Green v City of New York
2017 NY Slip Op 30759(U)
March 27, 2017
Supreme Court, Bronx County
Docket Number: 303219/2012
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

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TANEASA GREEN,

Plaintiff(s),

-against-

THE CITY OF NEW YORK and THE NEW YORK CITY POLICE DEPARTMENT,

Defendant(s).

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DECISION/ORDER

Present:
HON. MITCHELL J. DANZIGER

Index No.: 303219/2012

Recitation as Required by CPLR §2219(a): The following papers were read on this Motion for Summary Judgment and Cross Motion to Restore	Papers Numbered
Notice of Motion, Affirmation in Support with Exhibits	1
Notice of Cross Motion, Affirmation with exhibits and Memorandum of Law in Support of Cross Motion and in Opposition to Motion	2
Reply Affirmation in Support of Motion	3

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Defendants move for summary judgment dismissing the complaint herein pursuant to CPLR §3212 and/or for dismissal pursuant to CPLR §3211(a)(7).

Plaintiff, TANEASA GREEN ("plaintiff"), seeks to recover damages for injuries allegedly sustained on October 25, 2011 while she was employed by the New York City Police Department and on duty at the 42nd Precinct located at 830 Washington Avenue in the Bronx. At approximately 10:55 a.m. plaintiff was standing behind a desk in the station house and in front of a file cabinet. On top of the file cabinet, a dry erase board was propped up against the wall. The eraser board is referred to as the RMP board because it hold keys of the various vehicles at the precinct. The RMP board was approximately three feet by four feet in size according to plaintiff's notice of claim. While plaintiff was standing between the desk and the file cabinet, a Sergeant placed his bag on top of a smaller file cabinet, next to the file cabinet upon which the RMP was located. Plaintiff testified that the RMP board fell off the taller file cabinet onto plaintiff's head, immediately after the sergeant placed his bag on the smaller cabinet. Plaintiff's complaint alleges two causes of action: common law

negligence and the additional cause of action provided for by §205-e of the General Municipal Law. Plaintiff alleges that defendants failed to comply with §27-a(3) of the Labor Law and §28-301.1 of the New York City Administrative Code as the predicate statutory violations required by GML 205-e. Defendants contend that plaintiff's common law negligence claim should be dismissed because they had no actual or constructive notice of the alleged defect. Defendants further assert that the second cause of action should be dismissed because plaintiff's injury does not arise to her heightened risk of being a police officer.

Prior to defendants making the instant application, this matter was marked off the calendar on May 4, 2016 based upon plaintiff's failure to appear at a pre-trial conference. Therefore, in addition to opposing defendants' motion, plaintiff cross moves for an order restoring this matter to the calendar. Defendants have not opposed plaintiff's cross motion to restore. Moreover, when a matter is marked off the calendar without formally dismissing it for failure to prosecute, the court has given the dilatory party one year within which to restore the action without any obstacles to hurdle, but the specter of automatic dismissal and its attendant difficulties in restoration, i.e., proof necessary to vacate a default, takes effect after one year (*Basetti v Nour*, 287 AD2d 126, 134 [2d Dept 2001]. Here, since the case was marked off the calendar on May 4, 2016, and plaintiff has requested restoration within one year, there is no obligation to demonstrate a reasonable excuse, meritorious action, lack of intent to abandon, and lack of prejudice to the defendants, or some lesser burden (*Id.* at 135). Based on the foregoing, the plaintiff's cross motion is granted and the clerk is directed to restore this matter to the calendar.

The court now addresses defendants' dispositive motion pursuant to CPLR §3212. The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact

(*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Once movant has met his initial burden on a motion for summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]).

Regarding plaintiff's first cause of action, defendants assert that the same must be dismissed because plaintiff cannot establish that defendants had actual or constructive notice of the alleged defect. On a motion for summary judgment, the movant carries the burden of establishing its prima facie defense. It is not plaintiff's burden in opposing motions for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition (*Giufrida v. Metro North Commuter R. Co.*, 279 A.D. 2d 403 [1st Dep't. 2001]). However, even if a defendant establishes that it had no notice of the alleged defect, he must also establish that he did not cause or create the alleged defective condition in order to prevail on a motion for summary judgment (*Lovell v. Thompson*, 143 A.D.3d 511 [1st Dep't., 2016]).

The complaint alleges that the RMP board "was not fastened to the wall, but was propped against the wall, sitting on ledge [sic] approximately six feet above the ground for a period of time prior to the accident." Therefore, the defect alleged is that the RMP board was not properly fastened to the wall. The City has established that it had no actual notice of the alleged defect condition by showing that the there were no incidents of the RMP board falling off the file cabinet prior to the incident. The plaintiff does not contend that defendants had actual notice of the alleged defect and therefore, the court finds no actual notice in this case.

As for constructive notice in many cases, "a defect must be visible and apparent and it must exist for sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Doherty v. A&P*, 265 A.D. 2d 447, 448 (2d Dep't. 1999). However, a review of case law shows that this standard is applied when the defect arises from the presence of something that is not normally present, such as a slippery substance on a floor, litter, wet leaves, etc. However, in this case the alleged defect is a failure to fasten the RMP board to the wall. Consequently, notice is not dispositive but creation may be. This matter is analogous to *Lovell v. Thompson* (143 A.D.3d 511 [1st Dep't., 2016]). In *Lovell*, the plaintiff was injured when she was descending steps in the

defendants' home. Plaintiff testified that her fall was caused because one step was not as full as the previous steps (see *Lovell v. Thompson*, 2016 WL1558683 [N.Y.Sup. 2016]). Therefore, the alleged defect in *Lovell* was an alleged improper installation of a step just like the alleged defect here is an alleged improper installation of the RMP board. In *Lovell*, the defendants established that the stairs were built in accordance with applicable building standards at the time of construction, prior to their purchase of the home and that they did not renovate the stairs after construction.

Here, defendants do not contend that they did not place the RMP board on the cabinet without fastening the same to the wall. Therefore, they have made no showing that they did not affirmatively create the defect that plaintiff claims caused her injury. Furthermore, defendants offer no proof that it was appropriate, satisfactory, or compliant with standard procedures or practice, to have a virtually free standing RMP board on top of a file cabinet, in front of a duty desk where an officer is posted. Consequently, whether the City had constructive notice of the alleged defective condition or not, the court finds that defendants have failed to submit any proof to establish they did not cause or create the defective condition complained on by plaintiff. Further, defendants could have submitted evidence in the form of an affidavit from an engineer establishing that based upon the weight and size of the RMP board, it was unnecessary to fastened the same to the wall. However, no evidence has been submitted to show, as a matter of law, that defendants' apparent choice of setting the RMP board up in the manner that it was, did not expose officers working at the nearby desk, to some heightened risk of danger. Therefore, the court can only speculate as to whether defendants' failure to fasten the RMP board to the wall was negligent and summary judgment dismissing the first cause of action is denied.

As for plaintiff's second cause of action, GML §205-e provides:

> In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury...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.

In *Balsamo v. City of New York* (287 A.D.2d 22 [2d Dep't. 2001]), the Appellate Division, Second Department stated that a GML §205-e claim may be based upon an allege violation of Labor Law §27-a, because that law contains a specific mandate that public employers provide a safe workplace for its employees. There, plaintiff was injured when his knee came into contact with a sharp protruding edge of an unpadded computer console that was mounted in the police vehicle in which he was working. The court found that the City was potentially liable for failing to "provide shock absorbing padding surrounding the computer unit." Since, "[l]abor Law § 27-a imposes a clear legal duty on public employers to provide a safe workplace for their employees free from recognized hazards, and is applicable to the uniformed services and the safety or protective equipment provided to them (*Balsamo v City of New York*, 287 AD2d 22 [2d Dept 2001]).

The defendants argument that the unfastened RMP board is not a recognized hazard is in contrast with *Balsamo.* The court cannot confidently hold that an unpadded computer console is a recognized hazard, while an unfastened RMP board, placed above a desk where officers are stationed, is not. Moreover, plaintiff has raised an issue of fact as to whether NYC Admin. Code §28-301.1 can form the basis of a §205-e claim. Indeed, §28-301.1 pertains to the structural maintenance of a building or structure. While that section refers to structures, §27-232 defines "structure" to include "display signs." Whether the RMP board constitutes a sign, again, remains an issue of fact that warrants denial of the motion.

Based on the foregoing, the motion is denied and the cross motion to restore is granted.

Plaintiff shall serve a copy of this order with notice of its entry upon defendants within thirty (30) days of entry. The clerk is hereby directed to restore this matter to the calendar.

This constitutes the decision and order of the court.

Dated: 3/27/17
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.