

**Almas v Loza**

2011 NY Slip Op 32721(U)

October 20, 2011

Supreme Court, New York County

Docket Number: 112379/07

Judge: Cynthia S. Kern

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

-----X  
MOHAMMAD ALMAS,

Plaintiff,

Index No. 117458/2006

-against-

P.O. FERNANDO LOZA, NEW YORK CITY POLICE  
DEPARTMENT and THE CITY OF NEW YORK,

Defendants.

-----X  
JOSEPH SOSA,

Index No. 111840/2007

Plaintiff,

-against-

P.O. FERNANDO LOZA, THE CITY OF NEW YORK  
THE NEW YORK CITY POLICE DEPARTMENT AND  
MOHAMMAD ALMAS,

Defendants.

-----X  
EDGAR FRANTZ,

Index No. 112379/07

Plaintiff,

-against-

MOHAMMAD ALMAS, P.O. FERNANDO LOZA,  
NEW YORK CITY POLICE DEPARTMENT and  
THE CITY OF NEW YORK,

Defendants.

-----X

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

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.....	<u>1,2,3</u>
Answering Affidavits and Cross Motion.....	<u>4,5,6</u>
Replying Affidavits.....	<u>7,8,9</u>
Exhibits.....	<u>10</u>

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Plaintiffs commenced their respective actions to recover damages they allegedly sustained resulting from an automobile collision involving a New York City Police Department (“NYPD”) vehicle. Plaintiffs Joseph Sosa (“Sosa”) and Edgar Frantz (“Frantz”) move for an order striking the City and Police Officer Fernando Loza’s (“Loza”) answer. Frantz also moves for a special trial preference as he has reached seventy years of age. The City of New York (the “City”) cross-moves for an order granting summary judgment dismissing all of Frantz and Sosa’s claims against the City and Loza. The City also moves for summary judgment dismissing plaintiff Mohammad Almas’ claims against the City and Loza. Finally, Loza seeks dismissal of all individual claims against him. These motions have been consolidated for disposition. The court grants the City’s motion to dismiss the individual claims against defendant Loza, denies the City’s motion and cross-motions against plaintiffs for summary judgment and denies Sosa and Frantz’s motions to strike the City and Loza’s answer for the reasons set forth below.

The relevant facts are as follows. On July 10, 2006 at around 11:00 p.m., an NYPD vehicle driven by NYPD Officer Loza was driving northbound on Central Park West. Plaintiff Joseph Sosa, also an NYPD Officer was in the passenger seat of the vehicle. Loza and Sosa were traveling as back-up assistance in response to an emergency call that came over the radio. Although the testimony is conflicting regarding the circumstances, it is undisputed that the

NYPD vehicle driven by Loza ran a red light at the intersection of Central Park West and 97<sup>th</sup> Street. When Loza ran the red light, his vehicle was struck by a van heading westbound on 97<sup>th</sup> Street driven by Almas. Frantz was a passenger in the van driven by Almas. According to Loza, he engaged his lights and sirens, pulled up to the intersection of Central Park West and 97<sup>th</sup> Street and came to a complete stop. He testified that he looked to his left for traffic and that Officer Sosa informed him that there was no traffic coming from the right. He then proceeded into the intersection at 5-10 miles per hour and was struck by Almas. However, Sosa testified that Loza was traveling at around 45 miles per hour and an accident reconstruction expert attested on behalf of Sosa that Loza was traveling at between 55-60 miles per hour. Moreover, according to Almas, Frantz and Darrell Keister, another passenger in the vehicle driven by Almas who is not a party to this action, none of them heard any sirens or saw any lights. In addition, Sara Olson and Rick Mangi, two non-party witnesses who witnessed the accident also testified that the NYPD vehicle involved in the accident appeared to be driving around 40 miles per hour, did not slow down when it approached the intersection and did not have its lights or sirens 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.*

When a police officer driving a police vehicle involved in an emergency operation engages in specific conduct exempted by the Vehicle and Traffic Law (“VTL”) § 1104 (b), any injury causing conduct of such a driver is governed by the reckless disregard standard instead of the negligence standard. The City argues that the accident at issue in the instant action is governed by the reckless disregard standard and that this court should grant summary judgment against plaintiff dismissing their claims against the City because the conduct of Officer Loza did not amount to reckless disregard. Plaintiff Sosa argues that the ordinary negligence standard should apply to the instant action.

The court denies the City’s motion for summary judgment against plaintiffs for the reasons set forth below. The court will not reach the issue of whether the reckless disregard or the ordinary negligence standard applies because there remain triable issues of fact under either standard of care based on the affirmations in opposition to the City’s motion. The City, as the movant, presented the testimonial evidence of Officer Loza who testified that he went through the light at 5-10 miles per hour with the sirens and lights on. He also testified that although he did not look to his right before proceeding through the intersection, he relied on Officer Sosa who told him that traffic was clear on the right. However, the testimonial evidence presented by plaintiffs is in direct dispute with Loza’s version of the facts. In this regard, Almas, Frantz and Keister all testified that they did not see any lights or hear any sirens prior to the accident. Moreover, Sosa testified that Loza was traveling at around 45 miles per hour and Sosa’s accident reconstruction expert attested that Loza was likely traveling between 55-60 miles per hour. Finally, Frantz also produced the affidavits of two non-party witnesses Olson and Mangi who attested that the police vehicle did not have its lights or sirens on, did not slow down at the

intersection, and appeared to be traveling around 40 miles per hour. If a jury were to believe a version of the facts most favorable to plaintiffs – that Officer Loza sped through a red light at 60 mph without looking at both directions without his sirens or lights on, a jury could find that Officer Loza’s conduct amounted to reckless disregard. As the reckless disregard standard requires a higher burden of proof than negligence, it follows that a jury could also find that Officer Loza’s conduct amounted to negligence. Accordingly, the court denies the City’s motion and cross-motions for summary judgment against all plaintiffs.

The court grants defendant Loza’s motion to dismiss all claims against him on the ground that he was not named on the notice of claim. “General Municipal Law § 50-c makes unauthorized an action against individuals who have not been named in a notice of claim...” *Tannenbaum v City of New York*, 30 A.D.3d 357 (1<sup>st</sup> Dept 2006). In the present case, plaintiffs did not name P.O. Fernando Loza in the notice of claim as an individual defendant. They only named the City of New York. Accordingly, plaintiffs’ individual claims against defendant Loza are dismissed in their entirety.

The court will now turn to Sosa and Frantz’s motions to strike the City’s answer. On September 15, 2010 and September 23, 2010, the court issued two orders directing the City to turn over various documents to plaintiffs. Sosa and Frantz move to strike the City’s answer on the ground that the City has failed to turned over the documents ordered to be disclosed in those court orders.

“[I]t is well-settled that the drastic remedy of striking a party’s pleading pursuant to CPLR 3126 for failure to comply with a discovery order is appropriate only where the moving party conclusively demonstrates that the non-disclosure was willful, contumacious or due to bad

faith.” *McGilvery v. New York City Tr. Auth.*, 213 A.D.2d 322, 324 (1<sup>st</sup> Dept 1995). Willful and contumacious behavior can be inferred by a failure to comply with court orders, in the absence of adequate excuses. *See Johnson v. City of New York*, 188 A.D.2d 302 (1<sup>st</sup> Dept 1992). However, the First Department has held that “[a]ctions should, wherever possible, be resolved on the merits, and, therefore, litigants who have not replied expeditiously to notices of discovery and inspection should be afforded reasonable latitude before imposition of the harshest available penalty, the striking of pleadings.” *Bassett v. Bando Sangsa Co., Ltd.*, 103 A.D.2d 728 (1<sup>st</sup> Dept 1984).

In the instant action, plaintiff’s motion for an order striking the City’s answer is denied as plaintiff has not demonstrated that the City’s failure to comply with discovery was willful and contumacious. The City alleges that it has complied with all discovery requests. It has attached to its papers some of the documents previously ordered to be produced and states that some of the other documents do not exist. To the extent that the City has not produced the documents addressed in the discovery orders dated September 15, 2010 and September 23, 2010, the City is ordered to turn over all documents requested in those orders to the extent they exist within 30 days of the filing of this Decision. If any of the documents do not exist, the City must produce attorney affirmations attesting to that effect within 30 days of the filing of this Decision. If the City fails to comply with this order within 30 days of the filing of this Decision, the City’s answer will be deemed stricken.

Accordingly, the Loza’s motion to dismiss all claims against him is granted, the City’s motion and cross-motions for summary judgment against it are denied and Frantz and Sosa’s motions to strike the City and Loza’s answers are denied and Frantz’s motion for a special trial

preference pursuant to CPLR § 3403 (a) (4) on the ground that he has attained the age of 70 is granted without opposition. The clerk is directed to mark all papers in this case to reflect the special trial preference and to expedite the trial of this matter. This constitutes the decision and order of the court.

Dated: 10/20/11

Enter:           CK            
          J.S.C.

**CYNTHIA S. KERN**  
J.S.C.

**FILED**  
OCT 24 2011

CLERK OF COURT  
JULIA M. HARRIS  
100 NASSAU ST. 10TH FL.  
NEW YORK, NY 10038  
TEL: 212 312 3900  
WWW.COURTS.NY.GOV