Kelly v City of New York
2014 NY Slip Op 33701(U)
May 26, 2014
Supreme Court, Queens County
Docket Number: 9335/10
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Maryellen Kelly and Sean Kelly,

Plaintiffs,

- against -

City of New York and New York City Police Department,

Defendants.

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Index Number: 9335/10

Motion Date: 5/13/14

Motion Cal. Number: 69

Motion Seq. No.: 3

The following papers numbered 1 to 10 read on this motion by defendant, the City of New York, for summary judgment; and cross-motion by plaintiffs for leave to serve a further supplemental bill of particulars.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion-Affirmation-Exhibits.....	5-8
Reply.....	9-10

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

As a preliminary matter, since the New York City Police Department is merely an agency of the City, it is not a separate entity that may be sued.

Motion by the City for summary judgment dismissing the complaint is granted.

Cross-motion by plaintiff for leave to serve a further supplemental bill of particulars so as to allege a violation of §28-301.1 of the Administrative Code as an additional predicate to her cause of action under §205-e of the General Municipal Law is denied.

Plaintiff Maryellen Kelly, a New York City Police Officer, allegedly sustained injuries as a result of tripping and falling

over a power cord to a shredder she was using at the NYPD Medical Unit in Queens County on October 20, 2009. Plaintiff was assigned to the Medical Unit since she had experience working in a hospital and was a transcriptionist. Part of her job duties was to shred old medical documents. On the date of the accident, she took files of medical minutes to the computer room to make corrections on the computer to errors in data set forth in those minutes, printed out new minutes and gave them to a physician. She then brought the old records, consisting of approximately 20 sheets of paper, to the shredder, which was 40-50 feet from her desk and located in the kitchen area of the computer room. She used the shredder approximately two times per day. Upon shredding the aforementioned documents, she turned off the shredder and began to walk back to her desk when she tripped over the shredder's power cord plugged into the wall outlet and fell.

Plaintiff thereafter commenced the present action asserting a cause of action for common law negligence and a cause of action for violation of §205-e of the General Municipal Law based upon alleged violations of §§27-127 and 27-128 of the New York City Administrative Code and §27-a of the Labor Law.

The City contends that it is entitled to summary judgment dismissing the complaint because plaintiff's common law cause of action is barred by the firefighter's rule and because her §205-e claim does not have a proper statutory foundation.

The City contends that the common-law negligence claim asserted against the City by plaintiff is defeated by the "firefighter's rule" since plaintiff's injuries were caused by a specific risk associated with her job as a police officer. Plaintiff argues that the "firefighter's rule" is inapplicable to bar her common law cause of action against the City because the mundane activity that plaintiff was engaged in when she was injured - the shredding of medical documents - did not present a hazard uniquely faced by police officers.

With respect to the so-called "firefighter's rule", that phrase was coined to refer to the common law rule followed in New York which barred firefighters from maintaining negligence actions for injuries sustained in the line of duty related to the risks they are expected to assume as part of their job (see Santangelo v State of New York, 71 NY2d 393 [1988]). That rule was later also extended to police officers (see id.; Cooper v City of New York (81 NY2d 584 [1993]). The firefighter's rule applied to bar common law negligence actions by a firefighter and police officer against his or her municipal employer and co-workers, as well as against the general public, "when the performance of his or her duties

increased the risk of the injury happening, and did not merely furnish the occasion for the injury" (Zanghi v Niagra Frontier Transp. Commn., 85 NY 3d 423, 436 [1995]).

In 1989, the common law was modified by the enactment of § 205-e of the General Municipal Law (L 1989, ch 346), the legislative intent of which was to ameliorate the effect of the common law rule that disadvantaged firefighters and police officers, as compared to the general public, by barring them from suing for injuries resulting from the inherent risks of their jobs (see Galapo v City of New York, 95 NY 2d 568 [2000]). Under §205-e, firefighters and police officers were allowed to recover for injuries proximately resulting from the negligence of any person who violated any applicable statute or rule.

Finally, the common law was largely abolished in 1996, being legislatively superseded by the enactment of General Obligations Law § 11-106, which gives firefighters and police officers a negligence cause of action for line-of-duty injuries against any person or entity except the firefighters' or police officers' employer or co-employee (see L 1996, ch 703, § 5). General Obligations Law § 11-106(2) also specifically leaves §§205-a and 205-e of the General Municipal law intact. Thus, commencing in 1996, a firefighter or police officer may maintain an action for line-of-duty injuries under ordinary principles of common law negligence against the general public pursuant to General Obligations Law § 11-106, and may only maintain an action for line-of-duty injuries against his or her municipal employer or fellow-employees pursuant to General Municipal Law § 205-e. "Thus, while a police officer can assert a common-law tort claim against the general public, liability against a fellow officer or employer can only be based on the statutory right of action in General Municipal Law §205-e" (Williams v City of New York, 2 NY 3d 352, 363 [2004]).

Since it is undisputed that plaintiff was acting within the scope and course of her employment as a police officer, performing her official duties at the time of the accident, her common law negligence cause of action against the City, her employer, is barred by General Obligations Law §11-106 as a matter of law (see Giuffrida v Citibank Corp., 100 NY2d 72 [2003]; Link v City of New York, 34 AD 3d 757 [2nd Dept 2006]).

With respect to plaintiff's statutory cause of action under General Municipal Law § 205-e, as a prerequisite to recovery under that section for the negligent failure to comply with a statute, ordinance, rule, order or governmental requirement, a police officer must demonstrate an injury resulting from negligent

noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties (see Galapo v City of New York, supra; Desmond v City of New York, 88 NY2d 455 [1996]; Link v City of New York, supra). To support a claim under General Municipal Law § 205-e, a plaintiff must identify the statute or ordinance with which the defendant failed to comply (see Williams v City of New York,2 NY3d 352, 363 [2004]).

As a predicate to her claim under §205-e, plaintiff alleges, in her bill of particulars, violations of §§27-127 and 27-128 of the New York City Administrative Code and §27-a of the Labor Law.

Sections 27-127 and 27-128 of the Administrative Code, which concerned the responsibility of building owners to maintain their buildings and their buildings' facilities in a safe condition, were repealed on July 1, 2008 and, therefore, may not serve as the predicate for a cause of action under §205-e of the Labor Law under the facts of this case.

With respect to §27-a of the Labor Law, the substantive provision thereof is §27-a(3)(a), which provides, "3. Duties. a. Every employer shall: (1) furnish to each of its employees, employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees; and (2) comply with the safety and health standards promulgated under this section." It is the established law in the Second Department that §27-a(3)(a) of the Labor Law may serve as a predicate to a cause of action under §205-e (see Gammons v City of New York, 109 AD 3d 189 [2nd Dept 2013]). Thus, notwithstanding the lengthy argument by counsel for the City as to why §27-a(3)(a) should not qualify as a predicate under §205-e, this Court is constrained by stare decisis to follow the precedent set in this Department until the Court of Appeals holds otherwise (see Mountain View Coach Lines, Inc. v. Storms, 102 AD 2d 663 [2nd Dept 1984]).

Nevertheless, no evidence has been presented so as to raise an issue of fact as to whether the cord of a shredder is a recognized hazard within the contemplation of §27-a(3)(a)(1). No evidence has been presented of any similar accidents, and no rule, regulation or statute has been cited by plaintiff, and this Court is unaware of any, regarding the placement of shredders and their power cords. Likewise, although §27-a(3)(a)(2) also mandates public employers to comply with safety and health standards promulgated under that section, and §27(c)(4) requires that OSHA safety and health standards be adopted, no applicable OSHA safety standard has been cited so as to support a §205-e claim predicated upon Labor Law

§27-a(3).

Since plaintiff is barred from maintaining a common law negligence cause of action against the City pursuant to General Obligations Law § 11-106 and no applicable predicate has been presented to support her remaining cause of action under GML 205-e, the City is entitled to summary judgment and the Court need not reach the City's remaining arguments in support of its motion.

Cross-motion by plaintiff for leave to serve a further supplemental bill of particulars so as to allege a violation of §28-301.1 of the Administrative Code as an additional predicate to her cause of action under §205-e must also be denied.

Title 28 of the New York City Administrative Code (the New York City Construction Codes), Chapter 3, (Maintenance of Buildings), Section 28-301.1 provides, "Owner's responsibilities. All buildings and all parts thereof and all other structures shall be maintained in a safe condition. All service equipment, means of egress, materials, devices, and safeguards that are required in a building by the provisions of this code, the 1968 building code or other applicable laws or rules, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working condition. Whenever persons engaged in building operations have reason to believe in the course of such operations that any building or other structure is dangerous or unsafe, such person shall forthwith report such belief in writing to the department. The owner shall be responsible at all times to maintain the building and its facilities and all other structures regulated by this code in a safe and code-compliant manner and shall comply with inspection and maintenance requirements of this chapter."

This section concerns the maintenance of a building structure and building facilities and has no application to the allegedly careless placement of a shredder and its power cord. A shredder and its cord are not parts of a building, a structure or a building facility and are not regulated by any section of the Administrative Code, Construction Codes or Building Code, and are not subject to any inspection and maintenance requirements of Title 28, Chapter 3. Thus, although §28-301.1 is essentially a re-codification of §§27-127 and 27-128 of the New York City Administrative Code and leave to supplement the bill of particulars to allege this section would, therefore, not alter plaintiff's theory of liability, it would be pointless to allow amendment where this section, on its face, may not serve as a predicate to plaintiff's cause of action under §205-e.

Accordingly, the action is dismissed.

Dated: May 26, 2014

KEVIN J. KERRIGAN, J.S.C.