

Molina v Vollmers
2011 NY Slip Op 33565(U)
December 30, 2011
Sup Ct, Suffolk County
Docket Number: 04-15093
Judge: W. Gerard Asher
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SHORT FORM ORDER

COPY

INDEX NO. 04-15093
CAL. NO. 10-01530MVSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY**PRESENT:**Hon. W. GERARD ASHER
Justice of the Supreme CourtMOTION DATE 1-18-11
ADJ. DATE 9-15-11
Mot. Seq. # 007 - MGMAURICIO MOLINA, an infant over the age of
14 years, by his mother and natural guardian
ALEXANDRA LORES and ALEXANDRA
LORES, individually,

Plaintiffs,

- against -

GREGORY H. VOLLMERS, WERNER
VOLLMERS, VILLAGE OF QUOGUE,
VILLAGE OF QUOGUE POLICE
DEPARTMENT, TOWN OF SOUTHAMPTON,
and COUNTY OF SUFFOLK,

Defendants.

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Upon the following papers numbered 1 to 19 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (007) 1-11; Notice of Cross Motion and supporting papers; Answering Affidavits and supporting papers 12-18; Replying Affidavits and supporting papers ; Other 19 Village's Mem.Law; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that motion (007) by the defendants Village of Quogue and Village of Quogue Police Department pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint as asserted against them as barred by VTL §1104 and 114-b, is granted.



In this negligence action, the infant plaintiff, Mauricio Molina, and his mother and natural guardian, Alexandra Lores, seek damages personally and derivatively for injuries sustained by the then infant plaintiff, arising out of an accident which occurred on May 21, 2003, at the intersection of Route 104 and Woodleigh Place, East Quogue, New York. It is claimed that a police officer detained a vehicle and was issuing a summons to the driver of that car, and in doing so, obscured the infant plaintiff's view at a stop sign at the intersection, causing the infant plaintiff's vehicle to be struck by the vehicle operated by the defendant Gregory H. Vollmers and owned by Werner Vollmers, when the infant plaintiff made a left hand turn from Woodleigh Place onto County Road 104 and was struck by the Vollmers vehicle traveling north on County Road 104.

Motion (007) had been previously denied as untimely pursuant to the order dated August 8, 2011 (Asher, J). However, by order dated September 14, 2011 (Asher, J), that August 8, 2011 order was vacated on the basis the defendants' time to file an application for summary judgment was extended to on or before January 18, 2012 pursuant to an order dated November 3, 2010 (Tanenbaum, J). Therefore, motion (007) is deemed to have been timely served and is decided as follows.

The Village of Quogue and the Village of Quogue Police Department seek summary judgment on the bases that the Village's conduct was not the proximate cause of the accident and the plaintiff's injuries, and that they are immune from liability pursuant to Vehicle and Traffic Law §§1104 and 114-b.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of motion (007), the Village defendants have submitted an attorney's affirmation; copies of the pleadings; the deposition transcripts of Mauricio Molina dated August 6, 2007, Michael Fruin dated April 18, 2006; Manual for Police in New York State; a copy of the MV 104 Police Accident Report; and photographs. In opposing this motion, the plaintiffs have submitted an attorney's affirmation; copies of the deposition transcripts of Mauricio Molina dated July 27, 2005, Gregory Vollmers dated July 27, 2005, Michael Fruin dated April 18, 2006, Thomas Olcott dated August 7, 2007, Raymond O'Brien dated March 28, 2008, and P.O. Robert Brown dated July 13, 2006; and photographs.

At his July 27, 2005 examination before trial, Mauricio Molina testified that he did not have a driver's license on the date of the accident, that his learner's permit did not permit him to operate a vehicle without an adult in the vehicle and that he was operating the vehicle without an adult or licensed driver in the car. He was traveling on Woodleigh Place, and although it was a rainy day, it was not raining at the time of the accident. He stated the shoulder on County Road 104 was seven feet wide. Before he reached the intersection with County Road 104, he saw a blue van parked on the shoulder to his left on County Road 104 with its tires over the white shoulder line. When he reached the stop sign, he stopped for approximately five seconds. He stated that as he looked to his left, he could not see; so he kept inching up, and did not bring his vehicle to a stop before the accident occurred. He could not remember how far into the intersection he moved before the impact. He did not know how much time lapsed from when he stopped at the stop sign until the impact occurred, as he did not recall what happened, and did not even know that he had an accident. He did not know if his foot was on the brake as he moved forward, whether he was accelerating, what direction his vehicle was facing when the impact occurred, or, if at the time of impact, any part of his vehicle was still on Woodleigh Place, or if he had reached the double yellow lines on County Road 104. Just prior to the impact, he saw the front grill of the Cadillac in the right lane, but he did not know how much time lapsed from when he saw the Cadillac until the impact. He then stated that the rear of his vehicle was moving in the travel lane on County Road 104 at the time he first saw the other vehicle. He did not sound his horn as he inched forward. He heard no skidding of tires or the sound of a horn prior to the impact, and saw no signal lights on the other vehicle prior to impact.

Mauricio Molina, whose date of birth is June 3, 1986, also testified on August 6, 2007 to the effect that he was involved in an motor vehicle accident on May 21, 2003 at County Road 104 and Woodleigh Place, a T-intersection, while operating a Dodge Avenger, owned by his step-father Michael Fuchs. He did not have permission to use the car and was alone in the vehicle at the time of the accident. On the date of the accident, he drove the vehicle for about 25 seconds before the accident occurred about 200 feet from his home. He had traveled from his home on Woodleigh until he reached the stop sign on Woodleigh Place controlling traffic entering onto or across County Road 104 from Woodleigh. He was involved in the accident with a vehicle traveling north on County Road 104 to his left. Traffic on County Road 104 did not have a stop sign or traffic control device. He stated that he stopped for about ten seconds at the stop sign. When he looked to his right, he could see no traffic coming for about one hundred feet. When he looked to his left, he could not see the traffic as there was a stopped, unmarked, white police car which he had seen on previous occasions, and a blue construction vehicle on the shoulder of County Road 104, by the corner, blocking his view. He saw those vehicles from his house when he backed out of the driveway. The construction van was about four feet back from the intersection, and the police car was on the shoulder about a foot behind the van. Molina testified that he began inching up, so that the front of his car was on County Road 104 and he could make a left turn onto County Road 104. A split second passed from when he saw the other car involved in the accident, until the accident occurred. He continued that his vehicle was stopped, facing westbound, at the time of the impact, and the other vehicle was northbound on County Road 104.

Gregory Vollmers testified to the effect that he was involved in the motor vehicle accident on May 21, 2003 on County Road 104, northbound, and the intersection of Woodleigh Place, while operating his father's vehicle, a 1998 Cadillac Deville. As he traveled on County Road 104, there was a

shoulder to his right. The road was straight in the area of the accident. Traffic was normal. There were no vehicles traveling ahead of him. He was traveling about 35 to 40 mph at the moment of impact. When he was approximately 150 feet from the intersection with Woodleigh, he could see a silver vehicle stopped at the intersection, which had a stop sign controlling traffic entering onto County Road 104. Approximately three seconds later, he was involved in the accident with that vehicle. About two seconds before the impact, he saw the other vehicle move into the intersection. He applied his brakes a second before the impact and turned his vehicle to the left to avoid the collision with the plaintiff's vehicle which was moving straight, trying to make a left turn. He felt some skidding action. The front of his vehicle struck the drivers side door of the plaintiff's vehicle. Prior to the accident, he did not observe any police cars in the vicinity, although he saw a van on the shoulder of 104 set back a little from Woodleigh. He did not see any flashing lights in the area of the van. He could not remember if there was another vehicle behind the van.

Detective Michael Fruin testified that he was a detective with the Quogue police for approximately two and a half years, and had been a police officer since 1992, having trained at the Suffolk County Police Academy. He received hands on training regarding traffic stops. He was also provided with a New York Manual for Police. He prepared a handwritten Quogue Village Police Department Activity Report after the accident. On the date of the accident, he was assigned to a seat belt enforcement tour. He was using a white, unmarked police unit vehicle with no overhead lights. It did have, however, emergency lights, flashing lights, red flashing grill lights, a front windshield mounted flashing light, and flashing lights on the rear deck. All the flashing lights except for the headlights' red emergency lights were on. The speed limit at the 104 intersection was 40 mph. He issued one ticket at the intersection of County Road 104 and Woodleigh Place, south of Woodleigh Place, to a vehicle traveling east. He pulled that vehicle over by activating his emergency lights. He stopped, facing south on County Road 104, about twelve feet behind the vehicle on the north west corner of the intersection. He stated that his vehicle was slightly fanned, about a foot, which meant that his vehicle protruded into the road a little bit to afford officer protection. The standard fanning is just over a foot. His vehicle was on the shoulder, almost on the white line. The rear bumper of his vehicle was about 150 feet from the intersection with Woodleigh, and the front bumper of his vehicle was about 133 feet from the southeast corner of the intersection. He stopped a 1982 Chevy pickup truck which was about 17 feet long, on the shoulder, with the left two tires from the front to the rear on the paved area, and the right front and rear tires on the dirt, two thirds on the grassy area. The shoulder consisted of approximately six feet asphalt and four feet dirt. There was a line of hedges about four to six feet tall in the residential area to the right of the pickup truck. As he sat in his patrol car writing the summons, the pickup obscured his vision of the intersection of Woodleigh Place, but he heard a short two-second skid and a loud impact a couple feet in front of the truck. He looked up and saw the two vehicles connected, traveling to the west wooded portion of the roadway for a distance of about four feet. He stated it was a T-bone impact. A maroon Cadillac was traveling north, and a black small to mid-sized vehicle appeared to be traveling west. He saw red brake lights on the rear of the Cadillac. There was a stop sign on Woodleigh Place governing traffic coming from Woodleigh Place at this T-intersection. He did not investigate the accident scene as it was in the jurisdiction of the Southampton Police Department.

Robert Brown testified that he has been a police officer with the Town of Southampton over eighteen years, and prior to that, he was a safety control officer as a civilian employee who performed

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traffic duties, issued traffic tickets and directed traffic. He attended the Suffolk County Police Academy for six months in 1998. He is also a New York State firearms instructor, a DCJS certified intoxalyzer technician, and is also certified in the use of radar. He received a radio transmission from Police Officer Michael Fruin of the Quogue Village Police Department advising that there was an accident in his jurisdiction on County Road 104, at its intersection with Woodleigh Place, East Quogue, Town of Southampton. He was about a mile from the accident and responded within minutes.

Officer Brown testified that he spoke with the plaintiff who told him that he stopped on Woodleigh Place at the intersection, he did not see any traffic coming, so he pulled out onto County Road 104 and his vehicle was struck by the Cadillac. When he spoke to Molina later at the hospital, Molina told him that he thought his view had been obstructed by two police cars and a vehicle after he stopped at the stop sign. When he asked Molina if he inched out to see if there were cars proceeding on County Road 104, he stated no, that he had just simply pulled out. Officer Brown stated he spoke to the operator of the Cadillac who advised him that he was northbound on County Road 104 when a vehicle pulled into his path from Woodleigh Place. He was unable to avoid it, and he crashed into the side of it. Officer Brown noted that there were skid marks from the Cadillac "not far from where the Cadillac was." He indicated that the road was level at the intersection. Officer Brown further testified that he issued two summonses to Molina, one for failing to yield the right of way to the other vehicle, and the other was for driving without a license.

Raymond O'Brien testified to the extent that prior to retiring, he was a lieutenant commanding officer of the Pistol Licensing Bureau of the Police Department. He had no independent recollection of Officer Fruin. When he taught traffic stops at the Suffolk County Police Academy, he used the Manual for Police. There was a safety protocol he taught concerning pulling over a car during a traffic stop. He broke the instructions into phases. Safety was an issue throughout the different phases. His lesson plan was pretty much the standard. He testified about an officer's observation of traffic prior to making a traffic stop, and how to position the police vehicle. He stated that when an officer observes a violation and follows that vehicle, the officer is instructed how the vehicle is to be positioned with respect to the other party's vehicle. Safety for the officer and all parties is of concern. When it comes to positioning a vehicle, he uses the term "offset" as opposed to "fanning." He described offset as the position of the police vehicle to the rear and to the left, or to the street side, of the vehicle which was stopped. He trained the officers to move their vehicle to about three feet to the left of the stopped vehicle, but did not train officers to offset their vehicle at an angle. The purpose of the offset is to shield the officer from traffic that is coming from behind as the position creates a safety zone for the officer to move between his vehicle and the vehicle that has been stopped. The officer is also instructed to train the front wheels of his vehicle to the right to prevent his vehicle from rolling into traffic. The three feet offset is also dependent upon the road circumstances, such as the width of the road, and whether there is a shoulder or an incline. Ideally, the patrol vehicle is not in the moving lane of traffic. He instructed officers to park twelve to fifteen feet behind the stopped vehicle. He stated that making a stop at or near an intersection is dynamic, and, accordingly, there is no set number of feet to stop from an intersection. . A safe area would not be in the middle of an intersection. O'Brien continued that it is preferred that the officer make the stop in an area which is as visible as possible, and does not to interfere with traffic.

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The operator of an authorized emergency vehicle who is engaged in an emergency operation as defined by VTL § 114-b, is afforded the benefits of VTL § 1104, including protection from civil liability unless engaged in acts of reckless disregard (*Gonyea v County of Saratoga*, 23 AD3d 790, 803 NYS2d 764 [3d Dept 2005]). Reckless disregard, which removes the protection from liability of an authorized emergency vehicle engaged in an emergency operation under VTL § 1104, is described as the conscious or intentional doing of an act of an unreasonable character in disregard of a known or obvious risk so great as to make it highly probable that harm would follow, and done with conscious indifference to the outcome (*see, Saarinen v Kerr*, 84 NY2d 494, 620 NYS2d 297 [1994]; *Gonyea v County of Saratoga*, supra; *Hemingway v City of New York*, 81 AD3d 595, 916 NYS2d 167 [2d Dept 2011]; *Puntarich v County of Suffolk*, 47 AD3d 785, 850 NYS2d 182 [2d Dept 2008]). The reckless disregard test, which requires a showing of more than a momentary judgment lapse, is better suited to the legislative goal of encouraging emergency personnel to act swiftly and resolutely while at the same time protecting the public's safety to the extent practicable (*Rusho v State of New York*, 24 Misc3d 752, 878 NYS2d 855 [Ct of Claims 2009]). The manner in which a police officer operates his or her vehicle in responding to an emergency may form the basis of civil liability to an injured third party if the officer acts in reckless disregard for the safety of others (*Krulik v County of Suffolk* 62 AD3d 669, 878 NYS2d 436 [2d Dept 2009]). Reckless disregard for the safety of others requires more than a showing of lack of due care (*Saarien v Kerr*, 84 NY2d 494, 620 NYS2d 297 [1994]). Here, it cannot be said that the officer took a risk by parking his vehicle on the shoulder and having the other vehicle park on the shoulder during the stop, and that such action was unreasonable or in reckless disregard of the safety of others (*see, Szczerbiak v Coadministrators of the Estate of Eric Szczerbiak*, 90 NY2d 553, 664 NYS2d 252 [1997]).

Based upon the foregoing, it is determined that the Village of Quogue and the Village of Quogue Police Department have demonstrated their entitlement to summary judgment as a matter of law by establishing that the action against them is precluded by Vehicle and Traffic Laws § 1104 and § 114-b. It is determined that Officer Fruin was involved in a traffic stop, pursuing an actual or suspected violator of the law, which is deemed an emergency operation, and that Officer Fruin did not act, or have the vehicles stopped, in an unreasonable manner in reckless disregard of an obvious risk so great as to make it highly probable that harm would follow. It is further determined that Officer Fruin did not act with conscious indifference to an outcome. Thus, civil liability does not attach and the moving defendants are afforded the benefits of VTL § 1104 and § 114-b.

In opposition, the plaintiffs have failed to raise a triable issue of fact to preclude summary judgment from being granted to the moving defendants. Although the plaintiffs argue that there are factual issues concerning, inter alia, how far from the intersection the vehicles were parked, which Molina claims obstructed his view, it was the plaintiff who pulled into the intersection from the stop sign proximately causing the accident. There has been no showing, or factual issue raised, supported by evidentiary submissions rather than speculation, that the officer failed to use due care, or was inadequately trained, or departed from the procedure for safe stops, proximately relating to the accident, or that it was the officer's conduct rather than the plaintiff's entering onto the roadway at the stop sign that was the proximate cause of the accident (*see, Saarinen v Kerr*, supra). Thus, it is determined as a matter of law that the moving defendants are afforded the benefits of VTL §§ 1104 and 114-b, and bear no civil liability for the occurrence.

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Accordingly, motion (007) by defendants Village of Quogue and Village of Quogue Police Department for summary judgment in their favor is granted, and the complaint as asserted against them is dismissed.

Dated: Dec. 30, 2011

W. Grand Arle
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION