Quintero v City of New York
2012 NY Slip Op 32185(U)
August 15, 2012
Supreme Court, New York County
Docket Number: 115901/2008
Judge: Barbara Jaffe
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SCANNED ON 8/20/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Jaffe Justice PART 5

Index Number : 115901/2008
QUINTERO, JANICE
vs.
ROHE, JEFFERYD.
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT Cal. #65

INDEX NO. _____
MOTION DATE 6/19/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to 2, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1
Answering Affidavits — Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

AUG 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/15/12
AUG 15 2012

BARBARA JAFFE, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

----------x

JANICE QUINTERO,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, JEFFREY D. ROHE, SAMUEL B. BORGER, and CHAYA MALKA BORGER,

Defendants.

----------x

Index No. 115901/08

Argued: 6/19/12
Motion Seq. No.: 005
Motion Cal. No.: 65

DECISION AND ORDER

FILED

AUG 20 2012

NEW YORK
COUNTY CLERK'S OFFICE

BARBARA JAFFE, JSC:

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By notice of motion dated March 13, 2012, defendants City of New York, the New York City Police Department, and Jeffrey D. Rohe (collectively City) move pursuant to CPLR 3212 for an order dismissing the complaint and co-defendants' Samuel B. Borger and Chaya Malka Borger's cross-claim for negligence. Plaintiff opposes.

I. BACKGROUND

On April 11, 2008, plaintiff, a New York City Police officer assigned to the Cabaret Unit, the recorder in a police car driven by Rohe, looking for individuals suspected of engaging in prostitution. (Affirmation of Jennifer Herscovici, ACC, dated Mar. 13, 2012, Exhs. J, K). At approximately 3 a.m., after stopping in the left traffic lane on Eighth Avenue near its intersection with West 47th Street in Manhattan, plaintiff allegedly sustained physical injuries when her

vehicle was struck from behind by a vehicle owned by Ms. Borger and operated by Mr. Borger. (*Id.*, Exhs. E, J, L, N).

On November 26, 2008, plaintiff served defendants with a summons and complaint. (*Id.*, Exh. C). On January 14, 2009, plaintiff served them with an amended complaint, asserting claims against all defendants for common-law negligence and against City for violations of General Municipal Law (GML) § 205-e, predicating these claims on its alleged violations of the Vehicle and Traffic Law (VTL) and the Rules of the City of New York. (*Id.*, Exh. E). On February 13, 2009, City joined issue with service of its answer. (*Id.*, Exh. F). On March 17, 2009, the Borgers joined issue with service of their answer, asserting a cross-claim against City for negligence. (*Id.*, Exh. G). On June 19, 2009, plaintiff served defendants with a bill of particulars. (*Id.*, Exh. H).

At an examination before trial (EBT) held on August 11, 2010, plaintiff testified that stopping the vehicle to watch suspected prostitutes was a regular duty for officers assigned to the Cabaret Unit. (*Id.*, Exh. J). At the time of the accident, the officers had been stopped for approximately 15 to 20 minutes, observing two women they suspected to be prostitutes. (*Id.*). According to plaintiff, they had observed the women engage in conduct warranting their arrest and were planning to arrest them just before the accident happened. (*Id.*).

At an EBT held on August 18, 2010, Rohe testified that he and plaintiff had been stopped for less than two minutes at the time of the collision, that they were in the process of observing only one suspect, that there were no grounds for her arrest, that she had entered an adjacent store beyond his field of vision when the accident occurred, and that they would have arrested her had they continued to observe her and "if she fit the criteria to be arrested." (*Id.*, Exh. K). He also

testified that "watching for prostitution is part of [his] routine patrol as a cabaret officer," "that stopping the vehicle affords him an advantage in doing so, and that the vehicle's lights were not activated. (*Id.*).

On August 24, 2010, plaintiff served defendants with a supplemental bill of particulars listing Labor Law § 27-a as an additional statutory predicate for her GML § 205-e claims. (*Id.*, Exh. I).

At an EBT held on March 8, 2011, Mr. Borger testified that he had been traveling behind Rohe's vehicle for half a mile before the accident occurred, that there were a few cars between his and Rohe's that had passed Rohe's vehicle before the accident, that the accident occurred after Rohe's vehicle made a sudden stop, that his brakes did not activate in time to avoid colliding with Rohe's vehicle, and that he does not remember whether Rohe's vehicle began moving again before the impact or whether he saw its brake lights activate. (*Id.*, Exh. M).

II. CONTENTIONS

City asserts that plaintiff's common law claims are barred by the firefighter's rule, as her injuries resulted from a risk associated with her employment as a police officer in the Cabaret Unit, and that as plaintiff and Rohe were engaged in the emergency operation of pursuing a suspect when the accident occurred, and absent any evidence that Rohe acted recklessly in stopping the car, the traffic violations upon which plaintiff's GML § 205-e claims are predicated are barred by VTL § 1104. (*Id.*). It also claims that Labor Law § 27-a is not a valid statutory predicate for plaintiff's GML § 205-e claims, as her injuries arose from a risk inherent in police work, and not a physical hazard of her workplace. (*Id.*). City moreover contends that the Borgers's cross-claim for negligence should be dismissed as a rear-end collision with a stopped

vehicle demonstrates, *prima facie*, that the rear vehicle proximately caused the plaintiff's injuries. (*Id.*).

In opposition and to the extent she denies that sitting in a vehicle stopped in a traffic lane constitutes a special risk facing police officers, plaintiff denies that her common-law negligence claims are barred by the firefighter's rule. (Affirmation of Andrew D. Lefft, Esq., in Opposition, dated May 17, 2012). Mainly though, she denies that she and Rohe were engaged in an emergency operation, as they were merely observing, not pursuing, persons they suspected of engaging in prostitution, and that in any event, there exist triable factual issues as to the length of time they were stopped, the number of persons they were watching, and the classification of those persons as suspects. (*Id.*). Additionally, as she was not facing a special risk by virtue of sitting in a vehicle stopped in a traffic lane, and as there exist triable factual issues as to whether a stopped vehicle constitutes a recognized hazard, she asserts that her GML § 205-e claims are properly predicated on Labor Law § 27-a. (*Id.*). She also denies that City has demonstrated that its conduct was not a proximate cause of her injuries as there exist triable factual issues as to whether the accident was a foreseeable consequence of Rohe stopping the vehicle in a traffic lane. (*Id.*).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*,

49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

A. Plaintiff's common law negligence claims and the firefighter's rule

To establish a *prima facie* claim of negligence, a plaintiff must demonstrate duty owed, a breach thereof, and proximate cause. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]).

The firefighter's rule precludes a firefighter or police officer from recovering damages for common-law negligence "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 [, ...] and did not merely furnish the occasion for [it]." (*Wadler v City of New York*, 14 NY3d 192, 195 [2010]; *Zanghi v Niagara Frontier Transp. Comm.*, 85 NY2d 423, 436-40 [1995]). "The rule is grounded on the policy that – unlike members of the general public – firefighters [and police officers] are specially trained and compensated to confront hazards and therefore must be precluded from recovering damages for the very situations that create a need for their services." (*Galapo v City of New York*, 95 NY2d 568, 573 [2000]).

Here, it is undisputed that Rohe stopped the vehicle in furtherance of a specific police function, the surveillance of suspected criminals, and that plaintiff was injured while sitting in the vehicle performing her duties as a recorder. As stopping a vehicle in a traffic lane increased the risk of being rear-ended, plaintiff's performance of her duties exposed her to an increased risk of injury from an automobile accident, and accordingly, her common-law negligence claims are barred. (*See Church v City of New York*, 268 AD2d 382 [1st Dept 2000] [rule applied where

officer was riding in police van transporting prisoners and was injured when van was rear-ended, as his "injuries arose in connection with performance of [his] duties' as a police officer"]; *Melendez v City of New York*, 271 AD2d 416 [2d Dept 2000] [rule applied as plaintiff's performance of recorder function in patrol car "increased [her] risk of being injured in a motor vehicle accident"]; *Poveromo v Avis Rent-a-Car Sys., Inc.*, 242 AD2d 467 [1st Dept 1997], *lv denied* 91 NY2d 808 [1998] [rule applied where officer injured when he was riding in police car traveling to building inspection and car drove over metal bumper]; *see also Cooper v Cooper*, 81 NY2d 584 [1993] [rule applied where officer injured when he was riding as recorder in patrol car that rear-ended stopped vehicle while responding to emergency call]; *Androvic v Metro. Transp. Auth.*, 95 AD3d 610 [1st Dept 2012] [same]). The pertinent inquiry is not whether stopping in a traffic lane constitutes the specific function, as the specific function here was surveillance.

B. Plaintiff's GML § 205-e claims

1. VTL § 1104

VTL § 1104 was enacted in recognition that a police officer's duty "to respond quickly to preserve life and property and to enforce the criminal laws" may conflict with traffic laws, and "that, consequently, [officers] should be afforded a qualified privilege to disregard those laws when necessary to carry out their important responsibilities." (*Saarinen v Kerr*, 84 NY2d 494, 502 [1994]).

Pursuant to VTL § 1104(a), (b), and (e), the driver of an authorized emergency vehicle engaged in an emergency operation may, as pertinent here, "stop, stand or park irrespective of the provisions of [title VII of the VTL] so long as he does not "reckless[ly] disregard [ ] the safety of others." (*Ayers v O'Brien*, 13 NY3d 456, 458-59 [2009]; *Saarinen*, 84 NY2d 494).

VTL § 114-b defines emergency operation, in pertinent part, as the "operation, or parking, of an authorized emergency vehicle, when such vehicle is engaged in . . . pursuing an actual or suspected violator of the law . . . ." Neither the VTL nor the Penal Law defines "pursuit." As relevant here, Black's Law Dictionary defines pursuit as "[t]he act of chasing to overtake or apprehend." (Black's Law Dictionary 14c [9th ed 2009]).

Consistent with this definition, an officer is considered to have been pursuing a suspect within the meaning of VTL § 114-b if at the time of the accident, he or she was engaged in a vehicular chase of the suspect. (*See, eg, Mouzakes v County of Suffolk*, 94 AD3d 829 [2d Dept 2012] [vehicular chase of drunk driver]; *Gonzalez v Zavala*, 88 AD3d 946 [2d Dept 2011] [vehicular chase of reckless driver]; *Olivera by Santos v City of New York*, 239 AD2d 300 [1st Dept 1997] [vehicular chase of person suspected of possessing gun and having stolen car]). An officer may also be deemed to have been engaged in the pursuit of a suspect even if stopped in his vehicle, if he had been following the suspect by car and stopped in order to apprehend him. (*See Williams v City of New York*, 240 AD2d 734 [2d Dept 1997] [accident occurred after officers pulled over person suspected of stealing vehicle, observed damaged steering column in suspect's vehicle, and exited car to further investigate and apprehend suspect]).

Here, plaintiff and Rohe were not engaged in a vehicular chase when the accident occurred. Nor is it conclusively established that they stopped the vehicle to apprehend a suspect. Rather, the key elements of the inquiry into whether they were about to arrest a suspect, such as the number of persons they observed, the conduct they witnessed, and their ability and intention to arrest, are disputed. Consequently, there exist material questions of fact as to whether they were stopped for the purpose apprehending a suspect or suspects when the accident occurred, and

absent any authority for the proposition that merely observing a suspect to determine whether a law has been violated constitutes a pursuit within the meaning of VTL § 114-b, City has failed to demonstrate, *prima facie*, that Rohe was engaged in an emergency operation. Accordingly, it have failed to demonstrate that plaintiff's GML § 205-e claims are barred by VTL § 1104.

2. Labor Law § 27-a

Labor Law § 27-a(3)(a)(1) provides, in pertinent part, that:

> [e]very employer shall . . . furnish to each of its employees, employment and a place of employment which are free from recognized hazards that are causing or likely to cause . . . serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees . . . .

This section may serve as a predicate to a police officer's claim pursuant to GML § 205-e. (*Carro v City of New York*, 89 AD3d 1049 [1st Dept 2012]; *Koenig v Action Target, Inc.*, 76 AD3d 997 [2d Dept 2010]; *Balsamo v City of New York*, 287 AD2d 22 [2d Dept 2001]). However, it is inapplicable where an officer's injuries result from "the special risks faced by police officers because of the nature of police work." (*Williams v City of New York*, 2 NY3d 352, 368 [2004]).

A physical defect in an officer's patrol car may constitute a recognized hazard for the purpose of Labor Law § 27-a(3)(a)(1). (*See Balsamo*, 287 AD2d 22 [issues of fact as to whether unpadded computer console in police cruiser on which officer injured knee during automobile accident constituted recognized hazard]; *Williams*, 2 NY3d at 368 [noting that "under the facts in *Balsamo*, section 27-a applies because [it] is designed to prevent the type of occupational injury that occurred when the officer was given an improperly equipped vehicle"]). In contrast, in a case where an officer was struck by a vehicle on an open highway, his injuries were not deemed to have resulted from a recognized hazard of his workplace. (*Forster v City of New York*, 309

AD2d 578 [1st Dept 2003], *lv denied* 1 NY3d 583 [2004]).

Here, as in *Forster*, plaintiff's injuries resulted from an automobile accident, not, as in *Balsamo*, from any physical defect in or characteristic of the vehicle in which she was riding. Therefore, regardless of whether the risk of being rear-ended constitutes a special risk facing police officers, her injuries did not result from a recognized hazard of her workplace. Consequently, City is entitled to summary judgment on her GML § 205-e claims predicated on its alleged violation of Labor Law § 27-a. (*See Mitchell v City of New York*, 24 Misc 3d 1247[A], 2009 NY Slip Op 51904[U] [Sup Ct, New York County 2009] [where officer was injured in automobile accident and asserted that his assignment to vehicle driven by inadequately trained officer constituted recognized hazard, Labor Law § 27-a not predicate to GML § 205-e claim absent any faulty or defective condition in police vehicle]).

C. The Borgers's cross-claim

To establish proximate cause, a plaintiff must demonstrate that the defendant's conduct was a substantial cause of the events resulting in his or her injuries. (*Maheshwari v City of New York*, 2 NY3d 288, 295 [2004]). When the act of a third party intervenes between the defendant's conduct and the plaintiff's injuries, "liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence. Because questions concerning what is foreseeable . . . may be the subject of varying inferences, . . . these issues generally are for the fact finder to resolve." (*Derdiarian v Felix Contractor Corp.*, 51 NY2d 308, 315 [1980]).

Here, a reasonable jury could conclude that a rear-end accident was a reasonably foreseeable consequence of stopping the vehicle in a traffic lane in Manhattan without activating

its hazard or emergency lights during early morning hours. There thus exist triable factual issues as to whether plaintiff's injuries were proximately caused by Rohe's conduct in stopping the vehicle in a traffic lane. (*See Grant v Nembhard*, 94 AD3d 1397 [3d Dept 2012] [where vehicle illegally parked on shoulder rear-ended, triable factual issues existed as to proximate cause, as reasonable jury could find that accident was foreseeable consequence of parking in that location without activating hazard lights during early morning hours]; *White v Diaz*, 49 AD3d 134 [1st Dept 2008] [where car double-parked on busy Manhattan street for five minutes rear-ended by driver who fell asleep at wheel, triable issues of fact as to proximate cause, as jury could determine that it was "foreseeable that the flow of traffic being impeded by the double-parked van, an inattentive, careless or distracted driver might not stop to avoid" it]; *see also Dowling v Consolidated Carriers Corp.*, 65 NY2d 799 [1985] [where truck with mechanical problems struck buses illegally parked on shoulder, triable factual issue as to whether truck could have come to safe stop had buses not been illegally parked, and thus, as to proximate cause]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that City's motion for summary judgment is granted as to plaintiff's common-law negligence claims; and it is further

ORDERED, that City's motion for summary judgment is denied as to plaintiff's GML § 205-e claims predicated on City's alleged violations of the VTL and the Rules of the City of New York; and it is further

ORDERED, that City's motion for summary judgment is granted as to plaintiff's GML § 205-e claims predicated on City's alleged violations of Labor Law § 27-a; and it is further

ORDERED, that City's motion for summary judgment on the Borgers' cross-claim for

negligence is denied.

ENTER:

Barbara Jaffe, JSC

DATED: August 15, 2012
New York, New York

AUG 15 2012

BARBARA JAFFE
J.S.C.

FILED

AUG 20 2012

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