

DiBono v Consentino
2012 NY Slip Op 30520(U)
February 7, 2012
Sup Ct, Richmond County
Docket Number: 102133/10
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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NICHOLAS DIBONO,

DCM Part C-2

Plaintiff,

Present:

-against-

HON. THOMAS P. ALIOTTA

STEVEN CONSENTINO and
STEVEN CONSENTINO, JR. and THE CITY
OF NEW YORK,

DECISION AND ORDER

Index No. 102033/10

Motion Nos. 3663-003
4295-005

Defendants.

-----X

STEVEN CONSENTINO and
STEVEN CONSENTINO, JR.,

Third-Party Plaintiffs,

-against-

EVAN GOLDBERG,

Third-Party Defendant.

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The following papers numbered 1 to 4 were marked fully
submitted on the 14th day of December, 2011.

Papers
Numbered

Notice of Cross Motion by Defendant The City of New York for Summary Judgment, with Supporting Papers and Exhibits (dated September 30, 2011).....	1
Notice of Cross Motion by Plaintiff for Leave to Amend the Complaint, with Supporting Papers and Exhibits (dated November 23, 2011).....	2
Plaintiff's Memorandum of Law (dated November 23, 2011).....	3

Papers
Numbered

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Affirmation in Opposition to Plaintiff's Cross
 Motion and in Further Support of City's
 Cross Motion
 (dated December 7, 2010.....4

Upon the foregoing papers defendant, the City of New York's (the "City") cross motion (No. 3663-003) for summary judgment and dismissal of the complaint against it is granted to the extent that the third cause of action pleaded under General Municipal § 205-e is severed and dismissed. Plaintiff's cross motion (No. 4925-005) seeking leave to amend the complaint to assert a common-law negligence claim against the City is granted to the extent indicated.

This is an action for personal injuries allegedly sustained by plaintiff, a New York City Police Officer, on March 3, 2010. At the time, plaintiff and his patrol partner, third-party defendant Evan Goldberg, had pulled over a vehicle operated by defendant/third-party defendant Steven Consentino, Jr., which was listed as stolen on the Police Department data base. During the stop, P.O. Goldberg purportedly closed the door to the Consentino vehicle (which was owned by defendant/third-party defendant Steven Consentino, Sr.) on plaintiff's left hand, causing him injury.

On September 15, 2010, plaintiff commenced this action against the Consentinos and the City, predicating the third (*i.e.*, General Municipal Law § 205-e) cause of action on, *inter alia*, alleged

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violation of Labor Law § 27-a(3). It is well settled that General Municipal Law § 205-e(1) permits police officers or their survivors to recover for personal injuries or death caused by the negligent failure to comply "with the requirements of any [governmental] statutes, ordinances, rules, [and] orders", as well as the requirements of any federal, state, county, village, town or city governments or any and all of their departments, divisions and bureaus (see Galapo v City of New York, 95 NY2d 568).

On its motion for summary judgment, the City satisfied its prima facie burden of establishing that the subject accident was not the result of a "recognized hazard" within the meaning of Labor Law § 27-a(3)(a)(1) (see Carro v City of New York, 89 AD3d 1049, 933 NYS2d 605 [2d Dept 2011]). Thus, a cause of action against it under General Municipal Law § 205-e cannot be sustained (*cf.* Zanghi v Niagara Frontier Transp. Commn., 85 NY2d 423). Furthermore, it appears, prima facie, that plaintiff's injuries were not a product of the assumed risks of police duty", [which] merely furnished the occasion for his accident but did not heighten the risk of [the particular] injury" sustained (Delio v City of New York, 8 AD3d 325, 326 quoting Braxton v City of Yonkers, 278 AD2d 265, 265). The "Firefighter's Rule" bars *only* those claims for injuries caused by the negligence of a fellow police officer when the injury is

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related to the dangers that are associated with police functions" (*id.* at 325 quoting Cooper v City of New York, 81 NY2d 584, 591).

Under such circumstances, plaintiff is not barred from suing the City in common-law negligence. Hence, plaintiff's motion for leave to amend the complaint to assert a negligence cause of action against the City is granted (*id.* 326).

The law is well settled that "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit" (Sinistaj v Maier, 82 AD3d 868, 869; CPLR 3025[b]; Jablonski v Jakaitis, 85 AD3d 969, 971). At bar, since the amended complaint merely seeks to add a theory of recovery against the City based upon the same facts alleged in the third cause of action asserted in the original complaint, no prejudice or surprise can be claimed.

Accordingly, it is hereby

ORDERED, that defendants' cross motion for summary judgment is granted to the extent of dismissing plaintiff's third cause of action under General Municipal Law § 205-e; and it is further

ORDERED, that plaintiff's cross motion for leave to amend the complaint to assert a common-law negligence claim against the City is granted; and it is further

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ORDERED, that the amended complaint in the form annexed to plaintiff's cross motion is deemed served; and it is further

ORDERED, that defendant's time to serve an amended answer is extended until twenty days after the service upon them of a copy of this Decision and Order with notice of entry; and it is further

ORDERED, that the balance of the cross motions are denied.

E N T E R,

/s/
Hon. Thomas P. Aliotta
J.S.C.

Dated: February 7, 2012
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