

Despian v Garcia
2013 NY Slip Op 30520(U)
March 14, 2013
Supreme Court, New York County
Docket Number: 114389/2008
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN

Justice

PART 52

Index Number : 114389/2008
DESPIAN, MICHAEL
vs.
GARCIA, FELIX
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____

No(s) 1

Answering Affidavits — Exhibits _____

No(s) 2

Replying Affidavits _____

No(s) 3

Further reply
Upon the foregoing papers, it is ordered that this motion is

4

*please see
attached
order*

FILED
MAR 19 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/14/13

[Signature]
MARGARET A. CHAN
J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 52

-----X
MICHAEL DESPIAN

Plaintiff,

- against-

FELIX GARCIA

Index No. 114389/2008

Defendant.

-----X
FELIX GARCIA,

Third-Party Plaintiff,

- against -

DECISION AND ORDER

THE CITY OF NEW YORK and FRANCISCO
LUCIANO,

Third-Party Defendants.

-----X

MARGARET A. CHAN, J.S.C.:

FILED
MAR 19 2013
NEW YORK
COUNTY CLERK'S OFFICE

This action arises out of a three-car automobile collision, involving a Honda minivan, and two police cars, one a cruiser and the other an unmarked 2001 Chevrolet Durango. Plaintiff Michael Despian (Despian), a New York City Police Department detective, was a passenger in the Durango, which is owned by the City of New York (the City). New York City Police Officer Francisco Luciano (Luciano) was driving a police cruiser that was struck by a 2002 Honda minivan driven by defendant, third-party plaintiff, Felix Garcia (Garcia). Luciano's police cruiser spun around as a result of the impact from Garcia's vehicle, and then collided with the Durango. Despian brought this action seeking damages for serious personal injuries against

Garcia, who commenced a third-party action against the City and Luciano for indemnification. The third-party defendants filed a counterclaim for indemnification against Garcia.

Garcia moves for summary judgment pursuant to CPLR 3212, dismissing the complaint, on the ground that he was not negligent as a matter of law. The City and Luciano move to dismiss the third-party complaint, alternatively, pursuant to CPLR 3211 or 3212. Both motions are denied.

The accident occurred on October 27, 2006, at approximately 7:30 p.m., at the intersection of Parsons Boulevard and the service road of the Grand Central Parkway (GCP) in Queens County, New York. There is conflicting testimony as to whether it was raining. Luciano testified that it was clear and the road was dry. Garcia testified that it was raining lightly.

Luciano testified that he received a radio call from then sergeant Thomas Molloy (Molloy) directing him to proceed to a nearby hospital to interview a hit and run victim who was seriously injured and in danger of dying. After exiting the westbound GCP onto 168th Street, Luciano activated his turret lights and siren, and proceeded west. Luciano then turned onto Parsons Blvd. southbound, and continued south at 10 mph in the left lane. It was about six car lengths from where he turned onto Parsons Blvd. to the intersection where the accident occurred. There were no vehicles between Luciano's vehicle and the red light when he made the turn. Only the eastbound service road of the GCP intersects Parsons Blvd. at that traffic light. There is no westbound traffic where the accident occurred.

Luciano testified that he entered the intersection slowly against a red light. The other cars yielded. Luciano's vehicle was stopped halfway through the intersection when it was struck by Garcia's vehicle, which was traveling eastbound on the GCP service road. There are two travel

lanes and a parking lane on the eastbound service road. Luciano testified that the traffic in the two main left lanes had stopped to yield to him. Luciano believed that Garcia entered the intersection from the parking lane to the right, but Garcia testified that he was in the left lane. Luciano testified that he inched his way into the intersection, and was still moving when he was struck by Garcia's vehicle. Luciano's vehicle then spun around and collided with Despian's vehicle, which was stopped at the light headed north on Parsons Blvd. Luciano testified that he did not see Garcia's vehicle when he first entered the intersection, and was going about 10 mph when he first saw Garcia's vehicle, which was going "pretty fast" (Luciano dep at 32).

Garcia testified in his deposition that he was traveling at about 25 to 30 mph at the time of the accident. The speed limit is 30 mph. When Garcia first saw the police cruiser driven by Luciano, it had its turret lights and siren on. Garcia was between 15 and 25 feet from the intersection. He applied his brakes, but was unable to stop in time.

Despian testified at his deposition that he was on duty as a New York City Police Department narcotics detective at the time of the accident. Despian first saw Luciano's vehicle when it was in the middle of the block on Parsons Blvd., approaching the intersection, traveling at 30 to 35 mph, just before the accident. He saw Luciano enter the intersection against the red light, but could not tell whether Luciano slowed down as he entered the intersection. According to Despian, Garcia's vehicle was in the northernmost lane of the service road, which is the left lane.

New York City Police lieutenant Thomas Molloy (Molloy), who investigated the accident, opined in a written report (exhibit K to defendant's mov aff), issued after an internal police department hearing, that Luciano was at fault for the accident. It was Molloy, then a

sergeant, who dispatched Luciano on the call to the hospital. Molloy testified in his deposition that the police department would not consider this an emergency situation, and that it was improper for Luciano to use his siren and turret lights (exhibit L to defendant's mov aff at 62-65). Molloy also testified in his deposition that the accident report indicates that the siren was not on continuously, only intermittently, which means that it only sounded while the officer held the button down. He also testified that he had no independent recollection of the accident.

The threshold issue is whether Luciano's conduct is to be judged under standards of ordinary negligence, or under the higher "reckless disregard" standard of New York Vehicle and Traffic Law (VTL) § 1104, captioned, "[a]uthorized emergency vehicles," which provides, as pertinent:

"(a) [t]he driver of an authorized emergency vehicle, when involved in an emergency operation, may exercise the privileges set forth in this section, but subject to the conditions herein stated. (b) The driver of an authorized emergency vehicle may: ... [p]roceed past a steady red signal ... [and] [d]isregard regulations governing directions of movement (c) [T]he exemptions herein granted to an authorized emergency vehicle shall apply only when audible signals are sounded from any said vehicle while in motion ..., and when the vehicle is equipped with at least one lighted lamp (e) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others"

(*id.*).

In opposition to the City's motion to dismiss the third-party complaint, Garcia argues first that a question fact exists as to whether Luciano was responding to an emergency call at the time of the accident. Garcia argues that this issue depends upon whether "on receipt of the message, the police car occupants truly believe that an emergency exists and have reasonable grounds for

such belief” (*Bravata v Russo*, 41 Misc 2d 376, 378 (Sup Ct, NY County 1963), *revd on other grounds*, 21 AD2d 689 [2d Dept 1964]). Garcia next argues that, even under the reckless indifference standard, a question of fact would be presented as to whether Luciano acted with “reckless disregard for the safety of others” (VTL § 1104 [e]).

The City and Luciano argue, correctly, that the holding of *Bravato v Russo* is no longer an accurate statement of New York law after *Criscione v City of New York* (97 NY2d 152 [2001]). *Criscione* involved a collision between a police cruiser and a civilian vehicle that occurred after the officers in the cruiser had received a radio dispatch to respond to a 911 call of a domestic dispute, which was neither considered criminal in nature, nor classified by the police radio code transmitted to the cruiser as an emergency.

In *Criscione*, the Court of Appeals held that the police cruiser involved was an “authorized emergency vehicle,” as defined in VTL § 101, and that it was engaged in an “emergency operation” pursuant to VTL § 114-b, because it was “responding to ... [a] police call” (97 NY2d at 157), noting that section 114-b did not define a “police call,” but that

“we see no reason why a radio call to officers on patrol by a police dispatcher regarding a 911 complaint should not fall squarely within the plain meaning of that term, nor do we discern any legislative intent to vary the definition of ‘emergency operation’ based on individual police department incident classifications

(*Criscione v City of New York*, 97 NY2d at 157).

The Court of Appeals held further that a patrol vehicle responding to a police dispatch to investigate a 911 call is involved in an “emergency operation” as a matter of law, and it is “irrelevant whether the officers believed that the ... call was an emergency or how the Police Department categorized this type of call” (*id.* at 158). Thus, *Criscione* and not *Bravata* states the

current law in New York.

In the present case, although the dispatch received by Luciano did not involve a 911 call, it is nonetheless a “police call” to interview a possible crime victim whose testimony might be lost due to imminent death. Because of the urgent nature of this call, the reasoning of *Criscione* is applied.

Under *Criscione* and its progeny, Luciano was an authorized emergency vehicle engaged in an emergency operation as a matter of law, and thus entitled to the reckless disregard standard of VTL § 1104 (e) (*see Nikolov v Town of Cheektowaga*, 96 AD3d 1372, 1373 [4th Dept 2012])[holding that police officer responding to police call of reckless driver entitled to reckless disregard standard]; *Herod v Mele*, 62 AD3d 1269, 1270 [4th Dept 2009])[holding that police officer speeding while responding to a police call concerning a fight in progress was entitled to reckless disregard standard]). Luciano, likewise, was also engaged in one of the privileges authorized by VTL § 1104 (a) at the time of the accident - proceeding past a steady red light (*see Kabir v County of Monroe*, 68 AD3d 1628, 1633 [4th Dept 2009], *affd* 16 NY3d 217 [2011]) [holding that police officer was not entitled to reckless disregard standard because he was not engaged in one of the four privileges authorized by VTL 1104 [a]]).

The fact that Molloy did not believe that Luciano was engaged in an emergency operation is immaterial (*see Yerdon v County of Oswego*, 43 AD3d 1437, 1438 [4th Dept 2007]). Malloy’s report, which is not based on eyewitness reports or “postincident expert analysis of observable physical evidence [citation omitted]” (*Conner v Duck’s Cesspool Serv.*, 144 AD2d 329, 329 [2d Dept 1988]), is accorded no weight as to its competency. Molloy’s stated conclusion that it was Luciano’s fault because the light was against him does not take into consideration the qualified

privilege afforded by VTL § 1104.

The next issue is whether Luciano and the City have demonstrated as a matter of law that they are entitled to summary judgment,¹ dismissing the third-party complaint, on the ground that Luciano's actions did not rise to the level of reckless disregard. In order to be liable under the reckless disregard standard, the evidence must show that the defendant intentionally performed 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 [did] so with conscious indifference to the outcome [internal quotation marks and citation omitted]”

(*Saarinen v Kerr*, 84 NY2d 494, 501 [1994]; accord *Campbell v City of Elmira*, 84 NY2d 505, 510 [1994]). In a proper case, the issue of whether a defendant driving an emergency vehicle is reckless may be presented to the jury (*see Szczerbiak v Pilat*, 90 NY2d 553, 557 [1997]; *see also Plumart v U.S.*, 2007 WL 2089162, *5, 2007 US DIST LEXIS 5278, *14 [US Dist Ct, WD NY July 20, 2007, No. 05-CV-6230T] [a case with substantially similar facts involving VTL § 1104 was presented to the jury]). Here, because of the contradictory police testimony regarding Luciano's speed as he approached the intersection, the disputed testimony about whether it was raining, and from which lane Garcia entered the intersection, it cannot be determined as a matter of law whether Luciano acted with reckless disregard for the safety of others, and the issue can be better determined by a jury.

Finally, Garcia has not demonstrated as a matter of law that he was not negligent. VTL § 1144, captioned, “[o]peration of vehicles on approach of authorized emergency vehicles,”

¹ The City's alternative motion to dismiss the third-party complaint pursuant to CPLR 3211 is denied. The third-party complaint contains sufficient allegations to state a cause of action for indemnification.

provides, as pertinent:

“(a) Upon the immediate approach of an authorized emergency vehicle equipped with at least one lighted lamp exhibiting red light ... and when audible signals are sounded from any said vehicle by siren ..., the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to the right-hand edge or curb of the roadway, or to either edge of a one-way roadway three or more lanes in width, clear of any intersection, and shall stop and remain in such position until the authorized emergency vehicle has passed, unless otherwise directed by a police officer. (b) This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with reasonable care for all persons using the highway”

(*id.*).

Garcia has not submitted any evidence that he took any of the actions required by section 1144, when he admittedly heard the siren and saw the lights of the approaching emergency vehicle.

Accordingly, it is

ORDERED that the motion of defendant, third-party plaintiff, Felix F. Garcia for summary judgment is denied; and it is further

ORDERED that the motion of the City of New York and Francisco Luciano, for summary judgment dismissing the third-party complaint, is denied.

Dated:

3/14/13

FILED

MAR 19 2013

NEW YORK
COUNTY CLERK'S OFFICE

MARGARET A. CHAN
J.S.C.