

Morales v Morales

2010 NY Slip Op 32828(U)

October 7, 2010

Sup Ct, Suffolk County

Docket Number: 08-13382

Judge: John J.J. Jones

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

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PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 3-12-10
ADJ. DATE 6-9-10
Mot. Seq. # 003 - MD

-----X
MIRTHA MORALES, :
 :
 :
 Plaintiff, :
 :
 :
 - against - :
 :
 :
 ANGELA MORALES and THE COUNTY OF :
 SUFFOLK, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 47 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 16 - 28; 31 - 44 ; Replying Affidavits and supporting papers 45 - 46 ; Other plaintiff's memorandum of law 29 - 30; defendant County of Suffolk's memorandum of law - 47 ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendant County of Suffolk seeking summary judgment dismissing plaintiff's complaint against it is denied.

Plaintiff Mirtha Morales commenced this action against defendants Angela Morales and the County of Suffolk to recover damages for injuries allegedly sustained in a motor vehicle accident that occurred at the intersection of Fifth Avenue and Third Avenue in the Town of Islip on May 4, 2007. The accident allegedly happened when a marked police vehicle operated by Suffolk County Police Officer James O'Callaghan struck the passenger side of a vehicle operated by defendant Morales. At the time of the accident Officer James O'Callaghan allegedly was responding to a dispatch call for robbery that occurred at a Hess gas station located at the intersection of Brentwood Road and Suffolk Avenue in the Town of Islip, New York. Plaintiff, who was riding as a passenger in defendant Morales's vehicle, allegedly suffered injuries to her spine and right knee due to the collision. The Court notes that defendant

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Morales commenced a separate action under Index Number 26723/08 against the County of Suffolk and James O'Callaghan for injuries she allegedly sustained in the subject accident. By order of the Court dated January 6, 2009, the two actions arising out of the subject collision were joined for trial.

The County of Suffolk (hereinafter "the County") now moves for summary judgment on the basis that as Officer O'Callaghan was responding to a radio dispatched robbery call at the time of the incident, his actions in operating the emergency vehicle are governed by the reckless disregard standard set forth in Vehicle and Traffic Law §1104. The County asserts that plaintiff is unable to demonstrate that Officer O'Callaghan's operation of his vehicle at the time of the accident rose to the level of reckless disregard for the safety of others. The County, in support of the motion, submits a copy of the pleadings, copies of Mirtha Morales's and Officer O'Callaghan's deposition transcripts, and a copy of Angela Morales's 50-H hearing transcript. The County also submits a copy of the 911 robbery dispatch call, a copy of the Suffolk County Police Department's dispatch paperwork, a copy of the police accident report, and a copy of the Court's order issued January 6, 2009.

Plaintiff and defendant Morales oppose the instant motion on the ground that the County failed to establish that Officer O'Callaghan did not "recklessly disregard the safety of others" in the operation of his emergency vehicle at the time of the subject accident. In the alternative, plaintiff and defendant Morales assert that the evidence submitted in opposition establishes that there are material issues of fact as to whether Officer O'Callaghan breached his duty to refrain from operating his vehicle in a reckless disregard for the safety of others. Plaintiff and defendant Morales, in opposition to the motion, submit a copy of the pleadings, a copy of the police accident report, photographs of defendant Morales's vehicle, and copies of the parties' deposition and 50-H transcripts. Defendant Morales also submits her own affidavit.

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (*see Winegrad v New York Univ. Medical Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910, 841 NYS2d 615 [2007]; *Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 774 NYS2d 792 [2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). The failure of the moving party to make such a prima facie showing requires denial of the motion regardless of the insufficiency of the opposing papers (*see Dykeman v Heht*, 52 AD3d 767, 861 NYS2d 732 [2008]; *Sheppard-Mobley v King*, 10 AD3d 70, 778 NYS2d 98 [2004]; *Celardo v Bell*, 222 AD2d 547, 635 NYS2d 85 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]), and the party in opposition to the motion must put forth sufficient evidentiary proof in admissible form in support of his or her claim that there are material trial issues of fact in existence (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). However, mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue of fact (*see Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]).

Pursuant to Vehicle and Traffic Law § 1104, a police officer operating an “authorized emergency vehicle” has a qualified privilege to disregard certain traffic laws during an emergency operation (*see* Vehicle and Traffic Law § 1104[b](1)-(4); *Criscione v City of New York*, 97 NY2d 152, 736 NYS2d 656 [2001]; *Szczerbiak v Pilat*, 90 NY2d 553, 664 NYS2d 252 [1997]; *Saarinen v Kerr*, 84 NY2d 494, 620 NYS2d 297 [1994]; *Carollo v Martino*, 58 AD3d 792, 873 NYS2d 102 [2009]). An officer’s conduct during such an operation may not form the basis of liability to an injured third party unless the officer failed to exercise due regard for the safety of others or acted with a reckless disregard for the safety of others (*see Szczerbiak v Pilat, supra; Saarinen v Kerr, supra; Gonyea v County of Saratoga*, 23 AD3d 790, 803 NYS2d 764 [2005]; *Turini v County of Suffolk*, 8 AD3d 260, 778 NYS2d 66 [2004]). However, the privileges afforded by Vehicle and Traffic Law § 1104 are circumscribed by subsection (e) of the statute, which provides that “the foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such protect the driver from the consequences of his reckless disregard for the safety of others” (Vehicle and Traffic Law § 1104[e]; *see Saarinen v Kerr, supra*). Thus, the choice of words in the statute regarding the operation of an emergency vehicle evinces a carefully calibrated standard such that to act with a reckless disregard in the operation of an emergency vehicle has been defined as acting with a general intentionality on the part of the wrongdoer or acting with a conscious indifference to the outcome where there is a known or obvious risk that makes it highly probable that harm will follow (*see Campbell v City of Elmira*, 84 NY2d 505, 620 NYS2d 302 [1994]; *Burrell v City of New York*, 49 AD3d 482, 853 NYS2d 598 [2008]; *Puntarich v County of Suffolk*, 47 AD3d 785, 850 NYS2d 182 [2008]; *Mulligan v City of New York*, 245 AD2d 277, 664 NYS2d 484 [1997]; *Powell v City of Mount Vernon*, 228 AD2d 572, 644 NYS2d 766 [1996]). Therefore, “the reckless disregard standard” requires proof that the officer intentionally committed an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow,” (*Badalamenti v City of New York*, 30 AD3d 452, 453, 817 NYS2d 134 [2006]; *see also Daly v County of Westchester*, 63 AD3d 988, 882 NYS2d 209 [2009]), and acted with conscious indifference to the outcome (*see Saarinen v Kerr, supra*).

Plaintiff testified at an examination before trial that she was the front seat passenger in defendant Morales’s vehicle at the time of the subject accident and that the accident occurred after defendant Morales made a left turn onto Fifth Avenue. Plaintiff testified that the turning light on Pine Aire Drive was green when defendant Morales made the left turn onto Fifth Avenue, and that she saw a police vehicle stopped in a Hess gas station with the front of its vehicle facing Fifth Avenue. She testified that she observed the police vehicle begin to move before it struck the front passenger side of defendant Morales’s vehicle and that the police vehicle did not have on any flashing lights or sirens prior to the accident’s occurrence. Plaintiff further testified that the impact to defendant Morales’s vehicle was heavy and caused it to spin out and to the right.

Defendant Morales testified at a 50-H hearing that she was the operator of the vehicle involved in the accident with Officer O’Callaghan’s police vehicle, and that plaintiff was her passenger. Defendant Morales testified that prior to the accident she had picked up plaintiff, who was her son’s girlfriend, from work and was taking her home. She testified that the accident occurred when the police vehicle operated by Officer O’Callaghan quickly exited the Hess gas station, without stopping, right after she had completed a left turn onto Fifth Avenue. She testified that prior to the impact she did not see the police vehicle, and that she did not see or hear any lights or sirens on the police vehicle. She testified that she

turned from the left turning lane of Pine Aire Drive into the right lane of Fifth Avenue, and that she did not change lanes before the accident occurred. She further testified that the impact to her vehicle was hard, and that as a result of the impact plaintiff fell onto her right shoulder and she struck her chest on the steering wheel of the vehicle.

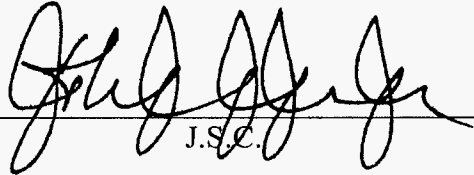
Officer O'Callaghan testified at an examination before trial that he has been a Suffolk County police officer with the Third Precinct for six and a half years, and that he was in the process of responding to a "1015" radio dispatch call regarding a robbery at a Hess gas station when the subject accident occurred on Fifth Avenue. Officer O'Callaghan testified that upon entering the Hess gas station on Fifth Avenue he realized that he had responded to the wrong location and decided to exit from the other side of the gas station and head to the correct Hess gas station on Brentwood Road and Suffolk Avenue. Officer O'Callaghan testified that he "only slowed down" after pulling into the gas station's north entrance and that he continued out its south exit. He testified that his lights and sirens were not activated when he pulled into the gas station, that he "paused" at the exit of the Hess gas station to check for traffic prior to exiting and activating his lights and sirens, and that he then proceeded into the intersection. He testified that he saw defendant Morales's vehicle before the impact, when her vehicle was approximately 20 feet away from his vehicle. Officer O'Callaghan testified that defendant Morales's vehicle was to his left as he began exiting the gas station. He testified that defendant Morales turned into the left lane of Fifth Avenue and then a "few seconds" before the impact occurred she moved her vehicle into the right lane, which did not leave him enough time to react. Officer O'Callaghan further testified that Suffolk County Police Department protocol requires that an officer activate the lights and sirens of the police vehicle when responding to an emergency call, and deactivate them after arriving at the scene.

Initially, the Court notes that the statements contained in the uncertified copies of the MV-104 Police Report and the copy of the Suffolk County dispatch paperwork constitute impermissible hearsay and, therefore, are inadmissible (*see Holloman v City of New York*, 74 AD3d 750, 904 NYS2d 79 [2010]; *Bates v Yasin*, 13 AD3d 474, 788 NYS2d 397 [2004]; *Lacagnino v Gonzalez*, 306 AD2d 250, 760 NYS2d 533 [2003]). However, even if these reports qualified as business records, no foundation was laid for their admissibility (*see CPLR 4518[a]*).

Here, it is undisputed that Officer O'Callaghan was operating an authorized emergency vehicle, and having been dispatched to a robbery at a Hess gas station, was engaged in an emergency operation when the subject collision happened (*see Vehicle and Traffic Law §§ 101, 114(b), 1104(e); Criscione v City of New York, supra; Daly v County of Westchester, supra; Mulholland v Nabisco, Inc.*, 264 AD2d 411, 693 NYS2d 242 [1999]). However, while it has been determined that a police dispatch call is an "emergency operation" under Vehicle and Traffic Law §114(b) (*see Criscione v City of New York, supra*), the County, in the instant matter, has failed to establish its entitlement to judgment as a matter of law that Officer O'Callaghan did not act with a reckless disregard for the safety of others in the operation of his emergency vehicle at the time of the subject accident (*see Badalamenti v City of New York, supra; Lupole v Romano*, 307 AD2d 697, 762 NYS2d 838 [2003]; *Lucia v Town of Crawford*, 294 AD2d 410, 741 NYS2d 913 [2002]; *Gordon v County of Nassau*, 261 AD2d 359, 689 NYS2d 192 [1999]). Officer O'Callaghan testified at his deposition that he "paused" at the exit of the Hess gas station to check for traffic, activated his lights and sirens just before entering the right lane of Fifth Avenue, and that front of his police vehicle struck the right passenger side of defendant Morales's vehicle a "few seconds" later. In

contrast, both defendant Morales and plaintiff testified that the police vehicle did not have on any lights or sirens at the time of the accident. In addition, plaintiff testified that she observed the police vehicle prior to the accident and that it was stopped in the Hess gas station, with its front facing Fifth Avenue, without any flashing lights or sirens activated. Moreover, Officer O'Callaghan testified that protocol requires that an officer respond to an emergency call with his lights and sirens activated, but he testified that he did not have his activated. Consequently, the County's submissions in support of the motion raised questions of fact as to whether Officer O'Callaghan had his emergency sirens and lights activated, and whether he operated his police vehicle in reckless disregard to the safety of others prior to entering the roadway (see *Corallo v Martino*, 58 AD3d 792, 873 NYS2d 102 [2009]; *Burrell v City of New York*, 49 AD3d 482, 853 NYS2d 598 [2008]; *Baines v City of New York*, 269 AD2d 309, 703 NYS2d 463 [2000]). Having determined that the County failed to meet its burden, it is unnecessary to consider whether plaintiff's and defendant Morales's opposition papers were sufficient to raise a triable issue of fact (see *Winegrad v New York Univ. Med. Ctr.*, *supra*; *Mariaca-Olmos v Mizrhy*, 226 AD2d 437, 640 NYS2d 604 [1996]). Accordingly, the County's motion for summary judgment is denied.

Dated: 7 Oct. 2010



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION