

McCormack v City of New York

2002 NY Slip Op 30169(U)

January 9, 2002

Supreme Court, New York County

Docket Number: 25620/89

Judge: Sherry Klein Heitler

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30**

..... X

ELIZABETH M. McCORMACK,
Individually and as Executrix of the
Estate of JOHN F. McCORMACK, Deceased.

Index No. 25620/89

Plaintiff,

DECISION & ORDER

-against-

THE CITY OF NEW YORK,
JOHN P. HUVANE and JAMES P. CURRAN,

Defendants.

..... X

SHERRY KLEIN HEITLER, J.:

In this wrongful death action, the defendants move for summary judgment dismissing plaintiffs case for failure to state a cause of action. The plaintiff opposes this application.

On April 27, 1988 a team of approximately 19 police officers from the Bronx Narcotics Unit, including Officer John P. Huvane, Officer James P. Curran, and Officer John F. McCormack, were assigned to execute a drug related "No Knock" search warrant at 24 Sickles Street, Apt #9D, New York, New York. At approximately 12:30 PM, the officers knocked on the door, yelling "Police, open the door." They did not receive a response. The officers then entered the apartment by use of a battering ram. They hit the door three times while yelling "Police" before the door finally opened. The officers were dressed in plain clothes with their police badges displayed around their necks or police vests over their clothes. Officers Huvane, Curran and McCormack were the first three officers who entered the apartment. They were followed by several other officers.

Immediately upon entering the apartment, the officers saw a pit bull dog in the kitchen and a woman, Maritza Batista, in the living room. Ms. Batista began to flee toward a back bedroom. The officers; Huvane, Curran and McCormack, followed her and as she entered the bedroom Officer

Huvane apprehended her and she was passed to several officers until Officer Collins was able to handcuff her. Officer Huvane continued into the bedroom and discovered Mercedes Perez standing behind a door with a firearm in her hand.

Officer Huvane told Ms. Perez he was a police officer and demanded that she drop the gun. She did not do so. Officer Huvane struggled with Ms. Perez and the gun went off, causing burn marks to Officer Huvane's wrist. He fired two shots back in her direction. Officer Curran entered the room and saw Officer Huvane struggling with Ms. Perez. Officer Huvane then stepped back and fell upon the bed while firing a third shot. Officer Curran placed himself on top of Officer Huvane and fired two shots in an attempt to disarm Ms. Perez.

During this incident Ms. Perez fired another shot and the bullet was found in the floor. She also received a gunshot wound in her arm. Officer McCormack was fatally shot as he was standing outside the room behind the door when a bullet traveled through the door and lodged in his neck.

Subsequent ballistics tests revealed that a shot fired by one of the defendant officers missed its target and accidentally struck Officer McCormack. There is no dispute that Ms. Perez was still armed when the fatal shot was fired. She was subsequently disarmed as she fled the bedroom and was tackled by another officer. This sequence of events lasted no longer than ten to twenty seconds.'

The defendants move for summary judgment and argue that the City of New York is not liable for the plaintiffs death as the police officers were justified in firing their service revolvers. They contend that deadly force was permissible under these circumstances as Ms. Perez refused to drop her gun and fired two shots. The defendants also argue that claims based on common law negligence are barred by the "firefighter's rule." Further, the defendants assert that plaintiffs claims

¹ See testimony of Officer Collins' EBT dated July 26, 1993, Page 32, Line 7.

under General Municipal Law §205(e) predicated on alleged violations of the Patrol Guide cannot form a basis for §205(e) liability pursuant to the recent Court of Appeals case Galapo v. City of New York, 95 N.Y.2d 568 (2000). Finally, the City argues that any §205(e) claims predicated on statutory violations should be dismissed as the police officers were justified in using deadly physical force.

In opposition, the plaintiff argues that the use of deadly force was not justified. The plaintiff claims that Officer McCormack's death was due to the defendant officers violation of the Criminal Procedure Law and the Penal Code. Consequently, the plaintiff asserts that a cause of action under §205(e) of the General Municipal Law is valid.

The court will first consider plaintiffs claim of common law negligence. The "firefighter's rule" holds that firemen injured in the line of duty are barred from recovery against their employer or fellow servants on a theory of common law negligence for injuries related to the dangers associated with performance of their duties. In Santangelo v. State of New York, 71 N.Y.2d 393, 397 (1988), the Court of Appeals stated that "[l]ike firefighters, police are the experts engaged, trained and compensated by the public to deal on its behalf with emergencies and hazards often created by negligence, and like firefighters, they generally cannot recover damages for negligence in the very situations that create the occasion for their services." Therefore, the "firefighter's rule" also applies to police officers. It is known as the *Santangelo* rule.

An exception to the *Santangelo* rule exists where "there is a sufficient degree of separation between the negligent act causing the injury and the event which occasioned the services being performed." Cooper v. City of New York, 601 N.Y.S.2d 432, 433 (1993). However, no such separation will be found where the requisite connection between the plaintiffs injury and the special hazards associated with police and firefighting duties are present. "In other words, where some act

taken in furtherance of a specific police or firefighting function exposed the officer to a heightened risk of sustaining the particular injury, he or she may not recover damages for common law negligence." Ruocco v. New York City Transit Authority, 626 N.Y.S.2d 23, 28 (1995).

Defendant makes the claim that the *Santangelo* rule bars the defendant's claim of injury due to common law negligence. The facts show that Officer McCormack was accidentally shot while participating in the "no-knock" drug related search warrant. According to defendant, such search warrants are precisely the type of police functions that expose an officer to heightened risks of personal injury that was envisioned under the *Santangelo* rule. Consequently, the defendant seeks dismissal of plaintiffs cause of action.

It is unquestionable that Officer McCormack's participation in the drug raid exposed him to a heightened risk. As tragic as this case is, death is an inherent risk police officers assume when carrying out their roles as law enforcers. The court finds that Officer McCormack's death was directly related to the service he was performing and his function as a police officer. Accordingly, plaintiffs cause of action for common law negligence is dismissed.

The court must now consider plaintiffs General Municipal Law §205(e) claim.

Section 205(e)(1) states:

§ 205-e. Right of action to certain injured or representatives of certain deceased police officers

1. In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury, death or a disease which results in death, 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 or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury

or death shall be liable to pay any officer, member, agent or employee of any police department injured, or whose life may be lost while in the discharge or performance at any time or place of any duty imposed by the police commissioner, police chief or other superior officer of the police department, or to pay to the spouse and children, or to pay the parents, or to pay the brothers and sisters, being the surviving heirs-at-law of any deceased person thus having lost his life, a sum of money, in case of injury to person, not less than one thousand dollars, and in the case of death not less than five thousand dollars, such liability to be determined and such sums recovered in an action to be instituted by any person injured or the family or relatives of any person killed as aforesaid, provided, however, that nothing in this section shall be deemed to expand or restrict any right afforded to or limitation imposed upon an employer, an employee or his or her representative by virtue of any provisions of the workers' compensation law.

Section §205(e) claims may only be predicated on the failure to comply with a provision which constitutes a well-developed body of law and regulations. The plaintiff has asserted a cause of action premised on the New York City Police Department Patrol Guide. The Court of Appeals recent decision in Galapo v. City of New York, 95 N.Y.2d 568 (2000), specifically held that the Patrol Guide is an internal manual and “[i]t is not a body of law or regulation establishing clear legal duties that should serve as a basis for civil liability of municipalities.” Accordingly, the court must dismiss plaintiffs claims based on alleged violations of the Patrol Guide.

The plaintiff argues that these officers are alternatively liable on the ground that they violated the Penal Law by using unjustified deadly force and, as such, the plaintiff may maintain an action under §205(e). Specifically, the plaintiff points to the fact that the armed suspect, Miss Perez, is a woman slightly over five feet tall who was in her eighth month of pregnancy. By contrast, plaintiff contends that Officer Huvane, is six feet two inches in height and weighed 210 pounds. The plaintiff asserts that the size difference between the officers and Miss Perez compelled the officers to use physical force to disarm her. The plaintiff further argues that Officer Huvane fired

uncontrollably forcing Officer Curran to hold him down.

The plaintiff presents an affidavit from Melvin Tucher, who was the former Chief of Police in Tallahassee, Florida, to support the argument that it was unreasonable when confronted by a frail, pregnant woman to use deadly force to disarm her. Mr. Tucher concludes that the officers endangered all those present in the apartment by use of deadly force when they were not in imminent jeopardy of death or great bodily harm. He concludes that proper disarming tactics should have been utilized as there existed a height and weight difference between the officers and Ms. Perez. Further, plaintiff argues that after the criminal trial, Ms. Perez was found not guilty of manslaughter of Officer McCormack, attempted murder of Officer Huvane and attempted assault.² As such, the plaintiff claims that the defendants cannot assert that the suspect was attempting to kill or assault them.

The plaintiff alleges that defendants violated the following sections of the Penal Law: 35.15(1)[a], [b], [c]; 35.15(2)[a](i), (ii), [b], [c]; 35.25; 35.30(1)[a](i), (ii), [b], [c], (2); 120.05; 120.10; 120.20; 120.25; 125.10; and 125.15. Plaintiff's claims depend on whether or not the officers were justified in firing their weapons under the circumstances. Penal Law §35.30 permits a police officer to use deadly physical force when he or she believes that it is "necessary to defend the police officer ... or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force."

When deciding whether the officer's use of deadly physical force was necessary, consideration must be given as to whether there was a threat of deadly physical force and a justified

² Ms. Perez was found guilty of illegal possession of a weapon in the second degree, criminal possession of a controlled substance in the seventh degree and criminal use of drug paraphernalia.

response. In the instant matter, the court finds that the following excerpts of testimony establish that there are no genuine material issues of fact as to the issue of the threat of deadly physical force and the justification of the police officers' conduct.

Specifically, Officer Huvane testified to the following:

Q When you saw this revolver in her left hand, where was it pointing?

A She had it by her waist, then she raised it up into my face.

Q Where was it first pointed?

A At me.

Q Then you saw she raised it up?

A Quick motion, she raised it right to my head.

(Examination Before Trial, January 16, 1992, John P. Huvane, Page 53, Lines 8-16)

Q At the time you swatted the gun away from your face in an upward direction, did the gun discharge?

A She fired a shot, yes.

Q You said she fired a shot?

A Yes.

(Examination Before Trial, January 16, 1992, John P. Huvane, Page 55, Lines 3-7)

Q When the gun was discharged, what did you do next?

A I returned the fire.

Q Did you point your gun at her?

A Right at her.

Q How many rounds did you discharge?

A I fired two as I am trained to do.

(Examination Before Trial, January 16, 1992, John P. Huvane, Page 55 Lines 13-19)

Q Is that the revolver, to your knowledge, that was in the hands of Mercedes Perez, when you first saw her?

A Yes.

Q Do you know how that revolver came to be on the living room floor?

A I found out later.

Q What did you find out?

A Also Colavito knocked it out of her hand and tackled her, when she was running out.

(Examination Before Trial, January 16, 1992, John P. Huvane, Page 79 Lines 13-21)

Q By the way, were you given any training on discharging a weapon when you went to the police academy?

A We were taught how to protect ourselves. Somebody is pointing a gun at your face, swat it away, you have to protect yourself, you have to try and disarm. And knocking the gun, knocking it away from my face, it would have been a lot better if the gun was knocked out of her hand, that would have been the end of that.

(Examination Before Trial, January 16, 1992, John P. Huvane, Page 92, Lines 2-11)

Q And why did you fire two shots, Officer?

A Well, I figured two shots would stop her at that time and I was trying to - - like I still didn't disarm her, she still had the gun in her hand.

Q Go ahead.

A As I fired the two shots, now she was coming out - - after the two shots, she didn't stop. Now she is coming out from behind a door.

(Transcript, People v. Perez, Direct, Page 727, Lines 4-11)

Q When you discharged the gun the third time, which way was your gun facing?

A Right at her.

Q Where was she?

A Still coming at me.

(Examination Before Trial, July 12, 1993, John P. Huvane, Page 58, Lines 19-23)

A [Officer Curran] ...was laying on top of me and I saw her coming towards me and just raise her gun at my head. So, I just - - I knew I was going to die and I closed my eyes and just closed my eyes and waited just I guess to die and I didn't hear anything. I heard clicking but I didn't feel any shots or anything.

(Transcript People v. Perez, Direct, Page 731, Lines 2-7)

A Yeah, I was - - I was scared. I was scared - - real scared. As far as I thought, I was - - I thought I was going to die in that apartment. When I turned my head, I thought that was it.

(Transcript People v. Perez, Redirect, Page 783, Lines 3-7)

Q Do you know what position you were on the bed? Do you know what your position was?

A What do you mean?

Q Were you curled up or what?

A Curled up? No.

Q What was your position?

A Half off the bed, my face had hit the dresser and I was like falling down. I remember looking down to the floor and looking at the floor and I remember saying: "I am going o die in this [****]hole."

(Examination Before Trial, July 12, 1993, John P. Huvane, Page 61, Lines 13-22)

Officer James Curran also testified to these events.

Q Then when you turned around and you went toward them, what did you see them doing?

A I saw Officer Huvane falling backwards.

Q What was the woman doing?

A She had a gun in her left hand, she was following Officer Huvane's movements.

(Examination Before Trial, July 19, 1993, James P. Curran, Page 43 Lines 19-24)

Q When you saw him falling down towards the bed, what did you do next?

A I moved over between the woman on the wall and Officer Huvane.

Q What did you do?

A I fired two shots at the woman.

Q What portion of the woman did you aim at?

A Her chest area, mid-section.

Q Did you fire these shots consecutively?

A I fired two quick shots.

(Examination Before Trial, July 19, 1993, James P. Curran, Page 45 Lines 2-11)

Q When you fired at Ms. Perez, were you firing to disable her?

A Yes, I was.

(Examination Before Trial, July 19, 1993, James P. Curran, Page 83 Lines 19-21)

Q When you fired at Ms. Perez' torso, did you fire with the intention of killing her?

A No, my intention was to stop her from shooting again at Huvane.

(Examination Before Trial, July 19, 1993, James P. Curran, Page 84 Lines 7-10)

Officer James Curran also testified as to why he placed himself on top of Officer Huvane, stating:

A I was trying to get myself in between her and Officer Huvane so she couldn't shoot at Officer Huvane.

(Grand Jury Testimony, Page 388, Lines 9-11)

In considering this matter the court notes that there is no dispute as to the essential facts, to wit that Miss Perez was armed, refused to drop her gun and fired two shots.³ Plaintiff requests that this court second guess the actions of these officers in firing their weapons. As sad as this case is, the police officers who fired had a loaded gun pointed in their direction. In these circumstances there is no issue of fact as to whether the police conduct was legally justified.

The fact that Miss Perez was acquitted of manslaughter, attempted murder and attempted assault does not impact on this case. At the criminal trial resulting from this incident, Miss Perez testified that she believed she was being robbed and took out the gun for protection. She claims that she had previously been robbed when three people entered her apartment, informed her they were police officers, pointed guns at her and demanded the "drugs and the money." She alleges she told them they could look for it and fled the apartment. When asked whether she reported the incident, she states:

A No.

Q Why not?

A Because my husband told me not to. He said that he did not want the police in the house.

(Transcript People v. Perez, Direct, Page 799, Lines 17-20)

³ She claims the gun discharged when Officer Huvane swatted her hand.

Further, upon being questioned about her use of a firearm, she stated:

Q Did you fire in the direction of anybody?

A No. It could very well be, I will not deny that it could have gone off but I did not shoot. I don't know how to use it. If I had to use it, it was just to intimidate somebody because I don't know what to do with it. At no time I pointed at him or anyone else.

(Transcript *People v. Perez*, Direct, Page 800, Lines 17-22)

Plaintiff's efforts to exculpate herself from very serious charges do not impact on the court's determination of whether or not the police conduct was justified. However, to the extent that she does admit that she was brandishing a gun, such conduct is consistent with the use of or possible use of deadly force. Plaintiff clearly admits that she took out a gun because she feared a repetition of an alleged former robbery. In fact, plaintiff testified that she used the gun as a means of intimidation. Plaintiff was successful in that endeavor as the officers could reasonably believe that she was prepared to use deadly force.

Plaintiff's expert affidavit supporting the position that the officers were required to use physical force to disarm the plaintiff as she was pregnant and small in stature is not probative as to the legal standard for justification of deadly force. Further, plaintiff's argument relative to Ms. Perez's fear at the time is not probative as to the defendants' justification for use of deadly force.

A determination of reasonableness is founded upon the individual circumstances facing a defendant (see, *People v. Liquori*, 284 N.Y. 309 [1940]). Justification of deadly force is based on an objective standard in light of the totality of the circumstances confronting the officers (see, *People v. Goetz*, 68 N.Y.2d 96 [1986]). Objectively there is no doubt that Miss Perez was armed and discharged her weapon. Further, the provisions of the Penal Law which recognize the right to use

deadly physical force under appropriate circumstances (in self defense) “have never required that an actor’s belief as to the intention of another person to inflict serious injury be correct in order for the use of deadly force to be justified,” Id. at 107, so long as there is a reasonable basis for the belief. Under these circumstances, the court finds that the officers had a reasonable belief that their lives were in jeopardy.

In the matter of Brunelle v. City of New York, 269 A.D.2d 347 (2nd Dept., 2000), the court affirmed summary judgment dismissing the §205(e) claims of a police officer who was shot by a fellow officer when he was struggling with a machine-gun wielding suspect. Although not carrying a machine gun, in this instance, the suspect actually fired the weapon. The discharge of the gun increased the likelihood that the confrontation could result in a death and raised the level of force which could be considered reasonable in response.

When a person takes the oath to become a police officer, he or she is aware that the profession is an inherently dangerous one which may result in the loss of his or her life. With this in mind, an officer has a legal right to defend himself or herself and the lives of civilians and other officers when confronted by an armed suspect who refuses to drop a weapon. The court sympathizes with Officer McCormack’s family; yet to question the justification of these officers’ actions would be to disregard the legal standard which allows the use of deadly force under certain circumstances.

Penal Law §35:30(1)[c] allows a police officer to use deadly physical force to defend himself or another from what the officer reasonably believes to be the use of deadly physical force. The court finds that in the absence of any contested material issue of fact the use of deadly physical force by the officers, under these circumstances, was justified and not a violation of the Penal Law. Consequently, plaintiffs §205(e) claims based on statutory violation must be dismissed.

Accordingly, defendant's motion for summary judgment is granted in its entirety and it is further ordered that the complaint is dismissed and the Clerk is directed to enter judgment accordingly.

This shall constitute the decision and order of the court.

DATED: JANUARY 7, 2002



SHERRY KLEIN HEITLER
J.S.C.