Gersbeck v Rodgers
2024 NY Slip Op 32659(U)
July 25, 2024
Supreme Court, Kings County
Docket Number: Index No. 1907/2013
Judge: Gina Abadi
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At an IAS Term, City Part 22 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York, on the 25th day of July, 2024.

PRESENT:
HON. GINA ABADI,
J.S.C.

JAMES GERSBECK, ROBERT WIEDMANN, JR., AND CATHERINE WIEDMANN,
Plaintiffs,
-against-
HALDANE RODGERS, JUNE RODGERS, AND CITY OF NEW YORK,
Defendants.

Index No.: 1907/2013
Motion Seq: 3-4

DECISION, ORDER, AND JUDGMENT

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion and cross-motion:

Papers	NYSCEF Numbered
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	16-35; 48-52
Opposing Affidavits (Affirmations)	39-45; 55-65
Reply Affidavits (Affirmations)	53; 68
Plaintiff's Surreply	70
City's Sur-Surreply	71

Upon a careful review of the entirety of the foregoing cited papers, the Decision, Order, and Judgment on plaintiffs' motion and the City's cross-motion is as follows:[1]

Plaintiffs Robert Wiedmann, Jr. ("Wiedmann"), and his wife suing derivatively (collectively, "plaintiffs"), move for summary judgment on the issue of liability on Wiedmann's first cause of action under General Municipal Law ("GML") § 205-a (the

[1] The Court assumes the parties' familiarity with the underlying facts, procedural history, and the issues presented, to which the Court refers only as necessary to explain its decision.

"statutory claim"), as against defendant City of New York ("City"). The City opposes and cross-moves for summary judgment dismissing the entirety of plaintiffs' complaint (as well as all cross claims) as against it.[2]

Background

On Monday, December 19, 2011, Wiedmann, a 13-year veteran firefighter with the FDNY and a four-year member of the FDNY's Rescue Company 2, was severely burned in a flashover[3] while fighting a fire inside a brownstone at 1100 Prospect Place in Brooklyn, New York, owned by the non-moving defendants Haldane Rodgers and June Rodgers.[4]

By Notice of Claim, received on March 16, 2012 (the "Notice of Claim"), plaintiffs characterized the nature of Wiedmann's statutory claim as "the [City's] failure to provide [him] with sufficient and proper safety equipment and gear and sufficient manpower to fight the fire [at issue] in violation of certain statutes, ordinances, rules, orders and requirements in accordance with [GML §] 205-a." Notice of Claim, ¶ 1.

[2] The remaining plaintiff James Gersbeck has discontinued his claims against all defendants.

[3] "Flashover" is "[a] stage in the development of a *contained* fire in which all exposed surfaces reach ignition temperatures more or less simultaneously and fire spreads rapidly throughout the space." National Fire Protection Association, Publication 555, *Guide on Methods for Evaluating Potential for Room Flashover*, page 555-6, § 3.3.5 (2013 edition) (emphasis added).

[4] According to the FDNY's post-incident investigation report:

> "[¶] The fire building was a three[-]story brownstone, occupied as a single[-]family dwelling and attached on both sides. The building dimensions were approximately 20 feet wide by 50 feet deep. Fire originated in the rear bedroom on the 3rd floor. The fire extended [horizontally] into the hallway between the rear bedroom and the stairs. There was also [a vertical] extension into the cockloft [the space between the ceiling and the roof] and [horizontally] to each of the other three bedrooms in the railroad style layout going toward the front of the building. [¶] The Bureau of Fire Investigation (BFI) determined that the fire was caused by overheated electrical equipment (curling iron plugged into a power strip). BFI determined that the fire originated on the 3rd floor in the rear bedroom, initially involving the contents of the rear room. [¶] Two members of Rescue Company 2 [Wiedmann and coplaintiff James Gersbeck] were seriously burned while operating in the front bedroom on the 3rd floor. They were transported to the . . . Cornell Burn Center. . . . The Rescue Company 2 Irons [Forcible Entry] Firefighter [Wiedmann] remained in Cornell Burn Center for 96 days and the Rescue Company 2 Hook Firefighter [James Gersbeck] remained there for nine days."

FDNY, Safety & Inspection Command, Investigative Report, Case No. SB 38/11, Vol I, Summary (NYSCEF Doc No. 41).

On February 14, 2013, plaintiffs commenced this action against the City (among others) by filing the Verified Complaint, dated February 14, 2013. Therein, plaintiffs asserted (in ¶ 18 thereof) that Wiedmann's statutory claim arose "as a result of the negligence and omissions of [the City], in that [the City] failed to comply with the requirements of the statutes, ordinances, rules and regulations of the State and City governments and/or of any of their departments, divisions or bureaus, and that [the City is] liable to [Wiedmann], who was a member of [the FDNY], and who was injured [in the fire] in the discharge or performance of his duties that were imposed upon him by the Fire Commissioner and his department and superiors."[5]

After the City answered the complaint, plaintiffs served their Verified Bill of Particulars, dated January 14, 2015 (the "BOP"). Therein, plaintiffs expounded on the predicate of Wiedmann's statutory claim by alleging (in ¶¶ 14 and 23 of the BOP) that the City violated Labor Law § 27-a (3), in that the City failed "to make timely and adequate use of available thermal imaging cameras ['TICs'] . . . [and] to enforce departmental requirements for the use of [TICs]," as well as failed to train the FDNY commanding officers in the use of TICs in accordance with the "training-frequency" subsection (2) of 29 CFR 1910.156 (c) ("Fire Brigades" – "Training and Education").

Thereafter, plaintiffs additionally expounded on their BOP by way of their Further Verified Bill of Particulars, dated January 29, 2021 (the "Further BOP"). Therein, plaintiffs advanced as the additional predicates for Wiedmann's statutory claim: (1) the FDNY Training Bulletin, Tools 27, February 16, 2006 ("Operation of Thermal Imaging Camera") (the "FDNY Bulletin"),[6] and (2) the "mandatory-training" subsection (1) of the aforementioned 29 CFR 1910.156 (c).

The crux of Wiedmann's statutory claim, as summarized in the affidavit of plaintiffs' firefighter-safety expert, stems from the deliberate decision of the FDNY commanding officers at the fire scene *not* to use a TIC before the flashover happened. As plaintiffs' firefighter-safety

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[5] The second (and final cause of action) is a derivate claim asserted by Wiedmann's wife.

[6] Plaintiffs' reliance on 29 CFR § 1926.32 (definitions used in Subpart C of the General Safety and Health Provisions of Part 1926 applicable to the Safety and Health Regulations for Construction) for interpretation of the words used in the FDNY Bulletin is misplaced. The FDNY Bulletin is an internal agency document, outside the purview of 29 CFR Part 1926.

expert explained: (1) the FDNY commanding officers, by failing to use their FDNY-issued TICs, were unable "to perceive and understand that . . . the heat build-up in [the front bedroom in which Wiedmann was then fighting the fire] exceeded the operating limits of [his] personal protective equipment"; (2) "[the] undetected heat build[-]up led directly to the flashover that burned [Wiedmann]"; and (3) "had [either or both of the two FDNY commanding officers at the scene] followed their training, and utilized the TICs [as required by the FDNY Bulletin], there would have been sufficient time to warn [Wiedmann] and order him out of that room prior to the flashover."[7]

Both motions were fully submitted on June 5, 2024 when the Court heard oral argument and reserved decision. The Court, in its discretion, accepted the parties' surreply briefs. The recitation of the well-established standard of summary judgment has been omitted from this Decision, Order, and Judgment in the interest of brevity.

Discussion

The City, in support of its cross motion, has made a prima facie showing that Wiedmann's statutory claim under General Municipal Law § 205-a is devoid of merit because it lacks a necessary predicate. In opposition to the City's prima facie showing and in support of their own motion for partial summary judgment on the issue of liability, plaintiffs have failed to point out a necessary predicate.

First, plaintiffs' reliance on Labor Law § 27-a (3) as a predicate for Wiedmann's statutory claim is misplaced because he was injured *not* because of a defect in the equipment (or on account of absence of some equipment[8]) but because of his commanding officer's (and

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[7] *See* Affidavit of Leo J. DeBobes, dated November 30, 2023 (NYSCEF Doc No. 29), ¶ 4.

[8] *Compare Gammons v City of New York*, 24 NY3d 562 (2014) (a police officer working the NYPD's "barrier truck detail" was provided with an improper flatbed truck); *Stolowski v 234 E. 178th St. LLC*, 129 AD3d 512 (1st Dept 2015) (firefighters not provided with personal ropes by the FDNY). *But see Fisher v City of New York*, 48 AD3d 303, 303-304 (1st Dept 2008) ("The motion court correctly concluded that the statutory and regulatory provisions relied on by plaintiff firefighter as predicates for his claim under the 'firefighter rule' [General Municipal Law § 205-a] are inapplicable, or that the record does not raise any triable issues of fact as to the violation of those provisions. Specifically, Labor Law § 27-a is inapplicable because plaintiff's respiratory injury, which was caused when a loose screw on his respirator's face mask suddenly gave way, allowing a head strap to release and resulting in his inhalation of smoke at a fire scene inside defendant hotel, did not arise from a recognized hazard in the workplace.").

the assisting company's commanding officer's) respective *decisions* not to use their TICs at the fire scene. *See Jollon v City of New York*, 124 AD3d 556, 557 (1st Dept 2015), *lv denied* 26 NY3d 905 (2015).

Second, plaintiffs may not rely on the commanding officers' respective decisions to forgo compliance with the FDNY Bulletin as a predicate for the alleged violation of Labor Law § 27-a (3) and thereupon use such Labor Law § 27-a (3) violation as a predicate for Wiedmann's statutory claim. *See Forster v City of New York*, 309 AD2d 578, 579 (1st Dept 2003), *lv dismissed in part, denied in part* 1 NY3d 583 (2004).[9]

Third, plaintiffs may not use the commanding officers' non-compliance with the FDNY Bulletin as a *direct* predicate for Wiedmann's statutory claim because a violation of the internal departmental procedures (whether promulgated within the FDNY or within the NYPD) does not constitute a basis for the statutory claim (whether asserted under GML § 205-a in the case of FDNY or under GML § 205-e in the case of NYPD). *See Galapo v City of New York*, 95 NY2d 568, 572-576 (2000); *Desmond v City of New York*, 88 NY2d 455, 459 (1996), *rearg denied* 89 NY2d 861 (1996); *Vosilla v City of New York*, 77 AD3d 649, 650 (2d Dept 2010); *Shelton v City of New York*, 256 AD2d 611, 613 (2d Dept 1998); *Von Ancken v City of New York*, 245 AD2d 286 (2d Dept 1997); *Luongo v City of New York*, 240 AD2d 712-713 (2d Dept 1997), *lv denied* 90 NY2d 812 (1997).[10]

Fourth and finally, the alleged violations of the "training-frequency" and the "mandatory-training" subsections (2) and (1), respectively, of 29 CFR 1910.156 (c) are irrelevant because the commanding officers (one from Wiedmann's Rescue Company and the other from the assisting Ladder Company) deliberately decided *not* to use the TICs at the fire

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[9] As the First Judicial Department held in analogous circumstances in *Forster* (at page 579):

> "The alleged breaches of proper police procedure described by plaintiff's expert are grounded in the Patrol Guide. Plaintiff, however, may not use a violation of the Patrol Guide as a predicate to establish a violation of Labor Law § 27-a (3) and then use that Labor Law § 27-a (3) violation as a predicate for a General Municipal Law § 205-e claim."

[10] As the Court of Appeals explained in *Galapo* (at page 575):

> "Significantly, though some of its provisions are couched in mandatory terms, the [NYPD] Patrol Guide does not prescribe the specific action to be taken in each situation encountered by individual officers, but rather is intended to serve as a guide for members of the Police Department."

scene, as more fully set forth in the margin.[11] *See Jollon*, 124 AD3d at 557; *Forster*, 309 AD2d at 579.[12] Such decisions were justifiable in the opinion of the FDNY's Chief of Fire Operations, as summarized in the margin.[13]

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[11] *See* Deposition Testimony of Wiedmann's commanding officer Captain Liam Flaherty, page 117, lines 17-20; page 117, line 23 to page 118, line 4; page 120, lines 12-18; page 192, lines 8-9; page 195, lines 18-21; page 46, line 5 to page 50, line 9; page 80, line 2 to page 81, line 5; page 172, line 17 to page 173, line 10; page 196, lines 10-15; page 196, line 23 to page 197, line 2; page 197, lines 6-19; page 212, line 19 to page 213, line 17; page 220, lines 2-9 (testifying, in relevant part, that: [1] "[f]or this type of building [*i.e.*, the brownstone at issue] [he] wouldn't use [a TIC]"; [2] "[he] would not have used [a TIC at the fire scene at issue]"; [3] "We have . . . a leeway . . . to take [to the fire scene] all the tools that we think [are] necessary . . . to complete the mission. If the guys [on his truck] took [a TIC to the fire scene at issue], even if [he] took [a TIC to the fire scene at issue], [he] can honestly say [he] would not have had it on or [he] wouldn't have used it, not from where [he] was anyway."; [4] "[the fire scene at issue] wasn't a fire that [he] traditionally . . . would use a [thermal imaging] camera at"; [5] he determined, based on his experience, that he was not going to use a TIC at the fire scene at issue; [6] in his opinion, a TIC sometimes gives unreliable readings in determining whether there was an extension of fire in the space between the ceiling and the roof; [7] the use of a TIC would be ideal in a "big structure, [in] maze-like structures, [and in] parking garages"; [8] "The way [he] use[s] [a TIC] is, if it's going to be of usefulness then we will use it at a fire or . . . at certain types of fire."; and [9] "[he had] had that [TIC] training bulletin [at issue] . . . [and] heard it probably 20 or 30 times"). *See also* Deposition Testimony of responding Ladder Company's commanding officer Captain Michael Cuccurullo, page 34, line 24 to page 35, line 3; page 86, line 24 to page 87, line 7; page 88, line 24; page 144, lines 2-10; page 145, lines 4-8; page 145, lines 13-22; page 145, line 23 to page 146, line 4; page 146, lines 19-23; page 156, line 12 to page 157, line 3 (testifying, in relevant part, that: [1] he did not use a TIC at the fire scene at issue; [2] it was his "determination whether to use [a TIC] or not. It is usually used to find the fire, but we knew [at the fire scene at issue] where the fire was."; [3] "You use [TICs] as needed."; [4] it was his understanding of the FDNY Bulletin that he had "to have [a TIC] with [him], to take [the TIC] up there [to the fire scene] and use [the TIC] as [he] deemed fit"; [5] "[he made] a conscious decision [not to bring a TIC to the fire scene from his Ladder Company truck] because the fire was already venting [out of the rear window] and we knew where the fire was"; [6] "It was [his] opinion that [a TIC] was not needed at that time. [He] could always call for it later."; and [7] at the time, he did not "come to a conclusion, based upon [his] training and experience, that [he] needed the thermal imaging camera").

[12] Separately from the foregoing, plaintiffs' reliance on the "training-frequency" and the "mandatory-training" subsections (2) and (1), respectively, of 29 CFR 1910.156 (c), is meritless because of their failure to set forth in their Notice of Claim any allegations concerning negligent or improper training. *See Colon v New York City Hous. Auth.*, 23 AD3d 425 (2d Dept 2005); *Dixon v Village of Spring Val.*, 6 AD3d 489, 490 (2d Dept 2004); *Bryant v City of New York*, 188 AD2d 445, 446 (2d Dept 1992).

[13] *See* Affidavit of John M. Esposito, dated February 26, 2024 (NYSCEF Doc No. 42), ¶ 21 ("It is my opinion, to a reasonable degree of certainty in the science of firefighting, that, even if the Ladder 132 Officer [Captain Michael Cuccurullo] and Rescue 2 Officer [Captain Liam Flaherty] were carrying thermal imaging cameras, they would not have used them in the minutes before the flashover occurred. *The [pretrial] testimony of both officers that they would not have used the camera if they had it[,] was reasonable because of the known conditions of the fire.* Further there was no mandate for the officers to use the camera in the minutes prior to the flashover.") (emphasis added); *see also* ¶ 11 ("If used from inside a building, a thermal imaging camera is not intended to determine if fire has entered or is extending into the . . . space between

(footnote continued)

Dismissal of Wiedmann's statutory claim mandates dismissal of his wife's derivative claim. *See Wijesinghe v Buena Vida Corp.*, 210 AD3d 824, 826 (2d Dept 2022); *Camadeo v Leeds*, 290 AD2d 355, 356 (1st Dept 2002).

The Court has considered the parties' remaining contentions and found them unavailing or moot in light of its determination.[14]

Conclusion

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment on the issue of liability is denied in its entirety; and it is further

ORDERED that the City's cross-motion for summary judgment is granted in its entirety, and the Verified Complaint is dismissed in its entirety (together with all cross claims) as against the City without costs or disbursements; and it is further

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the ceiling of the top floor and the underside of the roof in a flat building, such as a brownstone. . . . The ceiling of a room that is on fire (and likely adjacent rooms) is expected to be hot; use of the thermal imaging camera would merely confirm the existence of heat, not provide the actual temperature or any additional helpful information. In fact, it could pose an additional safety hazard for a fire officer to stop their other activities to use a thermal imaging camera in these circumstances."); ¶ 14 ("It is known that there is a risk of flashover to the front of these buildings if there is a fire in the rear due to the insufficient venting and the effects effect of winds. In my opinion, with a reasonable degree of certainty in the science of firefighting, in this fire the thermal imaging camera would not have told the firefighters more than what they already knew or could expect through the use of standard firefighting operations and procedures."); ¶ 17 ("A thermal imaging camera was not required at this fire scene to inform the firefighters that the fire had extended into the [space between the ceiling of the top floor and the underside of the roof] and traveled towards the front of the fire premises. . . . The firefighters would have expected such spread based on their experience and the conditions at the fire."); ¶ 18 ("Before the flashover occurred, the Rescue 2 Officer (Captain . . . Liam [Flaherty] was operating in the rear of the premises. The fire in the rear of the premises was burning from the floor to the ceiling. Had he used a thermal imaging camera during operations just before the flashover, he would not have been able to detect extension. . . . In order to fight any fire, the officers on the scene must have discretion to use their training and common sense in how to fight the fire. As each fire has its own peculiarities, there can be no firm direction of exactly when to deploy the camera during firefighting operations.").

[14] Plaintiffs' citation to one of the eleven recommendations in the post-incident investigation report – to "[e]nsure [that] thermal imaging cameras (TIC) are carried and used at all structural fire operations by all units equipped with this tool" – is unavailing. Evidence of subsequent remedial measures is not admissible as proof of negligence or culpability because it is irrelevant on the issue of the defendant's level of care at the time of the incident. *See e.g. Yates v City of New York*, 37 AD3d 458, 459 (2d Dept 2007); *Niemann v Luca*, 214 AD2d 658 (2d Dept 1995).

ORDERED that the action is severed and continued by the extant plaintiffs Robert Wiedmann, Jr., and Catherine Wiedmann as against the remaining defendants Haldane Rodgers and June Rodgers; the action (as severed) is transferred to the Non-City Part, however the action will appear in the City Trial Readiness Part on August 5, 2024 as presently scheduled; and the caption is amended to read in its entirety as follows:

ROBERT WIEDMANN, JR.,
AND CATHERINE WIEDMANN,
Plaintiffs, Index No.: 1907/2023

-against-

HALDANE RODGERS AND JUNE RODGERS,

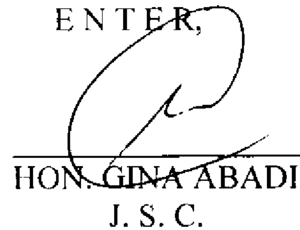
Defendants.

; and it is further

ORDERED that the Corporation Counsel is directed to electronically serve a copy of this Decision, Order, and Judgment with notice of entry on the other parties' respective counsel and to electronically file an affidavit of service with the Kings County Clerk.

The foregoing constitutes the Decision, Order, and Judgment of this Court

E N T E R,



HON. GINA ABADI
J. S. C.