

**Boisbel v Metropolitan Transp. Auth.**

2009 NY Slip Op 31914(U)

August 19, 2009

Supreme Court, New York County

Docket Number: 107134/07

Judge: Karen Smith

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. KAREN S. SMITH

PART 62

Index Number : 107134/2007

**BOISBEL, EVE-MAIRE**

VS.

**METROPOLITAN TRANSPORTATION**

SEQUENCE NUMBER : 003

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE 8/20/09

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion is decided pursuant to the attached memorandum decision and order.

**FILED**

AUG 26 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/19/09

K.S.S.  
HON. KAREN SMITH J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK - I.A.S. PART 62

-----X

EVE-MARIE BOISBEL,

Plaintiff,

-against-

METROPOLITAN TRANSPORTATION AUTHORITY,  
NEW YORK CITY TRANSIT AUTHORITY, CITY OF  
NEW YORK, and TRIBOROUGH BRIDGE AND  
TUNNEL AUTHORITY,

Defendants.

-----X

**HON. KAREN S. SMITH**

Index No.: 107134/07  
Motion Seq.: 002  
Motion Date: 7/10/09

Summons and Order  
**FILED**  
AUG 26 2009  
COUNTY CLERK

This motion by defendants Metropolitan Transportation Authority, New York City Transit Authority, and Triborough Bridge and Tunnel Authority, for summary judgment dismissing plaintiff's complaint and all cross-claims against them, is denied for the reasons stated more fully below.

Plaintiff Eve-Marie Boisbel brought this action to recover for injuries she allegedly sustained on September 25, 2006 when she was crossing the street on the corner of Lexington Avenue and East 63<sup>rd</sup> Street, New York, New York, and was struck by a car driven by Guy Corriero. Corriero's vehicle was caused to lunge forward when it was hit by another car operated by Joel Noonan during his attempt to flee from MTA police officers.

The facts (which are undisputed for the most part, unless otherwise indicated) can be found in the parties' motion papers and are as follows. On September 25, 2006, Joel Noonan parked his car at a bus stop located on Lexington Avenue. Having observed Noonan's parking violation, Metropolitan Transportation Authority (hereinafter: "MTA") police approached him and asked him for his driving licence, which Noonan produced. MTA police officer Nelson Perez directed Noonan to wait in his vehicle and returned to the patrol car to write up a summons for the violation, at which time Noonan "slowly" drove away. According to the movants, the MTA police turned on the lights and the siren on the vehicle, and followed Noonan's car. As Noonan sped up, MTA police engaged in pursuit of Noonan, who eventually ran a red light at the

intersection of 63<sup>rd</sup> Street and Lexington Avenue, crashed into the vehicle operated by Guy Corriero, and caused Corriero's car to jump off the curb and hit plaintiff. Shortly after the accident, MTA police arrived at the location and arrested Noonan. Only after his arrest did the MTA officers learn that Noonan was wanted for a murder in the state of Rhode Island.

Defendants Metropolitan Transportation Authority, New York City Transit Authority, and Triborough Bridge and Tunnel Authority now move for summary judgment dismissing all claims against them, pursuant to CPLR §3212, on the grounds that Vehicle and Traffic Law ("VTL") § 1104 expressly confers upon them a privilege as to their conduct in the operation of an emergency vehicle during an emergency operation. Plaintiff, in her opposition points out that VTL § 1104 does not shield defendants from liability where there is evidence that there was a reckless disregard of the safety of others in the operation of the emergency vehicle, and, as there are facts in dispute as to the manner in which the MTA police officers operated their vehicles, summary judgment cannot be granted.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact. (*Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 [1987]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers. (See *Winegard v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

VTL § 1104 governs the conduct of police officers, such as the ones in this case, when operating an "authorized emergency vehicle" in an "emergency operation." VTL § 114(b) defines "emergency operation," in relevant part, as "[the] operation . . . of an 'authorized emergency vehicle', when such vehicle is . . . pursuing an actual or suspected violator of the law . . ." VTL § 101 includes police vehicles in its definition of an "authorized emergency vehicle," and VTL §132(a) describes a "police vehicle", in pertinent part, as "every vehicle owned by . . . a public authority . . . and operated by the police department or law enforcement agency of such

governmental unit . . . .” While VTL §1104 permits a driver of an authorized emergency vehicle during an emergency operation to disregard certain vehicle and traffic laws, the law does not insulate such drivers from all liability where there is evidence of “reckless disregard of the safety of others.” (VTL §1104 [e]).

To hold MTA liable, plaintiff must “show that the actor has *intentionally* done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so *with conscious indifference to the outcome.*” (*Gervasi v Peay*, 254 AD2d 172 [1<sup>st</sup> Dept 1998] [emphasis in original] ). The reckless disregard test requires a showing of more than a momentary judgment lapse. (*Id.*)

There is no dispute that pursuant to VTL §1104, the MTA vehicle was permitted to pursue Noonan’s vehicle in disregard of some of the vehicle and traffic laws. As movants in the instant motion defendants have the burden of showing, through admissible evidence, that there is no dispute that the MTA police conducted the pursuit in a non-reckless manner.

Plaintiff contends in her opposition that there are sufficient facts in dispute as to the manner in which the MTA police conducted the chase to preclude summary judgment. Plaintiff submits the deposition testimonies of five non-party eye-witnesses, the two MTA police officers involved in the September 25, 2006 pursuit, Officer Perez and Sergeant Paul Dunn, and Detective Kenneth Stewart, an MTA detective who interviewed Officer Perez and Sergeant Dunn about the incident after the incident had occurred. Detective Stewart, on the other hand states, in his deposition testimony, that the officers told him when he interviewed them right after the incident that the incident began on Lexington Street between 67<sup>th</sup> and 66<sup>th</sup> Street, directly contradicting the officers’ testimony that it began between 65<sup>th</sup> and 64<sup>th</sup> Streets on Lexington Avenue. The officers also testified that when Noonan took off they turned on the siren and the lights on their vehicle and followed Noonan’s vehicle on Lexington Avenue towards 63<sup>rd</sup> Street, where they observed the instant accident. Both MTA officers deny engaging in a high speed pursuit and describe their speed to have reached maximum of 20 mph throughout their drive on Lexington Avenue. Additionally, Sergeant Dunn denies weaving in and out of the traffic, however, admits to maneuvering his vehicle in order to follow Noonan’s car.

The non-party eye-witnesses’ testimonies vary greatly from the MTA officers’

testimonies both as to where the incident began, the speed of the officer's vehicle, and the manner in which the officers conducted the pursuit.

Non-party eyewitness Edison Suero, a self-employed taxi driver, observed the alleged chase starting from an intersection of 71<sup>st</sup> Street and Lexington Avenue. He described Noonan's speed to be 40-50 mph and testified that the MTA police were traveling at approximately 40-45 mph, "breaking and trying not to hit anyone." Additionally, he states that he observed the MTA police weave in and out of traffic several times and pass a red light.

Non-party eyewitness Jose Sosa maintains he was standing in front of Hunter College, located at Lexington Avenue between 69<sup>th</sup> and 68<sup>th</sup> Street, when he saw a sedan car weaving in and out of traffic following Noonan's car at the speed of 35 mph. He did not hear the siren and does not remember whether the car had its emergency lights on.

According to non-party witness Glyn Parsley, he was cycling from 75<sup>th</sup> to 59<sup>th</sup> Street on Lexington Avenue. At about 67<sup>th</sup> Street he saw both Noonan's and the MTA vehicle driving 70 mph forcing him to swerve onto the sidewalk to avoid being hit.

Non-party witness Evan Schcier states that at the time of the incident he lived at 851 Lexington Avenue between 64<sup>th</sup> and 65<sup>th</sup> Street. After hearing the sirens, he saw a black Jeep Cherokee and an MTA car chasing after it. Assuming the city speed limit to be 30 mph, he described MTA car's speed to have been 50 mph. He lost sight of the pursuit from the intersection of 64<sup>th</sup> Street and Lexington Avenue and heard a crash coming from the 63<sup>rd</sup> Street either two minutes later (according to a statement he gave on the day of the accident) or fifteen to twenty seconds later (according to his EBT testimony.)

Non-party witness Mildred Benton states that she believed that both Noonan's car and the police car were traveling between 50 and 60 mph at the time of the crash and remembers hearing a police siren prior to the crash.

The evidence submitted does raise triable questions regarding the length of the pursuit, what the actual speed of the MTA defendants' car was, and whether MTA police officers driving was erratic, reckless, and/or "with conscious indifference to the outcome." With contradictory accounts of the incident and the officers' conduct in pursuing Noonan, issues of credibility are raised which are not appropriate for determination on a motion for summary judgment and

[\*6]  
should be reserved for the trier of fact. (*Curtis Properties Corp. v Grief Companies*, 212 AD2d 259, 263 [1<sup>st</sup> Dept 1995]). Thus, the motion for summary judgment must be denied.

Accordingly, it is

ORDERED that this motion by defendants Metropolitan Transportation Authority, New York City Transit Authority, and Triborough Bridge and Tunnel Authority for summary judgment dismissing plaintiff's claims and all cross-claims against them is denied in its entirety; and it is further

ORDERED that defendants Metropolitan Transportation Authority, New York City Transit Authority, and Triborough Bridge and Tunnel Authority serve a copy of this decision and order with notice of entry upon all parties and upon the Clerk of the Court, within 20 days of entry hereof.

This constitutes the decision and order of the court.

Dated: Aug. 19, 2009  
New York, New York

K S S.  
KAREN S. SMITH, J.S.C.

**FILED**  
AUG 26 2009  
COUNTY CLERK'S OFFICE  
NEW YORK