

**Constas v Desir**

2011 NY Slip Op 31554(U)

June 7, 2011

Sup Ct, NY County

Docket Number: 109789/09

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

CYNTHIA S. KERN  
J.S.C.

PRESENT: \_\_\_\_\_

PART 52

Index Number : 109789/2009

CONSTAS, LUKE

INDEX NO. 109 789/09

vs

DESIR, JACQUES

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

Sequence Number : 001

MOTION SEQ. NO. 01

DISMISS

Tl

Ni

\_\_\_\_\_ | No(s). \_\_\_\_\_

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

| No(s). \_\_\_\_\_

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

| No(s). \_\_\_\_\_

Upon the foregoing papers, It is ordered that this motion is *decided in accordance with the annexed decision.*

**FILED**

JUN 10 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 6/7/11

e.g. J.S.C.  
CYNTHIA S. KERN

- 1. CHECK ONE: .....  CASE DISPOSED  ~~NON-FINAL DISPOSITION~~
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

*001*

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

-----X  
LUKE CONSTAS AND PALOMA DIAZ,  
Plaintiffs,

Index No. 109789/09

-against-

**DECISION/ORDER**

JACQUES DESIR, YASIR JAMSHAD, THE CITY  
OF NEW YORK AND THE NEW YORK CITY  
POLICE DEPARTMENT,  
Defendants.

**FILED**

**JUN 10 2011**

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

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review 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

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Plaintiff commenced the present action to recover damages for personal injuries they sustained when they were passengers in a taxi cab which collided with an NYPD van driven by police officer David Gonzalez at the intersection of Madison Avenue and 108<sup>th</sup> Street.

Defendants the City of New York and the New York City Police Department now move for summary judgment dismissing the complaint on the ground that police officer David Gonzalez 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 November 18, 2005, police officer David Gonzalez was responding to a radio call for an officer requesting assistance in stopping a stolen vehicle moving north on Madison Avenue. He testified at his deposition that when he received this call, he activated his lights and sirens and proceeded North on Madison Avenue. He testified that at 108<sup>th</sup> street he slowed down and the taxi cab also slowed down but that as he proceeded into the intersection the taxi cab speeded up and the two vehicles collided. He did not remember what color the traffic light was at the time he proceeded through the light. The plaintiff Ms. Diaz testified that she did hear the sirens and that the light was red when the taxi driver went through it. The plaintiff Mr. Conostas testified that the light was red when the taxi driver went through it. He also testified that he did not hear any sirens and that he did not see any flashing lights. The driver of the taxi testified that the traffic light was green when he went through it. He also testified that he did not hear any sirens and did not recall seeing any emergency lights on the vehicle and does not know if the lights were on.

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).

