

**Charpentier v City of New York**

2010 NY Slip Op 32054(U)

July 27, 2010

Sup Ct, NY County

Docket Number: 113146/08

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN Justice  
J.S.C.

PART 52

Charpentier, J

INDEX NO. 113146/08

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 02

City

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision.

**FILED**  
AUG 04 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7/27/10

CK

CYNTHIA S. KERN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 52

-----X  
JEAN CHARPENTIER,

Plaintiff,

Index No. 113146/08

-against-

**DECISION/ORDER**

THE CITY OF NEW YORK, THE NEW YORK CITY  
FIRE DEPARTMENT AND PETER MOLINELLI,

Defendants.

-----X  
HON. CYNTHIA S. KERN, J.S.C.

**FILED**  
AUG 04 2010  
NEW YORK  
COUNTY CLERKS OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in view of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	_____
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	2
Exhibits.....	3

Plaintiff commenced the present action to recover damages for personal injuries he sustained when the school bus he was driving collided with a New York City Fire Department vehicle driven by defendant Peter Molinelli at the intersection of Canal and Centre Streets on October 10, 2007. Defendants now move for summary judgment dismissing the complaint on the ground that defendant Peter Molinelli was engaged in the emergency operation of a police vehicle under Vehicle Traffic Law § 114-b and that his behavior did not constitute reckless disregard under the standard set by the Court of Appeals in *Saarinen v. Kerr*, 84 N.Y.2d 494 (1994). For the reasons set forth below, defendants' motion for summary judgment dismissing

the complaint is denied.

The relevant facts are as follows. On October 10, 2007, defendant Peter Molinelli was transporting an unresponsive patient to Beth Israel Hospital in a New York City Fire Department ambulance when he went through a red light on Centre Street at its intersection with Canal Street and collided with the bus driven by the plaintiff. Defendant Peter Molinelli testified that his lights and sirens were engaged at the time of the accident but plaintiff testified that he did not observe any lights and sirens in use by the ambulance at any time before contact.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

The Court of Appeals has held that the relevant standard for assessing liability by the police for injuries sustained by third parties during an emergency operation of a police vehicle is “reckless disregard for the safety of others.” *Saarinen v. Kerr*, 84 N.Y.2d 494 (1994). In *Saarinen*, the court held that the reckless disregard standard requires “evidence 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.” *Saarinen* at 501, quoting Prosser and Keeton, Torts §

34, at 213 (5<sup>th</sup> ed). Courts have held that summary judgment should be denied where there are disputed factual issues as to whether an officer engaged in the emergency operation of a vehicle went through a red light and whether he had sirens on because a reasonable jury could conclude that the officer was reckless in proceeding through an intersection against a red light without having activated his sirens. *See Campbell v. City of Elmira*, 84 N.Y.2d 505 (1994); *see also Lupole v. Romano*, 207 A.D.2d 697, 698 (3<sup>rd</sup> Dept. 2003). The Court of Appeals held in *Campbell v. City of Elmira*, 84 N.Y.2d 505 (1994) that the evidence supported the jury's finding that the driver of a fire truck acted with reckless disregard based on testimony that the driver crossed an intersection against a red light and that the fire truck's sirens were not engaged. In *Lupole v. Romano*, 207 A.D.2d 697, 698 (3<sup>rd</sup> Dept. 2003), the Third Department held that a jury could "reasonably conclude that [an officer in the emergency operation of a police vehicle] was reckless in proceeding through [an] intersection against a red light without having activated the lights and siren." *See also Badalamenti v. City of New York*, 30 A.D.3d 452 (2<sup>nd</sup> Dept. 2006).

As an initial matter, it is undisputed that defendant Peter Molinelli was engaged in an emergency operation of the vehicle as defined by New York State Vehicle and Traffic Law § 114-b as he was transporting a sick or injured person at the time of the accident. However, defendants are not entitled to summary judgment as there is an unresolved issue of fact regarding whether defendant Peter Molinelli acted with reckless disregard. As the courts have held, the driver of a police vehicle engaged in an emergency operation who proceeds through a red light without activating the vehicle's lights and sirens could be considered to have acted with reckless disregard. *See Campbell v. City of Elmira*, 84 N.Y.2d 505 (1994), *supra*. In the instant case, there is an issue of fact regarding whether the lights and sirens on the ambulance were activated

