

Amaefule v City of New York

2011 NY Slip Op 34143(U)

November 7, 2011

Sup Ct, Bronx County

Docket Number: 304059/09

Judge: Larry S. Schachner

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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

Amaefule, Rafiah

Index No. 304059/09

-against-

Hon. LARRY S. SCHACHNER
Justice.

City of New York

The following papers numbered 1 to 6 Read on this motion DISMISSAL
Noticed on June 3, 2011 and duly submitted as No. 10 on the Motion Calendar of September 8, 2011

	PAPERS NUMBERED	
<u>Notice of Cross Motion</u>		
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	<u>1-2</u>	
Answering Affidavit and Exhibits <u>Supp Aff in Support</u>	<u>3-4</u>	
Replying Affidavit and Exhibits	<u>5-6</u>	
<u>Affidavits and Exhibits</u>		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in accordance
with the annexed memorandum decision.

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

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Dated: 11/7/11

Hon. [Signature]
J.S.C.
LARRY S. SCHACHNER

submits, among other things, the deposition testimony of PO Rodriguez and Eric Dorcean, the assistant supervising supervisor of the New York City Police Department (NYPD) Fleet Service Division, and the Sprint report of the robbery call police officers were responding to at the time of the subject accident.

Plaintiff cross moves for partial summary judgment on the issue of liability for this rear end motor vehicle accident on the grounds that the reckless standard of conduct is inapplicable and ordinary principles of negligence are applicable. She argues that under the ordinary negligence standard, defendants are responsible for this rear end collision as they have failed to offer a non-negligent explanation for the accident. In opposition to the City's motion and in support of her cross motion plaintiff includes her 50-h hearing testimony and her deposition testimony.

The reckless disregard standard of care in Vehicle and Traffic Law (VTL) § 1104 (e) is limited to accidents that are caused by exercise of a privilege enumerated in VTL § 1104 (b). *Kabir v County of Monroe*, 16 NY3d 217 (2011). VTL § 1104 (b) "*lists certain privileges accorded drivers of authorized emergency vehicles when responding to an emergency call or when in pursuit of an actual or suspected violator of the law.*" *id.* at 226 (emphasis supplied). These privileges include parking in prohibited places, passing stop signs or signals, exceeding speed limits and disregarding direction or turning restrictions, but the drivers in all cases must have due regard for the safety of others. *id.* In addition, "[t]he special privileges are granted, except in the case of police vehicles, only when the driver... is giving such audible signals as may be reasonably necessary and when his vehicle is displaying the proper warning lights." *id.* (citation omitted). "The exemption given to police vehicles is required because they may need to

approach suspected criminals without giving advance notice..." *id.* at 227. Thus, "the reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)." *id.* at 220. Moreover, "[a]ny other injury-causing conduct of such a driver is governed by the principles of ordinary negligence." *id.*

PO Rodriguez claims that he was operating his squad car in an "emergency operation" in response to a radio call of a purse snatching. However, there are inconsistencies in the record before the court as to whether or not the police vehicle was involved in an "emergency operation" as the Sprint report reveals that the purse snatcher may have been apprehended prior to the subject motor vehicle accident. This contrasts with PO Rodriguez's EBT testimony regarding the time frames for the subject radio call for the theft, subsequent arrest, and the subject motor vehicle accident, as well as the time of the accident contained in the police accident reports. Nevertheless, PO Rodriguez testified at his deposition that he was not speeding, did not run a red light or stop sign and was traveling in the correct southbound direction on Jerome Avenue at the time of the accident. Therefore, the specific privileges of VTL § 1104 (b) and the reckless disregard standard of care are not applicable to the case at bar which is governed by principles of ordinary negligence.

With regard to plaintiff's cross motion, plaintiff alleges that the City was negligent in its ownership, operation, maintenance and control of the NYPD vehicle involved in the subject accident. It is undisputed that the front of PO Rodriguez' police vehicle struck the rear of the stopped van in which plaintiff was a passenger. The City alleges that the conduct of PO

Rodriguez in pressing the brake pedal three times as his vehicle approached the plaintiff's vehicle was not reckless or negligent, as the brakes failed to work. The City also contends that there is no evidence that the City had any notice of any alleged defective conditions of the subject NYPD vehicle prior to and including the date of plaintiff's accident.

“[A] rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident.” *Cabrera v Rodriguez*, 72 AD3d 553 (1st Dept 2010) (citations omitted). In addition, “[a] defendant claiming brake failure must make a two-pronged showing that the accident was caused by an unanticipated problem with the vehicle's brakes, and that he exercised reasonable care to keep them in good working order.” *Tselebis v Ryder Truck Rental*, 72 AD3d 198, 200 (1st Dept 2010) (citation omitted); *see also Ballatore v HUB Truck Rental Corp.*, 83 AD3d 978 (2d Dept 2011).

The City contends that this two-prong test has been met through their submitted admissible evidence that they exercised reasonable care to maintain the brakes of the subject radio motor patrol car (RMP) in good working order and any brake failure was entirely unanticipated. PO Rodriguez testified in his EBT that he checked the brakes and the brake fluid before driving the RMP on the morning of the subject accident and everything was in proper working order. In addition, Eric Dorcean, the assistant supervising supervisor of the NYPD Fleet Service Division, in his deposition, testified that the subject RMP was serviced by fleet services every 4,000 miles for preventative maintenance, per standard operating procedure. He stated that the brakes of the subject RMP were checked each time during the RMP's preventative

maintenance inspections. He also stated that according to the repair history of the subject RMP before the accident, specifically between May 30, 2007 and May 30, 2008 (one year prior to the accident), the front and rear brake pads were done as part of the preventive maintenance on June 29, 2007.

However, Mr. Dorcean also testified that the work order which included all work done from the date of the accident, May 30, 2008, until the vehicle was put back in service on July 11, 2008, did not show that any work was performed on the brakes for the vehicle. Mr. Dorcean also stated that according to the police accident report the RMP was not towed after the accident. The court notes that the Accident Report of Police Department Vehicles contains redacted information including the preliminary statement of the investigating supervisor. This report is required to include a statement regarding the department vehicle operator's actions as well as the Board recommendation, which must contain an explanation for the recommendation made. In addition, PO Rodriguez admitted that he did not know whether skid marks at the crosswalk near the scene of the accident were created by his patrol car as a result of the accident. These conflicting issues create a question of fact regarding whether the brakes of the subject RMP were operable at the time of the accident and whether or not PO Rodriguez' actions were the proximate cause of the accident.

Accordingly, the City's motion and the plaintiff's cross motion are denied.

This constitutes the decision and order of the court.



LARRY S. SCHACHNER, J.S.C.

Dated: November 7, 2011