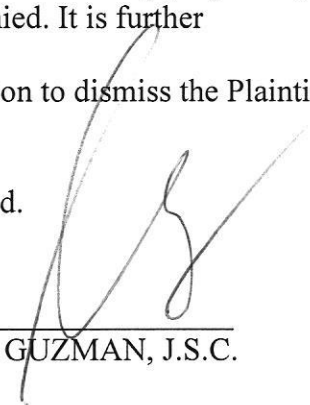
Accordingly, it is:

ORDERED AND AJUDGED that Plaintiff Franklin Brown's Motion for summary judgment pursuant to CPLR §3212 pursuant to General Municipal Law §205-e is hereby denied. It is further

ORDERED AND ADJUDGED that Defendant Michael Turner's Motion to dismiss the Plaintiff's action pursuant to CPLR §215(3) as untimely is hereby granted. It is further

ORDERED AND AJUDGED that Plaintiff's action is hereby dismissed.

Dated: August 5, 2022



HON. WILMA GUZMAN, J.S.C.