

Slyder v City of New York

2014 NY Slip Op 30931(U)

April 10, 2014

Supreme Court, New York County

Docket Number: 110456/08

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
PRESENT: JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 110456/2008
SLYDER, STEVEN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT CAL: #51

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | 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
ACCOMPANYING DECISION / ORDER**

FILED

APR 11 2014

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4-10-14
APR 10 2014


_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

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

- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5

-----X
STEVEN SLYDER,

Plaintiff,

- against -

DECISION/ORDER
Index No. 110456/08
Seq. No. 001

CITY OF NEW YORK, NEW YORK FIRE
DEPARTMENT OF CITY OF NEW YORK,

Defendants.
-----X

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.1-2(Exs.A-P)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
AFFIRMATIONS IN OPPOSITION.....	..3..(Exs.A-F)
REPLYING AFFIRMATION.....4.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this personal injury action arising from a pedestrian knockdown, plaintiff Steven Slyder moves, pursuant to CPLR 3212, for summary judgment on the issue of liability. After oral argument and consideration of the parties' papers and the applicable statutes and case law, the motion is **denied.**

FILED

APR 11 2014

COUNTY CLERK'S OFFICE
NEW YORK

Factual Background

On May 4, 2010, plaintiff Steven Slyder was injured when he was struck by an ambulance owned by the defendant City of New York (“the City”) and operated by the defendant New York City Fire Department (“FDNY”). In his notice of claim, plaintiff alleged that the ambulance which struck him was operated with “reckless disregard” since it was traveling in the wrong direction, was going too fast, and ignored a traffic signal. Ex. A to Defendant’s Aff. In Opp. In his verified complaint, plaintiff alleged that the ambulance, which was being driven recklessly by FDNY employee Paul R. Casson, Jr., struck and injured him as he was crossing River Avenue at the intersection of 149th Street in The Bronx. Ex. B, at par. 7. ¹ As a result, plaintiff claimed that he sustained a “serious injury” within the meaning of Insurance Law § 5102(d).

In his verified bill of particulars, plaintiff alleged that the incident occurred “within the crosswalk located on River Avenue, where it intersects with 149th Street.” Ex. E, at par. 2. Plaintiff alleges that the incident was caused by a myriad of negligent acts by the defendants, including, inter alia, operating the ambulance at an unsafe speed, failing to warn plaintiff that the ambulance was approaching, and failing to slow down at an intersection. Ex. E, at 7-9.

In their bill of particulars as to affirmative defenses, defendants asserted, inter alia, plaintiff’s failure “to take reasonable care” when confronted by an emergency vehicle with its sirens on and lights flashing. Ex. F.

At his 50-h hearing, plaintiff, an iron worker, testified that, as of the date of the incident, May 4, 2010, he was employed by CSG Rebar at a construction project at River Avenue and 149th Street

¹Unless otherwise noted, all further references are to the exhibits annexed to plaintiff’s motion.

in The Bronx. Ex. A, a 5-7. The accident occurred at about 2:30 p.m. as he was leaving the construction project and crossing the street with two co-workers. Ex. A, at 10, 17. There was a traffic light at the intersection which was red for vehicles traveling on River Avenue. Ex. A, at 14, 16.

As plaintiff began to cross the street, he heard a siren but was not sure where it was coming from. Ex. A, at 21. He looked to his left while crossing the street and his vision was blocked by parked vehicles. Ex. A, at 21. He was approximately halfway across the street when a FDNY ambulance struck him, about one to two feet past the double yellow lines in the center of the roadway. Ex. A, at 14, 21. He did not see the ambulance before it struck him. Ex. A, at 21. According to plaintiff, the driver of the ambulance said he was "only going about 50" and did not mean to hit him. Ex. A, at 23.

At his deposition, plaintiff testified that he was struck by a FDNY ambulance while crossing River Avenue at the intersection of 149th Street in The Bronx on May 4, 2010. Ex. G, at 10, 31. The incident occurred 4-6 seconds after plaintiff pulled his friend out of the path of a different vehicle. Ex. G, at 38. At the time of the incident, he was inside of the crosswalk and the ambulance was traveling on the wrong side of the road. Ex. G, at 23-24, 31, 39. He admitted that he "didn't really pay attention" to the pedestrian signal but saw that the light was red for traffic on River Avenue. Ex. G, at 23, 27-28. When the ambulance struck him, it had no sirens or horns or lights on. Ex. G, at 30. He admitted, however, that there was jackhammering and pile driving being conducted in the area. Ex. G, at 34-36. After the incident, the driver of the ambulance exited the vehicle and kept telling plaintiff that he had only been driving 5 mph. Ex. G, at 32.

Although plaintiff maintained that the ambulance struck him as soon as he took his first step

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off of the curb (Ex. G, at 100), a photograph annexed to plaintiff's motion as Exhibit H shows that plaintiff initialed an area three feet from the center of the roadway as the location where he was struck by the ambulance. Ex. G, at 107-108.

Edward Aldrich, an emergency medical technician for the FDNY, testified at his deposition that he was Casson's partner on the day of the incident. Ex. I, at 15. However, he had no recollection of the incident. Ex. I, at 14, 19.

Aldrich admitted that one of the requirements in the FDNY Operations Guide is that, in an emergency, an ambulance must have its lights and siren on. Ex. I, at 13, 28. He also stated that Operations Guide required that an ambulance, even if responding to an emergency, had to stop at a red light or stop sign. Ex. I, at 14. He further stated that an ambulance can travel on the wrong side of the road if it is going very slowly and has its lights and siren on. Ex. I, at 30.

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment on the issue of liability.

Contentions of the Parties

The plaintiff asserts that he is entitled to summary judgment as a matter of law since Casson drove with "reckless disregard" for the safety of others at the time of the accident. This, argues plaintiff, exempted defendants from the protections afforded to emergency vehicles by VTL § 1104. Specifically, plaintiff asserts that Casson was driving southbound in the northbound lane after crossing over a double yellow line and was in the process of running a red light when he struck plaintiff. Plaintiff claims that, although VTL § 1104(b)(2) allows a driver of an emergency vehicle to pass a steady red signal, he or she cannot do so without slowing down. Additionally, plaintiff maintains that the defendants are not entitled to the privilege in VTL 1104(a) since it did not have

* 6]
its siren and lights on.

Plaintiff further argues that he had the right of way because he was in a crosswalk and that defendants' affirmative defense of culpable conduct must be dismissed.

In support of his motion for summary judgment, plaintiff submits the pleadings, his bill of particulars, defendants' bill of particulars as to affirmative defenses, discovery responses, plaintiff's 50-h hearing and deposition testimony, Alrich's deposition testimony, photographs of the accident site, a certified ambulance call sheet,² sworn statements of witnesses Steven McGregor, Sean Merchant, Nazareth McFarlan, and Al Kegler, and a certified copy of the City's Emergency Medical Service ("EMS") Operating Guide.

Plaintiff argues that, according to the Operating Guide, ambulances are permitted to engage in "emergency operations" "only when siren (or other audible warning device) and emergency lighting are engaged, and only when responding to, operating at, or transporting a patient from an emergency call" (Ex. D, at 1) and that the both the warning lights and siren "must remain activated throughout the response." *Id.*, at 3 (*emphasis provided*). Plaintiff further asserts that the Operating Guide requires drivers operating in emergency mode to come to a complete stop at all red lights and then to proceed with extreme caution when safe to do so. *Id.*, at 4.

In his statement, McGregor stated that the ambulance did not have its siren or lights on. Ex. M. Plaintiff, who was crossing River Avenue with a cross signal, was about halfway across the

²This call sheet, which is not addressed by any of plaintiff's testimony or by any affidavit submitted by plaintiff, reflects that the ambulance had been called to 435 East 135th Street to respond to a person in cardiac arrest. The parties do not dispute that the ambulance was responding to an emergency. Although, as noted below, Al Kegler, a witness for plaintiff, stated in an affidavit that the ambulance was not responding to an emergency (Ex. P), he set forth no basis for this statement and it is purely hearsay.

street when struck by the ambulance. Ex. M. He opined that there was no way plaintiff could have avoided being hit. Ex. M.

Merchant said that plaintiff was crossing River Avenue in front of him. Ex. N. He did not recall hearing any siren and did not remember whether the lights of the ambulance were on. Ex. N. At the time plaintiff was struck, he had “just stepped out into the intersection” and was “in the crosswalk with a cross signal.” Ex. N. He opined that plaintiff had no culpability. Ex. N.

McFarlan said that plaintiff was struck by the ambulance after it drove around a car headed southbound which was stopped at a red light on River Avenue. Ex. O. The ambulance did not have its lights or sirens on when it struck plaintiff. Ex. O.

Kegler said he saw a pedestrian, who he later learned was plaintiff, struck by an ambulance on River Avenue. Ex. P. He stated that the ambulance was “not responding to [a] call, but was bringing someone to the hospital.” Ex. P.

Defendants assert that plaintiff failed to establish his prima facie entitlement to summary judgment. First, defendants assert that, although plaintiff alleges in his bill of particulars that he was struck by the ambulance while he was in a crosswalk, he circled an area outside of the crosswalk on a photograph when asked to mark where the ambulance struck him. Defendants further assert that the motion must be denied because plaintiff admitted that he heard a siren right before he was struck by the ambulance but did not know which direction the noise came from. Additionally, maintain the defendants, an issue of facts exists regarding the speed Casson was driving at the time of the incident. At his 50-h hearing, plaintiff said that Casson admitted to driving 50 mph at the time of the incident. However, at his deposition, plaintiff stated that Casson insisted he had been driving

only 5 mph at the time of the accident.

In opposition to plaintiff's motion, defendants submit plaintiff's notice of claim, an affidavit signed by Casson, an affidavit of P.O. Rafael Maldonado, who responded to the scene of the accident, a police accident report, an apparatus accident report.

In his affidavit, Casson states that, prior to the accident, he received a call from a dispatcher to respond to the scene of a cardiac arrest. Ex. C to Defendants' Aff. In Opp. Upon receiving the call, he activated the ambulance's lights and siren. *Id.* He drove southbound on River Avenue in the direction of traffic at 5-10 mph and started to slow down as he approached 149th Street, since he intended to turn left onto that street. *Id.* As he approached the intersection, he saw several individuals who appeared to be construction workers crossing the street outside of the intersection. *Id.* The individual who was struck by the ambulance walked in front of the vehicle. *Id.*

In his affidavit, Officer Maldonado stated that he completed an accident report based on his conversation with plaintiff and Casson. Ex. D to Defendants' Aff. In Opp. According to the accident report, the driver of the ambulance stated that he was traveling "[southbound] on East 149 St. and River with lights and siren responding to an emergency when pedestrian walk[ed] in front [of the ambulance]." Ex. E to Defendants' Aff. In Opp. The plaintiff stated that he was crossing the intersection with a red light when the ambulance struck him. *Id.*

The apparatus accident report prepared by Casson states that "while en route to a 911 call proceeding through an intersection [with] lights and continuous siren [plaintiff] walked in front of [the] ambulance." Ex. F. to Defendants' Aff. In Opp.

In his reply affirmation in further support of his motion, plaintiff argues that, although

Casson's states in his affidavit that he was using a siren and lights at the time of the incident, plaintiff is still entitled to summary judgment on liability because Casson violated the EMS Operations Guide, which requires operators of emergency vehicles to stop at all red lights and then proceed with extreme caution.

Conclusions of Law:

"[T]he 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 issue of fact from the case. *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 (2008) (*internal quotation marks and citation omitted*). 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 NY2d 557, 562 (1980). The failure to establish one's prima facie entitlement to summary judgment "requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 (2012).

For the reasons set forth below, this Court finds that plaintiff has failed to establish his prima

facie entitlement to summary judgment as a matter of law.

VTL § 101 provides, inter alia, that an ambulance is an “authorized emergency vehicle.” An authorized emergency vehicle is engaged in an “emergency operation” when it is responding to an emergency. *See* VTL § 114-b. “The manner in which an authorized emergency vehicle is operated in an emergency situation may not form the basis for civil liability unless the driver acted in reckless disregard for the safety of others (*see* [VTL] § 1104; *Saarinen v Kerr*, 84 NY2d 494, 501 [2008]; *Puntarich v County of Suffolk*, 47 AD3d 785, 786 [2008]; *Shephard v City of New York*, 39 AD3d 842 [2007].” *Woodard v Thomas*, 77 AD3d 738, 739 (2d Dept 2010). “The ‘reckless disregard’ standard requires proof that the [driver] intentionally committed an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow.” *Puntarich, supra* at 786.

VTL § 1104 (b)(2) provides that the driver of an authorized emergency vehicle may “[p]roceed past a steady red signal . . . but only after slowing down as may be necessary for safe operation.”

VTL § 1104 (c) provides, inter alia, that “the exemptions herein granted to an authorized emergency vehicle shall apply only when audible signals are sounded from any vehicle while in motion by bell, horn, siren, electronic device or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp” visible from 500 feet away.

VTL § 1104 (e) provides that 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.”

Despite claiming that the ambulance had neither its lights nor siren on at the time of the incident, plaintiff testified at his 50-h hearing that he heard a siren prior to the incident but did not know which direction it came from. Ex. A, at 21. This conflicts with the sworn statements given by plaintiff’s own witnesses, McGregor and McFarlan, who stated that the ambulance did not have its siren or lights on. Exs. M, O. Since plaintiff’s own witnesses contradict him, he is not entitled to summary judgment as a matter of law. *See generally Black v County of Dutchess*, 87 AD3d 1097 (2d Dept 2011); *Coscia v 938 Trading Corp.*, 283 AD2d 538 (2d Dept 2001).

Nor is plaintiff entitled to summary judgment based on Casson’s alleged failure to come to a complete stop at the intersection. In making this argument, plaintiff relies on the EMS Operations Guide, which in fact states that an emergency vehicle must come to a complete stop at a red signal and then proceed with extreme caution. Ex. D, at 4. However, contrary to plaintiff’s contention that the Operating Guide sets forth mandatory requirements which must be strictly followed by EMS drivers, it merely states that its purpose is “to set forth policy and guidelines for the operation of EMS vehicles.” Ex. D, at 1. *See Peters v City of New York*, 5 Misc3d 1020(A) (Sup Ct Kings County 2004). As noted above, the statute addressing such a situation is VTL § 1104 (b)(2), which provides that an authorized emergency vehicle may “[p]roceed past a steady red signal . . . but only after slowing down as may be necessary for safe operation.”

Plaintiff’s argument that he is entitled to summary judgment on liability because Casson did not slow down at the intersection is also without merit. Plaintiff admitted at his 50-h hearing that he did not see the ambulance before it struck him. Ex. A, at 21. Therefore, he could neither estimate

its speed nor tell whether it slowed down. The witness affidavits submitted by plaintiff, except for that submitted by Merchant, are silent as to the speed of the ambulance. See Exs M, O, P. However, Merchant merely states that “the [ambulance] driver did not slow down before entering the intersection.” Ex. N. He gives no details regarding the speed of the ambulance or the amount of time he observed it before it reached the intersection. Therefore, his affidavit is utterly conclusory and is an insufficient basis upon which to grant summary judgment on liability. See *Coleman v Maclas*, 61 AD3d 569 (1st Dept 2009).

Other issues of fact also exist precluding the granting of summary judgment on liability. Although plaintiff testified at his deposition that he was in the crosswalk at the time of the incident (Ex G, at 23-24), the photograph annexed to his motion as Exhibit H, on which he signed his initials to mark the location he was in when struck by the ambulance, clearly demonstrates that he was *not* in the crosswalk but three feet from the center of the roadway. Ex. G, at 107-108. Additionally, despite identifying the spot at the center of the roadway as that at which he was struck, plaintiff also testified that he was struck as he took his first step off of the curb. Ex. G, at 100.

In light of the foregoing, plaintiff has failed to establish his prima facie entitlement to summary judgment on liability. Even assuming, arguendo, that plaintiff had established his entitlement to summary judgment, the motion would still be denied since Casson’s affidavit, in which he stated that he had the siren and lights on at the time of the occurrence and that he slowed down at the intersection of 149th Street (Ex. C to Defendant’s Affirmation In Opposition) contradicts the proof submitted by plaintiff and raises material issues of fact regarding whether he acted with “reckless disregard” which would warrant the denial of the motion. See *Mouring v City of New York*,

112 AD3d 588 (2d Dept 2013); *Quoizel, Inc. v Hartford Fire Ins. Co.*, 102 AD3d 492 (1st Dept 2013).³

Finally, to the extent that plaintiff seeks dismissal of defendants' affirmative defense of culpable conduct, this relief must be denied, since it was not requested in the notice of motion. *See* CPLR 2214 (a). In any event, plaintiff would not have been entitled to the dismissal of defendants' affirmative defense of culpable conduct given his admission that he "didn't really pay attention" to the pedestrian signal as he was crossing River Avenue. Ex. G, at 23. *See Thoma v Ronai*, 82 NY2d 736 (1993).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion for summary judgment by plaintiff is denied; and it is further,

ORDERED that the parties are to appear for a settlement conference in this matter on May 1, 2014 at 80 Centre Street, Room 103, at 9:30; and it is further,

³This Court recognizes that defendants did not submit Casson's affidavit until after the filing of the note of issue, at which time it became necessary to oppose plaintiff's motion. However, in their September 23, 2012 response to the May 5, 2012 compliance conference order, defendants advised plaintiff that Casson was no longer employed by the FDNY and provided his last-known address, thereby allowing plaintiff the opportunity to contact him. Ex. K. Plaintiff has not submitted any court order reflecting that defendants are precluded from offering the affidavit. Nor has plaintiff cited any legal authority supporting such preclusion.

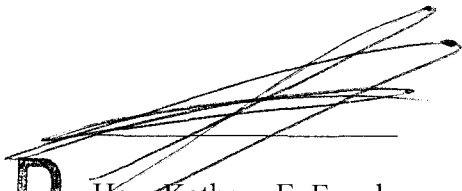
ORDERED that this constitutes the decision and order of the Court.

DATED: April 10, 2014

ENTER:

APR 10 2014

FILED


Hon. Kathryn E. Freed,
J.S.C.

APR 11 2014

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

COUNTY CLERK'S OFFICE
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