No. 161
Nocenzo Cusumano, et al.,
Respondents,
v.
City of New York,
Appellant.

Elizabeth S. Natrella, for appellant.
Michael P. Eisenman, for respondents.

PIGOTT, J.:

On December 22, 1999, plaintiff Nocenzu Cusumano, a firefighter in the New York City Fire Department attending a first responders training session, fell down a flight of stairs that ran from the first floor to the basement of a building owned by defendant City of New York. Plaintiff commenced this action

against the City pursuant to General Municipal Law § 205-a, asserting a statutory cause of action for firefighters who sustain a line of duty injury "as a 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 the . . . city governments" (General Municipal Law § 205-a [1]). To recover under that section, however, a firefighter "must demonstrate injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties" (Williams v City of New York, 2 NY3d 352, 364 [2004] [discussing General Municipal Law § 205-e, the sister provision of section 205-a] [internal quotations and citations omitted]).

Plaintiff contended at the liability trial that he slipped on debris at the top of the stairs and, due to a poorly constructed handrail, he was unable to grasp the handrail to prevent his fall. He relied on three provisions of the Administrative Code of the City of New York as predicates for his section 205-a claim, namely, sections 27-127, 27-128 and 27-375 (f). The first two are general provisions that require "[a]ll buildings and all parts thereof . . . be maintained in a safe condition," that "[a]ll service equipment . . . devices and safeguards that are required in a building . . . be maintained in good working order" and that "[t]he owner shall be responsible at

all times for the safe maintenance of the building and its facilities".[1] Section 27-375 (f), entitled "Interior stairs," mandates, among other things, that interior stair "[h]andrails shall provide a finger clearance of one and one-half inches".

Two experts testified for the plaintiff that the handrail violated section 27-375 (f) and was therefore unsafe. After the parties rested, the City argued at the charge conference that section 27-375 (f) was inapplicable because the stairs constituted "access stairs" pursuant to Administrative Code section 27-232, as opposed to "interior stairs" which must provide egress to the outside. Supreme Court held as a matter of law that the stairs constituted "interior stairs" and prohibited the City from arguing the inapplicability of section 27-375(f) during summation. Plaintiff's counsel, on the other hand, argued to the jury that the City violated section 27-375 (f)'s height and clearance requirements, and Supreme Court issued a jury charge relative to sections 27-127, 27-128 and 27-375 (f).

In response to separate interrogatories, the jury found that the City violated Administrative Code §§ 27-127 and 27-375 (f); the court did not submit an interrogatory relative to section 27-128. Following a separate damages trial, the City moved to set aside the verdict. As to the liability portion of the motion, the City reiterated its argument that section 27-375

[1] Both Administrative Code § 27-127 and § 27-128 were repealed effective July 1, 2008 and replaced by § 28-301.1.

(f) was inapplicable because the stairs at issue constituted "access stairs," not "interior stairs." It further argued that the jury's finding of liability under section 27-127 was unsustainable because the evidentiary basis for the jury's finding was the City's non-compliance with the inapplicable section 27-375 (f). Supreme Court denied the motion, holding that the City should have pleaded as an "affirmative defense" the inapplicability of section 27-375 (f).

The Appellate Division, with one justice dissenting, modified the jury's damages award to the extent of ordering plaintiff to stipulate to a reduction thereof or face a new trial on that issue (63 AD3d 5, 12 [2d Dept 2009]). It unanimously held, however, that section 27-375 (f) did not apply to the underlying facts because the stairs did not constitute "interior stairs" as defined by the Administrative Code, and that Supreme Court improperly shifted the burden to the City of demonstrating the inapplicability of section 27-375 (f)(id. at 8, 14). However, the majority and the dissent parted company as to whether plaintiff presented sufficient evidence independent of the section 27-375 (f) violation to establish that the City violated sections 27-127 and 27-128, with the majority concluding that he had (see id. at 9-10), and the dissent arguing that those sections did not provide a sufficient predicate for liability under General Municipal Law § 205-a (see id. at 17).

The Appellate Division properly concluded that section

27-325(f) is inapplicable. That code provision applies to "interior stairs," which are defined as "stair[s] within a building, that serve[ ] as a required exit" (Administrative Code § 27-232). By all accounts, the stairs from where plaintiff fell did not serve as an "exit" as defined by the Administrative Code (see id.), but rather as a means of walking from the first floor to the basement. Therefore, Supreme Court erred in denying the City's motion to dismiss the section 205-a claim to the extent it was premised on the City's alleged violation of section 27-375 (f).

The effects of this error are not limited to the claim based on that provision, however, because it cannot be assumed that the jury viewed plaintiffs' experts' handrail testimony in a vacuum. Both experts testified that the handrail clearance requirements were governed by section 27-375 (f) and that the City violated those requirements. Further conflating the distinction among the Administrative Code sections was testimony that the City violated sections 27-127 and 27-128 because it violated 27-375(f). Supreme Court's erroneous submission of section 27-375 (f) to the jury, coupled with the expert testimony, renders it impossible to discern the basis of the jury's verdict.

We decline the City's invitation to address the issue of whether sections 27-127 and 27-128 form a sufficient independent predicate to support a General Municipal Law § 205-a

claim. There is no record evidence that the City contested plaintiff's argument that those sections provided an independent predicate, as the record indicates that the City objected to the applicability of those sections only to the extent that they were interwoven with section 27-375 (f).

Accordingly, the order of the Appellate Division should be reversed, with costs, and a new trial ordered. The certified question should not be answered upon the ground that it is unnecessary.

Cusumano v City of New York

No. 161

LIPPMAN, Chief Judge (concurring) :

I agree with the majority that the trial was tainted by testimony regarding New York City Administrative Code § 27-375, and therefore, a new trial is necessary to determine whether plaintiff is entitled to recovery under General Municipal Law § 205-a (Section 205-a). Nonetheless, I disagree with the assertion that defendant-appellant City of New York did not preserve the argument that New York City Administrative Code § 27-127 (Section 27-127) is an insufficient independent predicate for Section 205-a liability. The argument was made at the charge conference of the liability trial and again on the motion to set aside the verdict. Accordingly, I believe we are obliged to reach this question on the merits.

For a claim brought under General Municipal Law § 205-a to survive, a plaintiff must demonstrate a line-of-duty injury, which "occurs directly or indirectly as a 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 the federal, state, county, village, town or city governments" (General Municipal Law § 205-a [emphasis added]). Section 205-a

liability therefore does not stand alone but must be predicated on a violation of a separate legal requirement.

The language "directly or indirectly" in Section 205-a has been accorded broad application by the courts, "in light of the clear legislative intent to offer firefighters greater protections" (Giuffrida v Citibank Corp., 100 NY2d 72, 80 [2003]). Still, we have established some clear limits on the possible predicates for Section 205-a recovery. As we explained in Williams v City of New York (2 NY3d 352, 364 [2004]):

> "[A]s a prerequisite to recovery, a [plaintiff] must demonstrate injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties. At the same time, a series of amendments ... teaches us that we should apply this provision expansively so as to favor recovery ... whenever possible"[emphasis added, internal quotation marks and citations omitted]).[1]

At issue here is whether Section 27-127 of the Administrative Code is part of a sufficiently "well-developed body of law" that imposes clear duties on a building owner, such that non-compliance with this code section may be the basis for Section 205-a recovery. Section 27-127 provides:

> "All buildings and all parts thereof shall be maintained in a safe condition. All service equipment, means of egress, devices, and safeguards that are required in a building by the provisions of this code or other applicable laws or regulations, or that were required by law when the building was erected, altered,

[1] Williams involved General Municipal Law Section 205-e -- the counterpart to Section 205-a that applies to police officers. The two statutes have been interpreted interchangeably.

> or repaired, shall be maintained in good working order."

In concluding that Section 27-127 is a proper statutory predicate for plaintiff's Section 205-a recovery here, the Second Department properly relied on ample Appellate Division case law (see Terranova v New York City Tr. Auth., 49 AD3d 10, 17 [2d Dept 2007] lv denied 11 NY3d 708 [2008]; see also Pirraglia v CCC Realty NY Corp., 35 AD3d 234, 235 [1st Dept 2006]; Lynch v City of New York, 14 AD3d 347, 348-349 [1st Dept 2005]); Kelly v City of New York, 6 AD3d 188 [1st Dept 2004]). Further, although this Court has not had a case granting 205-a recovery through Section 27-127, the writings in some of our foundational 205-a and 205-e cases assume that such recovery is possible (see Giuffrida, 100 NY2d at 80 n 4; see also Williams, 2 NY3d at 368 [rejecting plaintiff's General Municipal Law 205-e recovery predicated on Section 27-127 because plaintiff did not allege concretely that the building was maintained in an unsafe manner, not because 27-127 was an insufficient predicate for recovery]).

Moreover, we have stated before that the series of legislative amendments in response to narrow Appellate Division decisions have led us to "apply this provision [i.e., section 205-a] expansively so as to favor recovery by [police officers and firefighters] whenever possible" (Williams, 2 NY3d at 364). The arguments against basing Section 205-a recovery on a Section 27-127 violation ignore the legislative intent of broad protection of firefighters and also our statement in Giuffrida

that "a plaintiff need only establish a 'practical or reasonable connection' between the statutory or regulatory violation and the claimed injury" (Giuffrida, 100 NY2d at 81, quoting Mullen v Zoebe, Inc., 86 NY2d 135, 140 [1995]).

Still, the Appellate Division dissent insists that Section 27-127 does not impose clear duties or particular mandates that are parts of well-developed bodies of law and regulation, simply because the "safe maintenance" language of 27-127 does not specifically address handrails or finger clearance in stairwells. It is not contested that a violation of Section 27-127 is usually found where a "specific structural or design defect" exists in the building (see Beck v Woodward Affiliates, 226 AD2d 328, 330 [2d Dept 1996]; see also Guzman v Haven Plaza Hous. Dev. Fund, 69 NY2d 559, 566 [1987] [property owner had "both a general responsibility for safe maintenance of the building and its facilities and specific obligations pertaining to minimum handrail clearance..."]).

However, no additional statute is necessary to permit a conclusion in the present case that "two pieces of wood nailed to each other and nailed to the wall" (63 AD3d 5, 10 [2d Dept 2009] [internal quotation marks omitted]), passing for a handrail, constitutes a specific design defect. Instead, a violation of Section 27-127 may be proven to a jury with evidence such as Fire Code specifications, architectural standards, and other "industry-wide standard[s] or accepted practices in the field"

(Burke v Canyon Road Rest., 60 AD3d 558, 559 [1st Dept 2009]; see also Jones v City of New York, 32 AD3d 706, 707-708 [1st Dept 2006] [requiring evidence of a "particular professional or industry standard" to substantiate assertions about the alleged safety practice of anchoring garbage receptacles to sidewalks]).

If this Court were to accept the assertion that plaintiff could not recover in the absence of a statute specifically concerned with the space between a handrail and a wall, the purpose of Section 27-127 would be eviscerated. As the Second Department perceptively notes, if this view of Section 27-127 were to prevail, the code section would be "render[ed] ... inapplicable to all but the most commonplace conditions" (63 AD3d at 10). A trial court would be unable to rule on the existence of a hazardous condition that any casual observer could discern and unanimous expert testimony could confirm, unless an additional statute dictated the precise geometric dimensions of all features of a safe stairwell.

In conclusion, a rejection of Section 27-127 as a predicate for plaintiff firefighter's recovery is at odds with the Legislature's intent in the revision of Section 205-a: to expand the avenues of recovery for injuries in the line of duty. I would therefore confirm that 27-127 may indeed constitute a proper, independent predicate for 205-a recovery.

* * * * * * * * * * * * * * * * *

Order reversed, with costs, and a new trial ordered. Certified question not answered upon the ground that it is unnecessary. Opinion by Judge Pigott. Judges Graffeo, Read, Smith and Jones concur. Chief Judge Lippman concurs in result in an opinion in which Judge Ciparick concurs.

Decided October 14, 2010