

<b>Coronado v De La Cruz</b>
2017 NY Slip Op 30384(U)
January 6, 2017
Supreme Court, Bronx County
Docket Number: 310959/11
Judge: Elizabeth A. Taylor
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 2  
NICHOLAS CORONADO,

Plaintiff,

Index No. 310959/11

- against -

**DECISION/ORDER**

**Present:**  
**HON. ELIZABETH A. TAYLOR**

CORNELIO DELACRUZ,

Defendant.

CORNELIO DELACRUZ,

Third-Party Plaintiff,

Third-Party Index No.83748/12

- against -

NEW YORK CITY POLICE DEPARTMENT and  
JEFF GASTON,

Third-Party Defendants.

The following papers numbered 1 to \_\_\_ read on this motion, \_\_\_\_\_

No ___ On Calendar of _____	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1-2
Answering Affidavit and Exhibits-----	3-4
Replying Affidavit and Exhibits-----	5
Affidavit-----	_____
Pleadings -- Exhibit-----	_____
Stipulation -- Referee's Report --Minutes-----	_____
Filed papers-----	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

The branch of the motion pursuant to CPLR 3212, for an order granting summary judgment dismissing the third party complaint, on the ground that third-party defendants did not violate VTL § 1104, is denied.

Plaintiff Nicholas Coronado commenced this personal injury action alleging that he sustained injuries as a result of a motor vehicle accident that occurred on June 27, 2011, while he was a passenger in a livery cab operated by defendant third-party defendant Cornelio Del La Cruz. Mr. Del La Cruz commenced a third-party action against the New York City Police Department (NYPD) and Police Officer Jeff Gaston, alleging that Officer Gaston caused the accident.

NYPD and Officer Gaston move for summary judgment dismissing the third-party complaint. Movants contend that Officer Gaston was responding to an emergency and cannot be held liable as he did not operate his vehicle recklessly in violation of VTL § 1104.

It is well settled that the reckless disregard standard of care only applies when a driver of an authorized emergency vehicle . . . engages in following privileged conduct “1. Stop[s], stand[s] or park[s]; 2. Proceed[s] 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[s] the maximum speed limits so long as he does not endanger life or property; [or] 4. Disregard[s] regulations governing directions of movement or turning in specified directions” (VTL § 1104; see *Saarinan v Kerr*, 84 NY2d 494, 497 [1994]). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence” (*Kabir v County of Monroe*, 16 NY3d 217 [2011]; e.g. *Gonzalez v City of New York*, 91 AD3d 582 [1st Dept 2012]; *Tatishev v City of New York*, 84 AD3d 656, 657 [1st Dept 2011]).

In support of the motion, movants submit, the deposition transcript of plaintiff, the deposition transcript of Mr. Del La Cruz, and the deposition transcript of Officer Gaston. Plaintiff testified that he was sitting in the back seat of Mr. Delacruz' livery cab on the passenger's side when he noticed a police vehicle “slowly” changing lanes with its lights on. He further avers that Mr. Delacruz accelerated into the back of the police vehicle. Mr. Delacruz testified that he was in the middle lane of the Cross Bronx Expressway in stopped traffic. Mr. Delacruz avers that he began to move slowly when the police vehicle began to merge into the middle lane and struck his vehicle. Officer Gaston testified that he was traveling in the left lane of the cross Bronx expressway responding to a “hazmat condition” on the roadway with the lights and sirens activated on the vehicle. He further testified that the traffic was backed up and at a standstill, he merged into the middle lane, and then his vehicle was struck in the rear by the vehicle driven by Mr. Delacruz.

Based upon the foregoing testimony, movants fail to establish that the injury-causing conduct of Officer Gaston, specifically, merging from one lane of traffic into

another, falls within any of the categories of privileged conduct set forth in VTL § 1104 (b)(see *Gonzalez*, 91 AD3d 582 [1st Dept 2012] [court held that stopped vehicle that proceeded to turn right with the traffic light in its favor, was not engaged in privileged conduct]; *Tatishev*, 84 AD3d 656 [court held that making a left turn at a green light, within the speed limit, and not contrary to any restriction on movement or turning, did not fall within any of the categories of privileged conduct]).

The branch of the motion pursuant to CPLR 3212, for an order granting summary judgment dismissing the third party complaint, on the ground that the actions of third party defendant Delacruz were the sole proximate cause of the accident, is denied.

Movants contend that there is a presumption that Mr. Delacruz was negligent as the testimony of Officer Gaston establishes that his vehicle was stop at the time of the accident and Mr. Delacruz rear-ended the subject vehicle. In opposition, Mr. Delacruz argues that the instant motion for summary judgment is barred by *res judicata* and *collateral estoppel* based upon the order dated June 13, 2015.

The law of the case doctrine, precludes parties or their privies from relitigating an issue that has already been decided where a party has had a full and fair opportunity to address the issue (see *Carmona v Mathisson*, 92 AD3d 492, 493 [1st Dept.2012]). "The law of the case doctrine is designed to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case" (*People v Evans*, 94 NY2d 499, 504 [2000]).

In the instant matter, in the order dated July 13, 2015, Justice Tapia found that there were questions of fact as to whether officer Gaston violated VTL §1128 (a). Thereafter, movants made a motion to reague which was granted. Upon reargument, Justice Tapia found ". . . that questions of fact exists regarding the degree of comparative negligence between Mr. Delacruz and NYPD/Officer Gaston, because there are conflicting attestations as to how the MVA happened." As there has already been a finding that there are issues of fact regarding the comparative negligence of the drivers of the two vehicles, movants' application must be denied.

As, movants fail to meet their initial burden, this court declines to consider the opposition.

The branch of the motion to dismiss the complaint against the New York City Police Department (NYPD) is granted, as it is not a legal entity amendable to suit (see N.Y. City Charter § 396).

Accordingly, the Clerk is directed to dismiss the third-party complaint against defendant New York City Police Department and amend the caption to reflect such dismissal.

The foregoing shall constitute the decision and order of this court.

Dated: JAN 06 2017

  
\_\_\_\_\_  
A.J.S.C.