Monge v City of New York
2018 NY Slip Op 30282(U)
February 15, 2018
Supreme Court, New York County
Docket Number: 155902/2013
Judge: William Franc Perry
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 5

--x

FRANK MONGE,

Plaintiff,

-against-

CITY OF NEW YORK, CITY OF NEW YORK DEPARTMENT OF PARKS & RECREATION,

Defendants.

--x

Index No. 155902/2013

Mot. Seq. No. 001

DECISION & ORDER

W. FRANC PERRY, J.S.C.:

In this action for negligence, defendants the City of New York (the City) and the City of New York Department of Parks & Recreation (the Department of Parks) (collectively, Defendants) move for: (1) summary judgment, pursuant to CPLR 3212, dismissing the verified complaint (Complaint); and (2) for an order, pursuant to CPLR 3211 (a) (7), dismissing the Complaint for failure to state a cause of action.

Background

Plaintiff Frank Monge (Plaintiff) is a police officer employed by the New York City Police Department (NYPD), which is a department of the City. In the Complaint and Plaintiff's verified bill of particulars (Bill of Particulars), Plaintiff alleges that, on October 5, 2012, at approximately 8:10 p.m., he "was caused to fall" on a sidewalk due to a dangerous condition (the Accident) (Complaint ¶¶ 19-20; *see also* Bill of Particulars ¶¶ 1-2). Plaintiff states that the Accident occurred on the sidewalk in front of Riverside Park in Manhattan, located at West 138th Street and 12th Avenue, and, more specifically, "at the front entrance of the area designated as 'Riverside Valley Community Garden'" (the Premises) (Complaint ¶¶ 19-20; *see also* Bill of Particulars ¶¶ 1-2). As a result of the Accident, Plaintiff suffered, *inter alia*, injuries to his left knee that required a surgery,

which took place on January 11, 2013 (*see* Bill of Particulars ¶ 3). Plaintiff claims that said injuries "lead to a permanent partial disability" (*id.* ¶ 4), and caused him to be "incapacitated from work" (*id.* ¶ 8), and to incur past and future out-of-pocket expenses (*id.* ¶ 6). Plaintiff is not claiming a loss of earnings (*see e.g.* Plaintiff's dep tr at 11, lines 3-7).

Prior to commencement of this action, Plaintiff served a Notice of Claim upon the City and, pursuant to General Municipal Law ("GML") § 50-h, appeared for an examination (the 50-h Hearing), where he testified that: (1) Plaintiff was on duty at the time of the Accident, working a shift from 1500 (3:00 p.m.) to 2335 (11:35 p.m.) (50-h Hearing tr at 7-8, 10); (2) just prior to the Accident, at 142nd Street, between Broadway and Riverside Drive, Plaintiff observed a suspicious individual in possession of a firearm who, when Plaintiff approached him, started running away from Plaintiff toward Riverside Drive (*id.* at 10-14); (3) Plaintiff ran after the suspect, who threw "the gun into the park" (*id.* at 14); (4) as the chase continued along Riverside Drive, Plaintiff's left foot stepped into a pothole (the Pothole), his left knee twisted, and he "felt a pop", but he continued to run after the suspect until, eventually, on 12th Avenue, Plaintiff, along with other police officers, "tackled [the suspect and] brought him down to the floor" (*id.* at 14-15, 21-22); (5) after Plaintiff arrested the suspect, Plaintiff "just fell to the ground" and "couldn't get up" (*id.* at 26); (6) the Pothole was located on the sidewalk at 138th Street and 12th Avenue, "around the gate area" (*id.* at 16, 22); and (7) a few days after the accident, Plaintiff went back to the Premises and took photographs of the Pothole (*id.* at 22-25).

Plaintiff's description of the Accident at his deposition on March 31, 2014, was similar to the description he proffered at his 50-h Hearing on March 28, 2013 (*compare* Plaintiff's dep tr at 13-27, *with* 50-h Hearing tr at 7-8, 10-16, 21-22). Plaintiff testified: "I was giving chase. When I made that turn, my left foot got stuck into that hole. That's when I felt my knee twist. I felt a pop"

(Plaintiff's dep tr at 24). Plaintiff continued running (*see id.* at 25, lines 11-14). After Plaintiff caught and handcuffed the suspect, he was escorted straight to the hospital (*see id.* at 27-29). Plaintiff again described the location and the size of the Pothole into which he stepped while pursuing the suspect (*see id.* at 23-25).

On these facts, Plaintiff's Complaint asserts three causes of action for: (1) common-law negligence against the City; (2) common-law negligence against the Department of Parks; and (3) statutory negligence, pursuant to GML § 205-e, against the City and the Department of Parks (*see* Complaint ¶¶ 34-54).

Discussion

Defendants now move for summary judgment dismissing the first and second causes of action in the Complaint pursuant to CPLR 3212 and for an order dismissing Plaintiff's third cause of action, pursuant to CPLR 3211(a)(7), for failure to state a cause of action.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citation omitted]). Upon proffer of evidence establishing a prima facie showing of entitlement by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of cause of action, not whether the proponent of the pleading has a cause of action. (*Sokol v Leader*, 74 AD3d 1180, 1180-81 [2010] [citation omitted]). In considering such a motion, the court must "accept the facts as alleged in the complaint as true, accord [the] plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 1181, quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). A "plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face" (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]).

Plaintiff's First and Second Causes of Action for Common-Law Negligence

Defendants contend that Plaintiff's first and second causes of action for common-law negligence are barred by the "firefighter rule: '[P]olice and firefighters may not recover in common-law negligence for line-of-duty injuries resulting from risks associated with the particular dangers inherent in that type of employment'" (*Wadler v City of New York*, 14 NY3d 192, 194 [2010], quoting *Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423, 436 [1995]). "[T]he rule bars an officer's or firefighter's recovery 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" (*id.* [internal quotation marks and citation omitted])."

> "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. By contrast, a common-law negligence claim may proceed where an officer is injured in the line of duty merely because he or she happened to be present in a given location, but was not engaged in any specific duty that increased the risk of receiving that injury"

(*id.* at 195 [internal quotation marks, brackets, and citation omitted]). "[T]he rule has been applicable only in actions against a 'police officer's or firefighter's employer or co-employee'" (*id.* at 194, quoting General Obligations Law § 11-106 [1]; *see also Cosgriff v City of New York*, 241 AD2d 382, 382 [1st Dept 1997], *affd sub nom. Gonzalez v Iocovello*, 93 NY3d 539 [1999] [affirming the dismissal of common-law negligence claim against the City of New York, where a plaintiff, "who was a police officer at the time, was in pursuit of individuals involved in the sale of narcotics when he tripped and fell on a sidewalk"]).

Here, Defendants have made a prima facie showing of entitlement to judgment as a matter of law. At the time of the Accident, Plaintiff was an on-duty police officer, employed by one of the City's departments, in pursuit of a suspect (*see e.g. Cosgriff*, 241 AD2d at 382 [applying the firefighter rule where the plaintiff officer tripped over a metal plate on a sidewalk while in pursuit of individuals involved in the sale of narcotics]).

In opposition, Plaintiff contends that: (1) the dispositive factor is the nature of the risk presented by the Pothole and not whether Plaintiff was on duty at the time of the Accident; (2) the Pothole presented the same hazard to any pedestrian, whether a jogger or a police officer, who happened to be at the Premises; and (3) the firefighter rule should not bar Plaintiff's common-law negligence claims "[b]ecause the risk of injury associated with this pothole is not made greater by any police duty" (Perez affirmation in opposition ¶¶ 8-9).

The Court disagrees. At the time of the Accident, Plaintiff was on duty and engaged in the pursuit of a suspect, which is a "specific duty that increased the risk of receiving th[e] injury" (*Wadler*, 14 NY3d at 195; *Cosgriff*, 241 AD2d at 384).

Plaintiff's cited authority, *Tighe v City of Yonkers* (284 AD2d 325, 326 [2d Dept 2001]), is distinguishable from the facts in this action. In *Tighe*, a police officer, "allegedly sustained

personal injuries when he tripped over a raised steel plate in the street *while walking to his patrol car* after having moved a wooden barricade" (*id.* at 326 [emphasis added]). There, unlike Plaintiff here, the police officer, at the time of that accident, "was not engaged in any specific duty that increased the risk of receiving that injury" (*Wadler*, 14 NY3d at 195). Accordingly, Plaintiff's common-law negligence claims against the City and the Department of Parks, which is one of the City's departments, are dismissed (*see Williams v City of New York*, 2 NY3d 352, 363 [2004] ["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"]; *see also Cosgriff*, 241 AD2d at 384 [affirming dismissal of plaintiff officer's common-law negligence claims as against the City of New York]).

Third Cause of Action Under General Municipal Law § 205-e

Defendants contend that Plaintiff's claims under GML § 205-e should be dismissed for failure to plead a statutory predicate.

GML § 205-e, in relevant part, provides:

> "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 . . . 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 . . . shall be liable to pay any officer . . . of any police department injured . . . 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"

(GML § 205-e [1]). The Legislature enacted section 205-e of the GML in order "to provide police officers with an avenue of recourse where injury is the result of negligent non-compliance with

well-developed bodies of law and regulation which impose clear duties" (*Desmond v City of New York*, 88 NY2d 455, 464 [1996] [internal quotation marks, emphasis, and citation omitted]).

> "In order to assert a claim under General Municipal Law § 205-e, a plaintiff must [1] identify the statute or ordinance with which the defendant failed to comply, [2] describe the manner in which the [police officer] was injured, and [3] set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm"

(*Gammons v City of New York*, 24 NY3d 562, 570 [2014] [internal quotation marks and citation omitted]). "[F]ailure to specify or identify the statute, ordinance, rule, order or requirement which the property owner has allegedly violated renders the complaint insufficient" (*Maisch v City of New York*, 181 AD2d 467, 469 [1st Dept 1992]; *see also MacKay v Misrok*, 215 AD2d 734, 735 [2d Dept 1995] ["(t)he plaintiffs' failure to identify the specific statute or ordinance which the defendant . . . violated, renders the plaintiffs' cause of action under General Municipal Law § 205-e legally insufficient"]).

Defendants contend that Plaintiff has failed to plead any statutory predicate in support of his GML § 205-e claims. Neither the Complaint nor the Bill of Particulars specify a statutory predicate.

After Defendants moved on March 15, 2017, Plaintiff, on April 6, 2017, served an amended verified bill of particulars (Am. Bill of Particulars), in which he states that Defendants violated New York City Administrative Code (Administrative Code) §§ 7-210, 7-210(a), 7-210(b), and 19-152 (*see* Perez affirmation in opposition, exhibit A [Am. Bill of Particulars], ¶ 30). On May 18, 2017, Plaintiff filed the note of issue. On June 2, 2017, Plaintiff served and filed an opposition to Defendants' motion (NYSCEF Doc. No. 34, aff. of service). On July 5, 2017, Defendants filed the reply.

In opposition, Plaintiff submits the Am. Bill of Particulars and contends that now a statutory predicate has been pled (*see* Perez affirmation in opposition, ¶¶ 2-7). Plaintiff further contends that, "as discovery was still incomplete at that time, and because no note of issue had yet been filed, plaintiff was permitted by explicit statute and applicable law to amend/supplement his pleadings" (*see* Perez affirmation in opposition, ¶ 2). Plaintiff also points out that Defendants have not: formally rejected the Am. Bill of Particulars; sought any additional discovery; or objected or moved to strike the note of issue (see *id.*, ¶ 3).

In reply, Defendants point out that Plaintiff amended the Bill of Particulars only after Defendants, in their moving papers, pointed out that he had not provided a statutory predicate for his GML § 205-e claims. Defendants argue that the Am. Bill of Particulars should be rejected.

"In any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing of a note of issue" (CPLR 3042 [b]). "In a personal injury action, a supplemental bill of particulars may be served by a party 'with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial'" (*Torre v Cifarelli*, 157 AD2d 713, 714 [2d Dept 1990], quoting CPLR 3043 (b)]).

Defendants do not contend that they objected to Plaintiff's original Bill of Particulars. CPLR 3042, in relevant part, provides that "[i]if a party . . . fails to comply fully with a demand [for a bill of particulars], the party seeking the bill of particulars may move to compel compliance" (*see* CPLR 3042 [c]). Defendants apparently never requested, or moved to compel, Plaintiff to provide any statutory predicate for his GML § 205-e claims (*see cf. Florio v City of New York*, 226 AD2d 148, 149 [1st Dept 1996] ["plaintiffs failed to cure their pleading defect for five and one-

half years *despite repeated requests by the defendants and orders from the court* that they particularize the statute(s) or regulation(s) that were purportedly breached"] [emphasis added]).

Defendants also do not contend that they are not the owners of the Premises. Nor do they contend that they have been prejudiced as a result of Plaintiff's amending the Bill of Particulars, or that the notice of claim was deficient. It appears that the parties had extensive discovery with respect to the condition that caused Plaintiff's injury (*see* Am. Bill of Particulars ¶ 26 [stating that the Department of Parks' inspector - who inspected the defect and, on April 29, 2011, wrote a report - was deposed on August 26, 2016]). Accordingly, the Court rejects Defendants' arguments that Plaintiff's amendment of the Bill of Particulars was improper (*see* CPLR 3042 [b]; *see also Maisch*, 181 AD2d at 469 ["summary judgment dismissing the complaint should not be granted until plaintiffs have an opportunity to cure what may at present constitute merely a pleading defect"]; *Foley v City of New York*, 43 AD3d 702, 704 [1st Dept 2007] ["the section 205-e claim should be reinstated because (the plaintiffs') belated identification of several sections of the Administrative Code entails no new factual allegations, raises no new theories of liability, and has caused no prejudice to defendant"] [internal quotation marks and citation omitted]).

The question then is whether the Am. Bill of Particulars sufficiently amplifies Plaintiff's pleadings to state a cause of action under GML § 205-e.

> "In order to recover under General Municipal Law § 205-e the 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*. If a statute that provides for a general duty satisfies this requirement it may serve as a basis for a General Municipal Law § 205-e cause of action"

(*Gammons*, 24 NY3d at 571 [internal quotation marks, citations, and brackets omitted] [emphasis added]).

Plaintiff alleges that the Defendants violated, *inter alia*, Administrative Code § 19-152 which imposes an obligation on an owner of real property to "install, construct, repave, reconstruct and repair the sidewalk flags in front of or abutting such property... whenever the commissioner of the department shall so order or direct" (see id. at § 19-152[a]). "Administrative Code § 19-152... do[es] not impose an affirmative duty on the City to keep its sidewalks in safe repair" (*Gonzales v Iocovello*, 93 NY2d 539, 552 [1999]).

However, Plaintiff also alleges that Defendants violated Administrative Code § 7-210 (*see* Perez affirmation in opposition, exhibit A, ¶ 30), which provides, in relevant part, that: "[i]t shall be the duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition" (*id.* at § 7-210 [a]), and that the owner of real property abutting any sidewalk

> "shall be liable for . . . personal injury . . . proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags"

(*id.* at § 7-210 [b]).

Administrative Code § 7-210 clearly articulates that a property owner, which, in this case, appears to be the City, would be liable to an injured person for failure to maintain a sidewalk in a reasonably safe condition (*see Rodriguez v City of New York*, 12 AD3d 282, 282 [1st Dept 2004] [affirming the trial court's denial of defendant's motion to dismiss plaintiff's claim under Administrative Code § 7-210]). Accordingly, Administrative Code § 7-210 may serve as a statutory predicate for Plaintiff's claims under GML § 205-e (*see e.g. Foley*, 43 AD3d at 703-704 [holding that plaintiff police officer may assert a GML § 205-e cause of action against the City, asserting Administrative Code §§ 27-736 and 27-381 as statutory predicates, "which require the City to maintain illumination in a building's exits and stairways," where the plaintiff "was injured

when she tripped and fell on a stairway outside the rear exit of [a police precinct] while responding to a domestic violence incident"]; *see also Kelly v City of New York*, 134 AD3d 676, 678 [2d Dept 2015] ["a violation of Administrative Code of the City of New York § 28-301.1 may serve as a predicate for liability under General Municipal Law § 205-e]).

In the Am. Bill of Particulars, Plaintiff also stated that Defendants had prior notice of the defect (*see* Perez affirmation in opposition, exhibit A, ¶ 26 [stating that the Department of Parks' inspector inspected "said dangerous condition" and, on April 29, 2011, wrote a report]; *see Gonzalez*, 93 NY2d at 552 [noting the potential for liability on the City's part for injuries sustained as the result of a defective sidewalk where the City has prior notice of the defect]).

Accordingly, Plaintiff's claims based on Administrative Code § 19-152 are severed and dismissed, and Plaintiff's cause of action for negligence under GML § 205-e, otherwise, survives.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that the branch of Defendants' motion for summary judgment is granted and the first and second causes of action in the Complaint for common-law negligence are dismissed; and it is further

ORDERED that the branch of Defendants' motion to dismiss is:

(1) granted to the extent of dismissing those portions of the third cause of action that are premised on Defendants' violation of the Administrative Code of the City New York § 19-152;

(2) denied as to those portions of the third cause of action that are premised on Defendants' violation of the Administrative Code of the City of New York § 7-210; and

the motion is otherwise denied.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

Dated: February 15, 2018
New York, New York

SO ORDERED:

HON. W. FRANC PERRY, J.S.C.