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Southern District Finds Village Employees Entitled to a Defense on Volunteer Firefighter's Hazing Claims

Bernstein v. Village of Piermont, 2013 U.S. Dist. Lexis 151004. (October 21, 2013).

Plaintiff filed a civil rights action against the Village of Piermont and certain firefighters under 42 U.S.C. 1983 claiming that they hazed him during the beginning of his service as a volunteer Village firefighter. Upon the filing of suit, all three individually named firefighters moved for the Village to defend and indemnify them pursuant to a Village Code.

The Village did not particularly dispute that it owed the firefighters a defense, however, it did dispute their entitlement to separate counsel. The Village maintained the position that a single attorney could represent all three and that the legal fees each firefighter claimed were unreasonable.

The Court disagreed and found that because each of the employees had differing degrees of knowledge, involvement and defense theories relative to the alleged incidents of hazing, there was a conflict of interest and a likely chance of finger pointing among them that would render it impossible to have a single attorney representing their interests. The Court opined that the potential for liability shifting between the firefighters must be and was "genuine and serious," particularly because one employee plead guilty to some of the criminal charges brought against him relative to the hazing, while the other two had their criminal cases dismissed.

However, the Court found the firefighters' claims for indemnity to be premature, as liability had not yet been determined when the motion was before the Court.

Second Department Finds No Special Relationship Between Deceased, Elderly Plaintiff and Emergency Responders Whose Response Time was Delayed from Inclement Weather.

Freeman v. City of New York, 2013 Slip Op. 7707 (November 20, 2013).

Plaintiff was an elderly woman who passed away after waiting over three hours for emergency responders to travel to her home in the middle of a major blizzard. Her estate

commenced suit against the City of New York for failure to provide adequate emergency services and in failing prepare for and respond to the snowstorm.

The facts as alleged are that plaintiff's daughter called 911 after plaintiff had difficulty breathing. Due to the two feet of snow on the ground, the emergency responders took approximately three hours to arrive and plaintiff passed away at home later in the day.

Upon the City's motion to dismiss, the Court looked at the four corners of the complaint, took plaintiff's allegations as true (as required) and granted the motion. The Court noted that plaintiff was suing the City for discretional acts-its blizzard management and emergency operation management during the blizzard and that the City was thus, entitled to immunity. The existence of a special relationship between plaintiff and the City could have circumvented this immunity, but the Court found that plaintiff failed to adequately plead one. The Court opined that the City cannot be sued for breach of a duty owed to the general public, absent a direct, special relationship with the claimant, which was lacking. The absence of a special relationship was fatal to plaintiff's claims.

The plaintiff's initial complaint failed to allege the existence of a special relationship, as it merely claimed that defendants negligently prepared for and responded to the snowstorm that delayed their emergency response. The Court opined that plaintiff's cross motion to amend her complaint should have been denied because the amendment (which included affidavits from neighbors who called 911 and reported plaintiff's "emergency") would not have changed the outcome of the motion to dismiss. The affidavits plaintiff attached to her amended complaint still failed to show any direct relationship or contact between plaintiff and the City.

Southern District Partially Allows Various Claims Against Police Department Under 1983 to Survive

Chamberlain v. City of White Plains, 2013 U.S. Dist. Lexis 174745.

Plaintiff decedent was fatally wounded by Police Officers' gunshots during an attempt to disarm and subdue him. Plaintiff was mentally unstable and was acting erratically when the Police arrived at his home in response to numerous complaints of an emotionally disturbed individual. Plaintiff refused to grant the police officers entry to his apartment and brandished a knife through a partially opened door. Believing plaintiff could be a danger to himself and others, the police officers forcefully entered plaintiff's apartment, twice deployed a tazer, followed by a round of beanbags. The beanbag round sent plaintiff to the floor and one of the officers then shot two rounds into the plaintiff's chest, killing him.

Plaintiff's son commenced suit against the Police Department, alleging claims of excessive force, unlawful entry, supervisory liability and conspiracy under 42 U.S.C. 1983. Plaintiff also alleged that the Police Department was subject to *Monnell* liability under 1983 (liability for implementing or allowing a formal policy that is unconstitutional) based upon the allegation that one of the responding officers directed a racial slur towards the plaintiff in an effort to distract him. Various, State law tort claims were also alleged.

The City moved to dismiss, based in part upon its alleged qualified immunity. Accepting all the plaintiff's allegations as true as is required for motions for dismissal and based upon the complaint, audio recordings of the incident and police department documentation concerning the alleged incident and internal policy. The Court partially denied the motion and the plaintiff's case was allowed to survive.

The Court found that the officers were entitled to enter the plaintiff's apartment based upon the complaints received, the possible threat he posed to himself and others and the fact that their entry was authorized by the emergency aid doctrine. Therefore, the claim of unlawful entry was dismissed.

The Court also dismissed plaintiff's claim that the defendants conspired to deprive plaintiff of his constitutional rights, finding insufficient evidence that the individually named officers had a personal stake or motivation in their conduct that was separate and apart from that of their principal, the City Police Department, even considering the prior misconduct of some of these officers.

The Court dismissed plaintiff's *Monell* claims, finding that plaintiff had to but did not sufficiently plead that the City's policy or custom inflicted the plaintiff's injury. The Court noted that normally a pattern of similar offensive conduct is required to demonstrate either an internal custom or deliberate indifference to one under *Monell* and that plaintiff plead nothing to this effect.

The Court did not dismiss plaintiff's supervisory liability claim because plaintiff had sufficiently plead that the supervisory officers directly participated in the acts that injured plaintiff (namely, the first tazer deployment by one officer and the other officer's order to do it again). However, this claim was dismissed as to a third officer, as plaintiff only alleged that this officer was a senior one who did not report to the scene but directed his subordinates to properly arm and equip themselves with some of the materials used to subdue the plaintiff.

The Court refused to dismiss plaintiff's excessive force claim, finding that plaintiff had sufficiently alleged and that there was sufficient evidence that the second tazer deployment and the firing of two rounds were excessive, because the first tazer deployment did not incapacitate plaintiff (which should have suggested to the officers that the second deployment would only serve to cause plaintiff pain) and because the plaintiff has already fell to the ground and was, presumably, no longer a threat after the bean bags were fired. The Court however, did find that the first tazer deployment and the firing of the beanbag rounds not to be excessive.

The Court rejected defendants' arguments for dismissal based upon plaintiff's failure to name individual officers in the Notice of Claim, but agreed that plaintiff's wrongful death claim should be dismissed because there was no pecuniary loss plead in the complaint.

Court of Claims Dismisses Suit Related to Alleged Hurricane Irene Flooding of Residential Homes.

Alexandrov v. New York State Canal Corporation, # 2013-038-566.

Plaintiffs commenced suit against the State for property damage to their homes that was allegedly due to the State's improper maintenance and operation of the Erie Canal system before and during Hurricane Irene. The State brought and succeeded on a motion to dismiss plaintiff's complaint in lieu of an answer.

The defendant's motion to dismiss was predicated upon the plaintiff's failure to properly plead a cause of action against the State under section 11(b) of the Court of Claims Act and the failure of four plaintiffs to timely sue the State. The latter four plaintiffs were added to the caption through a notice of intention to serve the claim, which was untimely (beyond the 90 day time limit from accrual of the claim).

As to the plaintiff's failure to plead, the Court found that plaintiffs' mere claim that the State was responsible for the design, operation, maintenance and monitoring of the Erie Canal and Mohawk River watershed and that its negligence in doing so damaged the plaintiffs' property was insufficient to apprise the State of the nature and specifics of the claims against it, as 11 (b) requires. The Court was particularly inclined to dismiss plaintiffs' claims because while the pleadings identified the Counties that plaintiffs resided in, it did not provide exact addresses or locations as to where the alleged damage occurred.

In rendering this decision, the Court opined that while absolute exactness in pleading a cause of action against the State is not required, the claim must provide a sufficiently detailed description of the particulars of the claim, which is not satisfied by conclusory or general assertions of negligence without factual allegations that reveal some act or omission that would give rise to defendant's liability. The Court found that the plaintiffs' complaint did not sufficiently apprise the State of what its negligent act or omission actually was.

First Department Dismisses Dog Bite Case for Lack of Notice.

Gervais v. Laino, 2013 N.Y. Slip Op. 08819.

Plaintiff was bitten or scratched in the face by the defendant's dog, either while hovering over it and deciding whether to help free its hind paw from a fence or while actually doing so. When defendant moved for summary judgment on liability, plaintiff contended that defendant had prior notice of the animal's vicious propensities because while the dog was never aggressive towards humans, it did growl and bark at two other dogs in the neighborhood. Defendant's counter argument was that these other two dogs had previously been aggressive towards the defendant's dog, that the dog was never aggressive towards people and that the dog had, in fact, earned the American Kennel Club's good citizen certificate.

While the trial Court found an issue of fact, the First Department found none and dismissed plaintiff's case. The Court opined that mere growling or barking at other animals is insufficient to alert dog owners of any vicious propensities and that this was the only evidence proffered in opposition to the motion.