

Cole v City of New York
2016 NY Slip Op 31350(U)
June 14, 2016
Supreme Court, Bronx County
Docket Number: 25612/2014
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

-----X
TAUREAN COLE,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY
POLICE DEPARTMENT AND POLICE OFFICER
ALEX BARAN,

Defendant(s).

-----X
Recitation as Required by CPLR §2219(a): The following papers
were read on this Motion for Summary Judgment

Papers Numbered

Notice of Motion and Affirmation in Support with Exhibits.....
Affirmation in Opposition by Plaintiff
Reply Affirmation in Support

1
2
3

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Defendants move for summary judgment dismissing the complaint pursuant to CPLR §3212.

Plaintiff alleges that he was injured as a result of a motor vehicle accident that took place on July 12, 2014 at the intersection of Hunts Point Avenue and Bruckner Boulevard in the Bronx. The record before the court establishes the following. Defendant LT. ALEX BARAN (“Baran”) was the operator of a New York City Police Department vehicle equipped with lights and sirens at the time of the accident. Just prior to the accident, and while on duty, Baran received a radio call seeking support for officers responding to a man inside a complainant’s apartment with a knife. Baran testified that as he traveled to the location of the complainant’s apartment, the lights of his police vehicle were activated and the siren was “intermittently activated.” Baran was driving on Hunts Point Avenue towards its intersection with Bruckner Boulevard. There were two traffic lights at that intersection. The first shone green in Baran’s direction while the second light shown red. Baran passed underneath the green light without incident. Baran testified that as he approached the red light, he came to a full stop while his lights were activated. He then sounded his siren and proceeded into the intersection. At that point a commercial van was stopped in the intersection which partially

blocked Baran's view of oncoming traffic. He sounded his siren and then "inched" into the next lane of traffic so he could see if anything was coming. At that time he first noticed plaintiff's car about approaching his.

Plaintiff was traveling northbound on Bruckner Boulevard and had a green light ahead of him as he approached Hunts Point Avenue. Plaintiff also saw the commercial van in the intersection, which blocked Baran's vehicle and any flashing lights from plaintiff's sight. As he entered the intersection, the front of plaintiff's vehicle struck the front passenger side of Baran's vehicle. Plaintiff alleges he did not hear the siren before the collision.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Once movant has met his initial burden on a motion for summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]).

VTL §1104 provides in pertinent part:

- (a) The 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:
 1. Stop, stand or park irrespective of the provisions of this title;
 2. Proceed past a steady red signal, a flashing red signal or a stop sign,

but only after slowing down as may be necessary for safe operation;3. Exceed the maximum speed limits so long as he does not endanger life or property; 4. Disregard regulations governing directions of movement or turning in specified directions.

(c) Except for an authorized emergency vehicle operated as a police vehicle or bicycle, the exemptions herein granted to an authorized emergency vehicle shall apply only when audible signals are sounded from any said 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 so that from any direction, under normal atmospheric conditions from a distance of five hundred feet from such vehicle, at least one red light will be displayed and visible.

The statute permits the operator of an emergency authorized vehicle to proceed past red traffic lights, exceed the speed limit and disregard regulations regarding the direction of traffic, as long as a certain safety precautions are observed including the sounding of audible signals while the vehicle is in motion (*Saarinen v. Kerr.*, 84 N.Y. 2d 494 [1994]). However, “[t]he privileges afforded by the statute are circumscribed by section 1104(e), which provides that ‘[t]he 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. at 499-500).

It is undisputed that Baran was the operator of an emergency vehicle at the time of the accident. It is also undisputed that Baran was engaging in an emergency operation of the vehicle. However, plaintiff argues the summary judgment must be denied since is it unclear whether Baran’s intermittent sounding of the alarm was sufficient, and whether Baran acted with reckless disregard proceeding into oncoming traffic when his view was obstructed by the commercial van. The court agrees and for the reasons set forth below, denies the motion.

“Reckless disregard” has been defined as a, “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” (*Szczerbiak v. Pilat*, 90 N.Y.2d 553 [1997]). The “reckless disregard” standard of care under VTL §1104(e), “requires the trier of fact not to second guess an officer’s split-second decision weighing of choices,” but


instead requires it to determine whether, “the actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make is highly probable that harm would follow and has done so with conscious indifference to the outcome” (*Gonzalez v. Iocovello*, 93 N.Y. 2d 539, 551 [1999]; see also *Campbell v. City of Elmira*, 84 N.Y. 2d 505, 510 [1994]). In the absence of any material questions of fact regarding whether [the operator of an emergency vehicle] was speeding in poor road or traffic conditions, was inattentive, or otherwise proceeded in an unreasonably dangerous manner without caution or care for the safety of bystanders and motorists, it cannot be said that [the operator] acted with ‘conscious indifference to the outcome’” (*Frezzell v City of New York*, 24 NY3d 213, 219 [2014]). However, in the instant matter a material question exists as to whether Baran was proceeding in an unreasonably dangerous manner without caution for the safety of other motorists, including plaintiff. Baran testified the he inched into the intersection while his view of oncoming traffic was partially obstructed by the van. His decision to do so was not a “split second decision made in haste while in pursuit.” By his own testimony, Baran slowed down and stopped, then decided to proceed into the intersection despite having an obstructed view of oncoming traffic. Whether this constituted reckless disregard should be resolved by the trier of fact. The purpose of the motion court is issue finding, not issue determination (*Pirrelli v. Long Island Railroad*, 226 A.D.2d 166 [1st Dep’t., 1996]).

Based on the foregoing, the motion is denied.

This constitutes the decision and order of the court.

Dated:

6/14/16
Bronx, New York


HON. MITCHELL J. DANZIGER, J.S.C.