SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

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MATTHEW I. HANDELSMAN, et. al.,

Index No.: 0021177/2012

DECISION/ORDER

Plaintiff(s),

Present:
HON. MITCHELL J. DANZIGER

-against-

ANDREW L. LLEWELLYN, et. al.,

Defendant(s).

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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	1
Notice of Cross-Motion, Affirmation with Exhibits.....	2
Reply Affirmation in Support and Affirmation in Opposition.....	3
Reply Affirmation in Support of Cross-motion....	4

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

Defendants, The City of New York and The City of New York, s/h/a The New York City Police Department, ("City") move for summary judgment and dismissal of plaintiff's complaint pursuant to CPLR §§3212 and 3211 and pursuant to CPLR §§ 3017, 3018, 3019 for a default judgment as plaintiff, Brian Hess ("Hess"), failed to serve an answer to the City's counter-claim. Plaintiffs' cross-move for an order granting them spoliation sanctions against the City for their failure to preserve the police vehicle and police vehicle's black box (event data recorder), for an order pursuant to CPLR §3215(d) dismissing the City's counterclaim against plaintiff Hess, and for an order denying the City's summary judgment motion.

Plaintiffs seek to recover for damages sustained after a motor vehicle accident. Plaintiffs, Handelsman and Hess, allege that on November 17, 2011 they were in a Chevy Tahoe in the course of their employment with the Westchester County Police Department. Officers Handelsman and Hess observed a police chase unfolding between co-defendants, CITY OF NEW YORK and co-defendant Andrew Llewellyn, ("Llewellyn or Mr. Llewellyn"), at the Wakefield Bridge area. Llewellyn was operating a BMW that plaintiffs allege was being pursued by police

employed by the CITY OF NEW YORK. Thereafter, a motor vehicle accident occurred between the BMW driven by Mr. Llewellyn and the Chevy Tahoe ("SUV") driven by plaintiff Hess, with plaintiff Handelsman as a front seat passenger.

According to NYPD officers, Eric Downes, Jason Korpolinski, and Patrick Jean, they observed Mr. Llewellyn, in his BMW, running a steady red light while speeding on East 241st Street. At that point, the officers proceeded to pursue Mr. Llewellyn on 241st Street, with emergency lights activated until the Wakefield Bridge area.

Mr. Llewellyn, testified that on November 17, 2011, he was driving his black BMW 528i, heading towards when he went around a non-party car with flashers on. That car moved from it's spot at the same time Mr. Llewellyn went around him and the cars almost made contact. The driver of that car approached Mr. Llewellyn at the next light at 4th Street and Mundy and was yelling profanities at him. Mr. Llewellyn rolled up his window and drove off down East 241st Street. At the next intersection, the driver of that car approached Mr. Llewellyn again arguing with him, eventually pulling a gun out and pointing it at Mr. Llewellyn. Mr. Llewellyn then sped off down East 241st Street. Mr. Llewellyn sped towards White Plains Road on East 241st Street and the driver of the other car was following right behind him. Mr. Llewellyn heard sirens at White Plains Road, while he was traveling at approximately 80 M.P.H.

Mr. Llewellyn continued down East 241st Street, driving approximately 3/4's of the way over the Wakefield Bridge, when he made a u-turn and headed back towards White Plains Road. He saw the NYPD police vehicle with the sirens activated when he was at the Wakefield Bridge. Mr. Llewellyn did not know where the police car with the sirens was when he passed White Plains Road, despite being able to hear them. At the time Mr. Llewellyn saw the police lights behind him they were approximately 7-8 blocks away.

According to Mr. Llewellyn he was speeding, weaving in and out of traffic, and ran a red light while fleeing the man with the gun. Mr. Llewellyn testified he saw the police car go flying past him after he pulled the u-turn on the Wakefield Bridge. Mr. Llewellyn testified that he was going to pull over near the train station where there was a lot of people. He was traveling slower after he pulled the u-turn and was looking for a place to pull over. Thereafter, the SUV, occupied by plaintiffs, came into contact with his car. Mr. Llewellyn testified that his vehicle was stopped

and the SUV was speeding down the double yellow line of the street and hit him.

After the accident took place, the NYPD police car pulled up behind him. Mr. Llewellyn was charged with reckless driving and unlawfully fleeing a police officer. Mr. Llewellyn testified that the police car with the sirens that pursued him never made contact with his car because it was not close to his car. Mr. Llewellyn pled guilty for reckless driving. Mr. Llewellyn testified that the NYPD police car was not the reason why his vehicle and the SUV collided. The SUV smashing into the front of his BMW is why the incident occurred.

The Court has reviewed the testimony of the NYPD officers, the plaintiffs, and the non-party witnesses. For the sake of brevity, the Court will not recite their testimony here.

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]). Moreover, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he [or she] is ruling on a motion for summary judgment or for a directed verdict."(*Asabor v Archdiocese of New York*, 102 AD3d 524, 527 [1st Dept 2013]).

The City moves for summary judgment and dismissal arguing that the City is immune

from suit for the discretionary acts of its police officers, that the police officers are entitled to the reckless standard and did not act recklessly, and that there is no evidence that the City's police officers' actions or inactions were a proximate cause of the accident. The City further moves to dismiss the plaintiffs spouses from the action and for a default as against plaintiff, Hess, for failing to interpose an answer to the City's counter-claims. The plaintiffs argue that the reckless standard is not applicable here based on the facts of this case and that the conflicting versions of the accident and the events leading up to the accident require denial of the City's motion. Plaintiffs' oppose the portion of the City's motion regarding their notice of claim and seek spoliation, as the City did not preserve the black box recorder or the NYPD police vehicle involved in the pursuit. The Court finds the City has met its prima facie burden and the plaintiffs fail to raise a triable issue of fact. The Court finds that the police pursuit in this matter was neither the proximate or a concurrent cause of the accident, nor was it reckless as a matter of law.

The City argues that pursuant to VTL 1104, authorized emergency vehicles are permitted to disobey otherwise prescribed traffic regulations and can only be held liable when operating said authorized emergency vehicle with reckless disregard for the safety of others, this is otherwise known as the reckless standard.

VTL 1104 states in pertinent part:

> The driver of an authorized vehicle, when involved in emergency operation....may...proceed past a steady red signal, a flashing red signal, but only after slowing down as may be necessary for safe operation...exceed the maximum speed limits long as he does not endanger lift or property....
> except for an authorized vehicle
> operated as a police vehicle, the exceptions herein shall apply only when audible signals are sounded and 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.

As an initial matter, it is an undisputed fact that the NYPD officers were operating an authorized emergency vehicle. Per the testimony of every witness deposed in this matter, the NYPD officers were pursuing Mr. Llewellyn's BMW at some point prior to the accident, and exceeded the speed limit traveling anywhere from 50 to 100 M.P.H., and per the testimony of plaintiff Hess, the NYPD officers ran a red light in pursuit of Mr. Llewellyn. Further, while it is not required, they did have on their emergency lights as testified to by all witnesses and appear to have also had on their sirens. According to all witnesses, the NYPD officers were in pursuit of Mr. Llewellyn prior to the incident occurring and were exceeding the speed limit while doing so. The NYPD officers testified that they were pursuing Mr. Llewellyn because he ran a red light and was exceeding the speed limit on East 241st Street. Mr. Llewellyn testified that he heard the sirens and eventually saw the lights of the NYPD vehicle during the pursuit. As such, the record is clear that the NYPD vehicle was engaged in privileged conduct per VTL 1104(b).

In opposition, plaintiffs submit that the City was in violation of the NYPD patrol guide with regard to their pursuit of Mr. Llewellyn and therefore were not permitted to be engaged in such pursuit. Plaintiffs' submit an expert report from Christopher Calabrese, a previous commander of the Westchester County Police Department in support of their argument that the NYPD officers were in violation of the NYPD patrol guide in many regards, including how the NYPD officers completed their accident reports, in that they did not notify the radio dispatcher at the start of the pursuit and inform headquarters with pertinent information, including the nature of the offense. Plaintiffs also submit that there are credibility issues with the NYPD officers because they may have falsified information in order to avoid a command discipline for the pursuit. Ultimately, Mr. Calabrese's affidavit is offered to set forth the premise that the NYPD officers were not in compliance with NYPD procedures thereby engaging in an unauthorized pursuit of Mr. Llewellyn's BMW for a traffic infraction, therefore were not engaged in an emergency operation and were not authorized to violate the traffic laws of New York State.

Without addressing defendant's argument regarding the admissibility of plaintiffs' expert, Mr. Calabrese's affidavit is insufficient for other reasons. In his affidavit, Mr. Calabrese reaches a legal conclusion, the function of this Court on the within motion, finding that the

NYPD officers are not entitled to the privileges afforded by VTL §1104. Moreover, Mr. Calabrese addresses issues of credibility numerous times in his affidavit, accusing the NYPD officers of lying, committing perjury, and falsifying documents, among other things. Mr. Calabrese bases these accusations on speculation and assumptions, often surmising that the NYPD officers had to be lying in their recollection of the incident, which is insufficient to withstand summary judgment. (*Diaz v. NY Downtown Hosp.*, 99 N.Y.2d 542 [2002]). Further, credibility issue are a jury function. Additionally, Mr. Calabrese misinterprets the law. The NYPD Patrol Guide is not the law, but rather an internal set of guidelines for NYPD officers. A violation of an internal agency guideline that impose a higher standard of care on a defendant than those imposed by law cannot serve as a basis for liability against a governmental agency. (*Flynn v. City of New York*, 258 A.D.2d 129 [1st Dept. 1999]). As a result, the Court does not find Mr. Calabrese's affidavit to be probative.

Pursuant to VTL §114-b, emergency operation is defined in part as....pursuing an actual or suspected violator of the law. Here, the record supports a finding that Mr. Llewellyn, who admittedly ran a red light while traveling well over the speed limit, reaching 80 M.P.H. or more, in a heavily populated area of the Bronx, was an actual violator of the law. The NYPD observed Mr. Llewellyn posing a threat to public safety, and therefore had the right and duty to use whatever means are necessary, short of recklessness, to stop the offending Mr. Llewellyn. (*Saarinen v. Kerr*, 84 N.Y.2d 494 [1994]). As such, the NYPD officers were engaged in permissible emergency operation of their vehicle. The behavior that the NYPD officers were engaged in is protected conduct which should now be analyzed pursuant to the reckless standard.

The reckless disregard standard requires proof that the NYPD officer "intentionally committed 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 "has does so with conscious indifference to the outcome." (*Frezzell v. City of New York*, 24 N.Y.3d 213 [2014]). There is nothing in the record here that indicates that the officers committed any unreasonable acts with conscious indifference to known or obvious risks as to make harm highly probable. (*Aqeel v. Tony Casale*, 44 A.D.3d 572 [1st Dept. 2007]). Plaintiffs argue that the NYPD officers did not call in the pursuit to their command for two minutes and this is evidence of the NYPD officers

recklessness. The police officer in *Saarinen*, delayed in calling headquarters during his pursuit of Mr. Kerr, a driver who had been drinking, who ultimately crashed into plaintiff Saarinen. The Court found that the delay was hardly surprising given the rapidly unfolding flow of events and the short time period in which the entire incident occurred. Here, the NYPD officers failure to call in the pursuit, when the officer who decided to engage in the pursuit, was not a police officer, but rather a supervising lieutenant with NYPD, is not evidence of recklessness and has no bearing on causation. (*Aqeel, id.*).

Plaintiffs posit that even if the reckless disregard standard is applied here, the pursuit of Mr. Llewellyn, at a dangerous rate of speed, caused him to lose control and collide with the plaintiffs' vehicle. Plaintiffs rely on *Mercado v. Vega,* 77 N.Y.2d 918 (1991), in support of their argument, however, that matter can be distinguished from this matter. The police in *Mercado*, involved in a pursuit, traveling approximately 84 M.P.H, through a residential area, knew that they could not overtake the pursued vehicle and continued pursuit despite knowing that the car was approaching a curve that could not be negotiated at high speeds. The car took the "treacherous curve" and crashed into a tree, killing the driver, Mr. Vega and seriously harming his passenger. The Court found that both Mr. Vega's driving and the chase which the officers knew was leading to a dangerous curve, that could not be negotiated at high speeds, could be concurrent proximate causes of the accident. As such, in the *Mercado* case, the officers knew of the risks and had a conscious indifference to the same.

Such is not the case here. Mr. Lewellyn testified that he was running from a non-party driver with a gun, not the NYPD officers. He testified that the NYPD officers did not get close to his car. That the NYPD officers did not make contact with his BMW. He testified that they were not the reason for the collision, but instead the plaintiffs were the cause of the collision because they hit him. Mr. Llewellyn pled guilty to reckless driving. There is no evidence presented that the NYPD police pursuit was a concurrent proximate cause of this incident. Moreover, there is no testimony here that the NYPD officers knew of obvious risks in their pursuit of Mr. Llewellyn and disregarded the same. The Court does not find the plaintiffs argument that Mr. Llewellyn's testimony is incredible. Mr. Llewellyn's story has been consistent for the duration of this suit, that the NYPD pursuit was irrelevant to this accident and there is not one witness who says that

the NYPD vehicle made contact with Mr. Llewellyn's vehicle. Moreover, Mr. Llewellyn's testimony created a question of fact as to whether plaintiffs actually caused or contributed to this accident. See decision in this matter by this Court dated August 7, 2018, affirmed by the Appellate Division, 1st Department on February 25, 2020.

The plaintiffs argue that the differing versions of events in this matter prevent the Court from granting summary judgment. This Court disagrees as the differing versions do not raise a triable issue of fact. Plaintiffs compare this matter with *Campbell v. City of Elmira*, 84 N.Y.2d 505 (1994). There, the Court of Appeals in *Campbell* had to address the question of whether any rational review of the trial evidence supported the jury verdict that the City of Elmira's fire truck driver acted with reckless disregard for the safety of others, after the fire truck proceeded through an intersection, against a red light, at approximately 10 to 15 miles per hour. Plaintiff Campbell was a motorcyclist who entered the intersection with a green light and unsuccessfully attempted to stop his motorcycle upon seeing the fire truck. Plaintiff Campbell testified that he did not see lights or sirens. The trial revealed numerous disputed issues of fact and credibility regarding the parties sharply differing versions of the happening of events. Conflicting testimony and inferences emerged regarding whether the fire truck driver looked towards plaintiff Campbell's lane of traffic, whether the driver accelerated or decelerated in the intersection, whether emergency soundings were heard, and whether defendant's driver even knew of the color of the light when entering the intersection.

Such issues of fact go to the ultimate issue of case in *Campbell*, in that an emergency vehicle may enter an intersection against a red light after taking proper precautions such as slowing down and looking both ways. The issues of fact in *Campbell* were whether the driver took said precautions. This case is different, the factual issues and differing version of events do not go to the ultimate issue of the case. Here, the differing versions of events by the NYPD officers, the plaintiffs, Mr. Lewellyn, and the witnesses do not create a triable issue of fact, where Mr. Lewellyn testified that the NYPD officers had nothing to do with how he was driving and did not cause the collision. His testimony cuts the chain of causation. Interestingly, the Court of Appeals in *Campbell*, contrasts the *Campbell* case with the *Saarinen* case, which as stated above, is similar to the within matter. The *Campbell* court noted that *Saarinen* is very different than

Campbell and that the *Saarinen* "presents a once-more removed vicarious liability setting in that pursued driver, and not the pursing officer, was the actor that crashed into the plaintiff."

This matter is quite similar to *Fuchs v. City of New York*, 186 A.D.3d 459, 2nd Dept. 2020. In *Fuchs*, the plaintiff was injured when the vehicle she was operating was struck by another vehicle which was being pursued by NYPD police officers. The pursued vehicle turned the wrong way onto a one-way street and struck plaintiff. The Court found that the municipal defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the NYPD officers were involved in a pursuit which exceeded the speed limit and disregarded the direction of movement or turning in specified directions, and did not act with reckless disregard for the safety of others. Further, the Court found that the proximate cause of the accident was the independent recklessness of the driver of the vehicle that was being pursued, not the police officers' conduct in initiating the pursuit. Such is the case here.

As this Court finds that the NYPD officers conduct in pursuing Mr. Llewellyn was privileged pursuant to VTL §1104(b), there is no evidence that the NYPD officers acted recklessly as a matter of law, and that the pursuit was not the proximate cause or a concurrent cause of this incident, the plaintiff's complaint as against the City is dismissed. The Court shall not consider the other arguments presented as they are now moot. The City is ordered serve a copy of this order, with Notice of Entry on the parties within 30 days. The Clerk of the Court is directed to transfer this matter to a non-City part.

The above constitutes the decision and order of the Court.

Dated: 12/11/2020
Bronx, New York

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