Basil v City of New York
2019 NY Slip Op 30315(U)
February 5, 2019
Supreme Court, New York County
Docket Number: 154021/2016
Judge: Alexander M. Tisch

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

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ALEXANDRA BASIL,

Plaintiff,

- against-

THE CITY OF NEW YORK,

Defendant.

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DECISION & ORDER

Index No.: 154021/2016

ALEXANDER M. TISCH, J.:

Defendant City of New York (City) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff Alexandra Basil's complaint. Plaintiff alleges that she sustained personal injuries as a result of a trip-and-fall accident while attempting to exit a vehicle owned by defendant. As set forth below, defendant's motion is denied as it failed to meet its burden to establish that it lacked constructive notice of the defective condition.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff alleges that, while on-duty as a police officer employed by the New York Police Department (NYPD), she sustained injuries to her left knee as a result of becoming entangled in wires as she was exiting the passenger seat of NYPD radio motor patrol vehicle (RMP) number 3819. The accident occurred on January 26, 2016 at 12:15 a.m., in front of the 17th police precinct, located in the County, City and State of New York.

On March 9, 2016, plaintiff served a notice of claim on the City. In the notice of claim, plaintiff indicated that she was proceeding with a claim pursuant to Section 205-e of the General Municipal Law (GML), for violation of Section 27-a (3) of the Labor Law and Section 365 of the Vehicle and Traffic

Law (VTL). In relevant part, plaintiff alleged that defendant was negligent with respect to maintaining the RMP and that defendant failed to provide her with a safe place to work.

Shortly after serving the notice of claim, plaintiff commenced the instant action. In the first cause of action grounded in negligence, plaintiff alleges that defendant was the owner of the RMP and that her "fall was caused solely and wholly by reason of the negligence, carelessness and recklessness of the defendant, with no fault or culpable conduct on the part of the plaintiff contributing thereto." Complaint, ¶ 10. In the remaining cause of action, plaintiff asserts a claim pursuant to GML § 205-e, alleging that defendant was "negligent in failing to comply with statutes . . . ., including but not limited to Sections 375 and 382-c of the[VTL], Section 27-a (3) of the Labor Law and 15 NYCRR 55.1 and 55.2." *Id.*, ¶ 19. In pertinent part, plaintiff alleges that defendant "operated, repaired and maintained" the RMP in a negligent condition and that defendant failed to provide her with a safe place to work. *Id.*, ¶ 21. In addition, plaintiff asserts that "the risk of injury caused by defendant's conduct in this case was a hazard recognized by the defendant within the meaning of Section 27-a (3) of the Labor Law." *Id.*, ¶ 22.

Plaintiff testified that, on the date of the accident, Officer Jose Arenas (Arenas) drove vehicle 3819 to pick her up from her job posting and drive her to the precinct. When Arenas pulled up to the job post, the officer assigned to relieve plaintiff at her job post exited the passenger seat and plaintiff got in the car. Plaintiff testified that she did not see any wires hanging down when she was sitting in the car. Plaintiff exited the car by placing her right foot on the ground. When she went to take her left foot out, "the wire kind of wrapped around my ankle and pulled my feet out from under me." Plaintiff's EBT tr at 15. Plaintiff continued that she landed on her knees and felt pain in her left knee. She further noted that she has seen similar wires in police vehicles prior to the accident, however, "[i]f the vehicle is maintained properly, it could be sort of running along the floor or sometimes it's taped along the side of where your feet are." *Id.* Plaintiff had previously been a passenger in vehicle 3819 but never recalled seeing the wire hanging and never heard from anyone else about hanging wires. As a result of a torn

meniscus and cartilage damage, plaintiff was temporarily out of work and required surgery. By the time plaintiff returned to work, plaintiff noticed that the wire in vehicle 3819 had been repaired as it was "affixed to the floor." *Id.* at 33.

Arenas testified that, at the end of his shift, he was picked up by another police officer who was driving vehicle 3819. Arenas then drove to pick up plaintiff at her job post. Arenas testified that he did not "check [vehicle 3819] out at the precinct" before he started work because "[t]hat vehicle wasn't assigned specifically" to him. Arenas tr at 13. He stated that he did not notice any hanging wires in the passenger console. Arenas testified that, after plaintiff fell, he looked into the RMP and "observed a cable in the front passenger side door, on the floor." *Id.* at 21. He continued that the cable was not by the dashboard, but on the bottom of the car door frame. He explained, "you know, you're stepping in and out of the vehicle, it's that bottom area." *Id.* at 22.

Sergeant Joseph Leonard (Leonard) was on duty the night of plaintiff's accident. Leonard testified that plaintiff had explained to him that she "tripped on a wire in one of the RMPs, fell, and hurt her knee on the sidewalk." Leonard tr at 9. Prior to plaintiff's accident, Leonard could not recall any other complaints about the wire in vehicle 3819. Leonard testified that he went to vehicle 3819 and saw the black wire below the glove compartment. He filled out a line of duty accident report related to the incident on plaintiff's behalf.

Defendant moves for summary judgment dismissing plaintiff's claims on the basis that it did not create or have actual or constructive notice of the allegedly hazardous condition. In support of its motion, it provides an affidavit from Richard Catalano (Catalano), Operations Supervisor of the NYPD Fleet Service Division. Catalano submitted the maintenance and repair records for vehicle 3819 for the 18 months prior to plaintiff's accident. Catalano stated that "there were no repair records, defects, or any other maintenance issues relating to the wires located under the passenger side console on the date of the alleged incident – January 26, 2016, or eighteen months prior to that date contained in these records." Catalano aff, ¶ 5.

Regarding common-law negligence, defendant argues that there was no actual notice of the subject condition, given that no one noticed the condition prior to plaintiff's accident and that there were no reports of repairs of any loose wires on the passenger side of vehicle 3819. Further, according to defendant, as no one had observed the hanging wire and there were no complaints of the hanging wire prior to plaintiff's accident, defendant did not have constructive notice of the subject condition. Defendant summarizes, "[g]iven the lack of any notice to the City – neither actual nor constructive notice, there is no liability that can attach to the City and it is therefore entitled to summary judgment." Davidoff affirmation in support, ¶ 31.

In addition, defendant argues that it did not cause or create the condition that allegedly caused plaintiff's injuries. According to defendant, there is no testimony or physical evidence to establish that the defective condition was caused by any affirmative act on defendant's behalf.

With respect to the other cause of action, defendant maintains that, although plaintiff listed several statutes in her complaint, Labor Law § 27 (a) is the only possible statutory predicate under GML § 205-e applicable in this situation.[1] Nonetheless, according to defendant, plaintiff does not have a viable claim because she cannot establish that defendant had actual or constructive notice of a defect with the wires in vehicle 3819.

In opposition, plaintiff argues that defendant cannot meet its initial burden on the issue of lack of constructive notice because it has not established when vehicle 3819 was last inspected by its employees prior to plaintiff's accident. According to plaintiff, general maintenance records do not indicate when the passenger console was last inspected to check for loose wiring.

In the alternative, plaintiff argues that a jury could infer that defendant caused the defective condition. According to plaintiff, vehicle 3819 was only used by NYPD employees and these types of wires were common in other RMPs. Specifically, "access to the subject vehicle was limited to NYPD

[1] For purposes of this motion, defendant does not dispute that plaintiff sustained a serious injury pursuant to Section 5102 of the Insurance Law of the State of New York. *See* complaint, ¶ 12.

employees who apparently loosened the wire, thereby creating the hazard complained of." Plaintiff's memo of law at 12.

Plaintiff further argues that she has a viable GML § 205-e claim predicated on defendant's violation of Labor Law § 27-a (3). According to plaintiff, Labor Law § 27-a (3) requires her employer to provide her with a safe place to work, free from recognized hazards. Plaintiff continues that, pursuant to this statute, defendant had an obligation to provide her with adequate protection against tripping and falling on a loose wire. Regarding causation, plaintiff maintains that she does not need to demonstrate that her injuries were proximately caused by the statutory violation but only show a reasonable connection between the violation and her injury. In addition, plaintiff argues that claims made under GML § 205-e have a lower burden of proof than a common law negligence claim on the issue of prior notice. [2]

DISCUSSION

I. Summary Judgment Standard

"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). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case 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*

[2] Plaintiff's complaint alleges violations of Vehicle and Traffic Law (VTL) §§ 375 and 382-c and 15 New York Code of Rules and Regulations (NYCRR) §§ 55.1 and 55.2. However, in opposition to defendant's motion, plaintiff does not address her reliance on these statutes. As a result, these claims are deemed abandoned and will not be addressed the Court.

Grasso, 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

II. Negligence

In a "slip-and-fall" case, the plaintiff must prove that the defendant either created the condition which caused the accident, or that it had actual or constructive notice of the condition and failed to remedy it. *Kesselman v Lever House Rest.*, 29 AD3d 302, 304 (1st Dept 2006). "To establish that a defendant caused or created a hazardous or defective condition, the plaintiff must point to some affirmative act or negligence on the defendant's part." *Lococo v Mater Cristi Catholic High School*, 142 AD3d 590, 591 (2d Dept 2016).

In support of its motion, defendant argues that there was no evidence or testimony suggesting that an NYPD officer took an affirmative act to cause or create the defective condition. In opposition, plaintiff argues that a jury could infer from the record that, as access to vehicle 3819 was limited to NYPD employees, they "apparently loosened the wire, thereby creating the hazard complained of." Plaintiff's memo of law at 12. However, plaintiff's allegations that defendant created the defective condition are speculative and fail to raise a triable issue of fact. Plaintiff offers no evidence that defendant's employees, through an affirmative act, loosened the wire and created the hazard. *See e.g. Kelly v Berberich*, 36 AD3d 475, 477 (1st Dept 2007) (citations omitted) ("[w]hile Staples may have permitted unattended carts to remain in the parking lot, there is no indication that Staples, through an affirmative act, caused unattended carts to be present there").

Defendant has established that it lacked actual notice of the condition by stating that there were no prior accidents with the wires prior to plaintiff's accident and that there were no complaints about any hanging wires in vehicle 3819. *See Lococo v Mater Cristi Catholic High School*, 142 AD3d at 591 ("Actual notice may be delivered to a property owner either orally or in writing"). In opposition to

defendant's motion, plaintiff does not dispute that defendant lacked actual notice. Thus, the Court finds there was no actual notice.

"To constitute constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986). Defendant argues that it lacked constructive notice of the hanging wires in vehicle 3819, based on the witnesses' testimony that no one noticed the hanging wires prior to plaintiff's accident and the fact that there were no maintenance records associated with the hanging wires.

Although plaintiff did not see the wires prior to her accident, on a motion for summary judgment, it is not plaintiff's burden to establish that defendant had actual or constructive notice of the dangerous condition. It is defendant's burden, as a matter of law, to establish the lack of notice. *See e.g. Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 (1st Dept 2001) ("[w]here the defendant neither created the condition nor had actual notice, a defendant seeking to dismiss the complaint must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed"). As set forth below, defendant failed to demonstrate that it lacked constructive notice of the hazardous condition.

Although Arenas testified that he never saw the hanging wires and Leonard testified that there were no complaints about hanging wires, defendant has not established when vehicle 3819 was last inspected prior to plaintiff's accident. *Clarkin v In Line Rest. Corp.*, 148 AD3d 559, 560 (1st Dept 2017) (Restaurant manager's "testimony and averment that he would inspect the entire premises every time the restaurant was open is insufficient to establish when the lawn was last checked before the accident" and could not satisfy initial burden to demonstrate that it lacked constructive notice); *see also Lebron v Napa Realty Corp.*, 65 AD3d 436, 437 (1st Dept 2009) ("The deposition of its general manager was not probative, because he had no personal knowledge of the condition of the sidewalk at the time of the accident or in the hours immediately preceding it. Nor did his testimony establish that any of the

employees who worked in the convenience store operated by defendant could not have noticed the ice in time to clear it").

The only evidence presented by defendant is that there were no repair records or maintenance issues reported with wires located under the passenger side console of vehicle 3819 for 18 months prior to plaintiff's accident. However, although there are general repair orders in the record, it is unclear whether the wires would have been inspected during the vehicle's last repair in December 2015. *See e.g. Baptiste v 1626 Meat Corp.*, 45 AD3d 259, 259 (1st Dept 2007) (court found the store's general maintenance procedures failed to satisfy defendant's burden that it lacked constructive notice as "[t]here were insufficient details provided regarding the last time the aisle had been checked prior to the accident or about the actions of defendant's staff on the date of the accident").

"Since defendant failed to meet its burden to demonstrate that it lacked . . . constructive notice as a matter of law, the burden never shifted to plaintiff to establish how long the condition existed." *Savio v St. Raymond Cemetery*, 160 AD3d 602, 603 (1st Dept 2018).[3] Accordingly, as a question of fact remains for a jury to decide whether constructive notice can be found, defendant's motion for summary judgment on the negligence cause of action is denied.

III. GML § 205-e

Pursuant to GML § 205-e, police officers have a right of action to recover for accidental injuries that "occur[] 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 . . . ." GML § 205-e (1); *see also Gammons v City of New York*, 24 NY3d 562, 567-568 (2014). To establish liability under GML § 205-e, plaintiff is required to "[1] identify the statute or ordinance with which the

[3] In its reply, defendant argues that "[p]laintiff misconstrues the testimony of Officer Arenas to say that he did not inspect the subject RMP prior to Plaintiff's trip and fall, but this is unsupported by Officer Arenas' testimony." Sorrentino affirmation in reply, ¶ 5. However, in its motion, defendant did not proffer any testimony from Arenas that he did inspect the vehicle.

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." *Williams v City of New York*, 2 NY3d 352, 363 (2004) (internal quotation marks and citation omitted).

Here, plaintiff relies on Labor Law § 27-a (3) (a) (1) as the statutory predicate for her GML § 205-e claim. "Labor Law § 27-a, known as the Public Employee Safety and Health Act (PESHA), was enacted to provide individuals working in the public sector with the same or greater workplace protections provided to employees in the private sector under OSHA." *Williams v City of New York*, 2 NY3d at 367 (internal quotation marks and citation omitted). Specifically, Labor Law § 27-a (3) (a) (1) requires every employer to "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."

The Court of Appeals has held that Labor Law § 27-a (3) (a) (1) can serve as a statutory predicate to a cause of action alleging damages under GML § 205-e. *Gammons v City of New York*, 24 NY3d at 574. Applying the elements of GML § 205-e, plaintiff has alleged that loose wiring in vehicle 3819 is a recognized hazard and that defendant violated Labor Law § 27-a (3) (a) (1) by not providing her with adequate protection against this hazard. Plaintiff has described the way she was injured and alleged, as stated above, that her injury stemmed from defendant's negligence.

"To establish entitlement to judgment as a matter of law, defendant had to show either that it did not negligently violate any relevant government provision or that, if it did, the violation did not directly or indirectly cause plaintiff's injuries." *Guiffrida v Citibank Corp.*, 100 NY2d 72, 82 (2003). In its motion for summary judgment, defendant does not dispute that the risk of tripping as a result of loose wires in its vehicle is a recognized hazard in the workplace or that this hazard did not directly or indirectly cause plaintiff's injury.

In support of its motion, defendant argues that, in relevant part, it lacked the requisite notice of the defective condition. Defendant is correct that a GML § 205-e "claim cannot be maintained in the absence of notice," *Johnson v Wythe Place, LLC* 134 AD3d 569, 570 (1st Dept 2015). Nonetheless, "[a]n action premised on that statute does not require proof of such notice as would be required under a common-law theory of negligence. . . . [P]roof sufficient to satisfy the notice requirement for a common-law action is necessarily sufficient to satisfy the requirements of [GML] 205-e." *Anthony v New York City Tr. Auth.*, 38 AD3d 484, 486 (2d Dept 2007). In the instant situation, defendant failed to raise a triable issue of fact that it lacked constructive notice of the defective condition in its motion for summary judgment on the common law negligence claim. Therefore, defendant also fails to meet its burden that it lacked constructive notice with respect to the GML § 205-e claim, and its motion for summary judgment on this claim is denied.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby ORDERED that defendant The City of New York's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that a conference will be held on March 21, 2019 in Room 103 of 80 Centre Street at 9:30 a.m.

This constitutes the decision and order of the Court.

Dated: February 5, 2019

ENTER:

J.S.C.

HON. ALEXANDER M. TISCH