STATE OF NEW YORK

3718

2021-2022 Regular Sessions

IN SENATE

January 30, 2021

Introduced by Sen. ORTT -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the penal law, the criminal procedure law and the civil practice law and rules, in relation to the justified use of physical force

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 35.15 of the penal law, as added by chapter 73 of the laws of 1968, subdivisions 1 and 2 as amended by chapter 511 of the laws of 2004, is amended to read as follows:

§ 35.15 Justification; use of physical force in defense of a person.

1. A person may, subject to the provisions of subdivision two **of this section**, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person, unless:

(a) The latter's conduct was provoked by the actor with intent to cause physical injury to another person; or

(b) The actor was the initial aggressor; except that in such case the use of physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force; or

(c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one **of this section** unless:

(a) The actor reasonably believes that such other person is using or about to use deadly physical force. [~~Even in such case, however, the actor may not use deadly physical force if he or she knows that with~~

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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~~complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating; except that the~~] **The** actor is under no duty to retreat if he or she is:

(i) in his or her dwelling **or any other place that he or she is lawfully permitted to be** and **is** not the initial aggressor; or

(ii) a police officer or peace officer or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant to section 35.30 **of this article**; or

(b) He or she reasonably believes that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible criminal sexual act or robbery; or

(c) He or she reasonably believes that such other person is committing or attempting to commit a burglary, and the circumstances are such that the use of deadly physical force is authorized by subdivision three of section 35.20 **of this article**.

§ 2. Section 35.05 of the penal law is amended by adding a new subdivision 3 to read as follows:

3. When a defendant has offered the defense of justification for the threatened or actual use of deadly force, the court shall instruct the jury that they shall not be permitted to consider the possibility of retreat as a factor in determining whether a person who threatened or used deadly force reasonably believed that the force was necessary to prevent death or serious bodily injury to himself or another.

§ 3. Section 35.10 of the penal law is amended by adding a new subdivision 7 to read as follows:

7. A person who is justified in threatening or using physical force against another person in defense of himself, herself, another person, or property pursuant to this section is immune from criminal and civil liability for any damages incurred by the aggressor pursuant to the application of reasonable physical force or threatened use of force.

§ 4. Subdivision 1 of section 120.14 of the penal law, as amended by chapter 222 of the laws of 1994, is amended to read as follows:

1. He or she intentionally places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon, dangerous instrument or what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm**; provided, however, that where a person is justified in the use of physical force upon another person in self-defense or defense of a third person, or in defense of premises under the provisions of article thirty-five of this chapter, such person shall not be liable under the provisions of this subdivision**; or

§ 5. Section 140.10 of the criminal procedure law is amended by adding a new subdivision 4 to read as follows:

4. No person shall be arrested pursuant to this section for a use of force, unless the police officer believes that there is probable cause to find that the use of force was not justifiable under article thirty-five of the penal law.

§ 6. Section 180.10 of the criminal procedure law is amended by adding a new subdivision 8 to read as follows:

8. Upon arraignment, if a defendant offers the defense of justification to any allegation involving the use of physical force, including deadly physical force, the court shall dismiss the charges unless the court determines by clear and convincing evidence that the use of such physical force by the defendant was not reasonable or justified.

§ 7. Rule 3211 of the civil practice law and rules is amended by adding a new subdivision (i) to read as follows:

(i) (1) Motion to dismiss; use of force; justification. A party may move to dismiss a cause of action on the basis that the moving party used reasonable force under section 35.15 of the penal law. Upon filing a motion to dismiss, the court shall hold a hearing prior to trial and shall grant such motion unless the party responding to the motion proves by clear and convincing evidence that the use of force was not reasonable or justified.

(2) The court shall award reasonable attorney fees, court costs, compensation for any loss of income and all other expenses incurred by a person in defense of any civil action arising from the person's use of reasonable force pursuant to section 35.15 of the penal law if the court finds that the defendant's actions were justified and dismisses the case under this subdivision.

§ 8. The civil practice law and rules is amended by adding a new section 3012-c to read as follows:

§ 3012-c. Certificate of merit in certain actions to recover damages for personal injury, injury to property or wrongful death. (a) In any action to recover damages for personal injury, injury to property or wrongful death brought by an individual who committed a crime against the respondent, where the injuries complained of resulted from a use of physical force or deadly physical force by the respondent at the time of the commission of the crime, the complaint shall be accompanied by a certificate, signed by the attorney for the plaintiff, certifying that the attorney has reviewed the facts of the case and that, to the best of such attorney's knowledge, information and belief there is a reasonable basis for the commencement of such action and that the respondent was not justified in the use of physical force or deadly physical force against the plaintiff.

(b) Where a certificate is required pursuant to this section, a single certificate shall be filed for each action even if more than one defendant has been named in the complaint or is subsequently named.

(c) If the attorney for the plaintiff fails to provide the certificate as required by subdivision (a) of this section the court may dismiss the complaint or make such final or conditional order with regard to such failure as is just including but not limited to denial of the accrual of any interest, costs, attorneys' fees and other fees, relating to the underlying mortgage debt. Any such dismissal shall be without prejudice and shall not be on the merits.

§ 9. This act shall take effect immediately; provided however, that section five of this act shall take effect upon the repeal of subdivision 4 of section 140.10 of the criminal procedure law pursuant to section 59 of chapter 222 of the laws of 1994, as amended.