Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

Yilheum Park,

Plaintiff,

- against -

The City of New York, The New York City Police Department and Troy V. Prescod,

Defendants.

----------X

Index Number: 14599/09

Motion Date: 12/7/10

Motion Cal. Number: 16

Motion Seq. No.: 2

The following papers numbered 1 to 10 read on this motion by defendants, City of New York, sued herein as the City of New York and New York City Police Department, and Troy V. Prescod (collectively, the City) for summary judgment; and cross-motion by plaintiff for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion-Affirmation-Exhibits.....	5-8
Reply and Affirmation in Opposition.....	9-10

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Motion by the City for summary judgment dismissing the complaint is denied. Cross-motion by plaintiff for summary judgment on the issue of liability is granted.

In order to obtain summary judgment, the movant must make a prima facie showing that it is entitled to said relief, by tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). The City has failed to meet its initial burden. Conversely, plaintiff has established his prima facie entitlement to summary judgment by tendering proof that the subject accident was caused solely by the City's negligence.

Plaintiff allegedly sustained injuries as a result of a motor vehicle accident on May 25, 2008 in which the vehicle he was operating, which was legally parked in the parking lane of Northern Boulevard eastbound approximately 100 feet east of the intersection of Murray Street in Queens County, was struck in the rear by the police vehicle operated by Officer Prescod.

The evidence adduced establishes, and it is undisputed, that Northern Boulevard is a two-way road. With respect to its eastbound direction, it is comprised of three lanes: the left and middle lanes are traffic lanes and the right lane abutting the curb is a parking lane. To the left of the left lane of traffic is a double yellow line dividing the eastbound lanes from the westbound lanes of traffic.

In his deposition, Officer Prescod testified that he was working on "buckle up duty" to issue summonses to motorists not wearing seatbelts. He testified that he was traveling eastbound on Northern Boulevard in the left lane one car length behind a vehicle with a female driver and female passenger and noticed that one of the occupants was not wearing her seatbelt. He first made this observation approximately one to two blocks before the intersection of Murray Street and 30 seconds before the accident. He explained that upon this initial observation, he went across the double yellow line in the lane of opposing traffic and sped up to the driver's side of the other vehicle to look for the seat belt and saw it hanging freely. He then dropped back behind the vehicle, turned into the middle lane and sped up to the passenger side of the vehicle to look for the passenger's seat belt, but could not determine whether the passenger was wearing her seatbelt. His testimony establishes that while he was parallel with the passenger side of the vehicle containing the unbelted motorist, he was looking left with his attention focused on trying to discern whether the passenger in that vehicle was wearing her seatbelt and he was not looking ahead of him and did not notice the double-parked vehicle until after he passed Murray Street, whereupon he noticed the double parked vehicle in front of him for the first time when it was (according to his varying testimony) "a couple" of car lengths in front of him, two to three car lengths or four or five car lengths distant. He testified that his velocity was greater than 20mph but less than 25mph at that moment. In an attempt to avoid hitting the double-parked vehicle, he pressed on his brakes and swerved to the right, collided into the rear of plaintiff's parked vehicle, mounted the sidewalk and crashed into a restaurant.

It is well established that a driver approaching another vehicle from the rear has a duty to maintain a reasonably safe rate

of speed and control over his vehicle and to exercise reasonable care to avoid colliding with the other vehicle (see Chepel v Meyers, 306 AD2d 235 [2nd Dept]; Power v Hupart, 260 AD2d 458 [2nd Dept]). A driver also has a common-law duty to see that which he should have seen through the proper use of his senses (see Domanova v. State, 41 AD 3d 633 [2nd Dept 2007]). Moreover, a driver has a duty to maintain a safe distance from the vehicle ahead (see Filippazzo v Santiago , 277 AD2d 419 [2 nd Dept]). A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of liability with respect to the driver of the rearmost vehicle, absent a non-negligent explanation (see Chepel v Meyers, supra; Mohan v Puthumana, 302 AD2d 437 [2 nd Dept]; Filippazzo v Santiago, supra).

Officer Prescod testified that the double-parked vehicle was stationary when he first noticed it. Moreover, the accident occurred at 11:54 A.M. on a sunny day. The City does not offer any non-negligent explanation for Officer Prescod's rear-ending of plaintiff's parked vehicle and neither raises an issue of fact concerning nor even alleges that either plaintiff or the operator of the double-parked vehicle were in any way comparatively negligent. Indeed, the uncontested evidence establishes that the accident occurred solely as a result of Officer Prescod's carelessness in not looking where he was driving.

The City's sole contention in support of its motion and in opposition to plaintiff's cross-motion is that it is immune from liability pursuant to §1104 of the Vehicle and Traffic Law (VTL) because Officer Prescod was responding to an emergency situation and did not act recklessly. The City's argument is without merit.

Pursuant to Vehicle and Traffic Law § 1104(b) and (c) and as defined in Vehicle and Traffic Law §§ 101 and 114-b, an authorized emergency vehicle involved in an emergency operation may disregard certain traffic laws if safety precautions are taken (see, Criscione v City of New York, 97 NY2d 152 [2001]; Baines v City of New York, 269 AD2d 309 [1st Dept 2000]). A driver of an authorized emergency vehicle is not relieved of the obligation to drive with "due regard for the safety of all persons" nor does the statute protect reckless conduct (Vehicle and Traffic Law § 1104[e]). Thus, a driver of an authorized emergency vehicle engaged in an emergency operation will be provided with a qualified exemption from civil liability for injuries to a third party unless he "acted in reckless disregard for the safety of others" (Saarinen v Kerr, 85 NY2d 494, 501 [1994]).

Officer Prescod was not engaged in an emergency operation at the time of the accident and, therefore, VTL 1104(b) is inapplicable to shield him and the City from liability for his

negligent conduct.

The City contends that Officer Prescod was engaged in an emergency operation by virtue of pursuing a vehicle for a violation of the seatbelt law. The Court notes that the pursuit of a criminal suspect or violator of the law by a police officer constitutes an emergency operation (see VTL 114-b) and that such action cannot form the basis of civil liability on the part of the police to a third person unless the police officer involved acted recklessly (see Saarinen v Kerr, 85 NY2d 494, 501 [1994]; Dorsey v. City of Poughkeepsie, 275 AD 2d 386 [2nd Dept 2000]; Young v. Village of Lynbrook, 234 AD 2d 455 [2nd Dept 1996]). However, the record, on this motion and cross-motion, establishes that Officer Prescod was not "in pursuit" of the other vehicle. The other vehicle was not fleeing from him or attempting to evade capture. He was not trying to pull over the vehicle at the time of the accident and had not signaled to the driver of that vehicle to pull over. Although he testified that it was his intention to pull behind the vehicle to pull it over, he had not yet done so before the time of the collision. He merely drove next to the vehicle to try to see whether the passenger was wearing her seatbelt. It is clear, therefore, that Officer Prescod was not engaged in an emergency operation under the standards set forth in Vehicle and Traffic Law § 1104 and the applicable case law.

Even if, arguendo, Officer Prescod's actions could be interpreted as constituting an emergency activity, VTL 1104 is still inapplicable to shield him and the City from liability. VTL 1104(b) authorizes the driver of an emergency vehicle engaged in an emergency operation to disregard no parking, standing or stopping signs, traffic control devices such as traffic lights or stop signs, maximum speed limits and regulations governing directions of movement or turning in specified directions. There is no issue in this case concerning a violation of any of these traffic regulations. The accident was not the result of speeding, going through a red light or stop sign or making an illegal turn or proceeding in the wrong direction. Moreover, there is no issue regarding Officer Prescod being issued a summons for illegal parking, stopping or standing. Rather, the accident was caused solely by Officer Prescod's carelessness in not looking where he was driving, for which negligence no qualified immunity attaches under VTL 1104.

Since VTL 1104 is inapplicable to shield Officer Prescod and the City from liability, the Court need not reach, and does not address, the issue of whether Officer Prescod acted recklessly.

Accordingly, the City's motion is denied and plaintiff's cross-motion is granted.

Dated: January 6, 2011

KEVIN J. KERRIGAN, J.S.C.