Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI - SUFFOLK COUNTY

PRESENT:
Hon. PAUL J. BAISLEY, JR.
Justice of the Supreme Court

----------X

ROSEMARY RICCARDI,

Plaintiff,

- against -

COUNTY OF SUFFOLK, THE SUFFOLK COUNTY POLICE DEPARTMENT and KEVIN FORD, JR.,

Defendants.

----------X

INDEX NO.: 621635/2018
CALENDAR NO.: 202000358MV
MOTION DATE: 9/17/20
MOTION SEQ. NO.: 001 MD
MOTION SEQ. NO.: 002 MG

DAVID N. SLOAN, ESQ.
Attorney for Plaintiff
600 Old Country Road, Suite 450
Garden City, New York 11530

DENNIS M. COHEN, ESQ.
Suffolk County Attorney
Attorney for Defendants
100 Veterans Memorial Highway, POB 6100
Hauppauge, New York 11788

Upon the following papers read on these-filed motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendants, filed June 22, 2020; by plaintiff, filed August 13, 2020 ; Notice of Motion/Order to Show Cause and supporting papers; Answering Affidavits and supporting by plaintiff, filed August 13, 2020; by defendants, filed September 16, 2020 ; Replying Affidavits and supporting papers by defendants, filed September 16, 2020 ; Other _____; it is

ORDERED that the motion by defendants County of Suffolk, Suffolk County Police Department, and Kevin Ford, Jr., and the motion by plaintiff Rosemary Riccardi are consolidated for purposes of this determination; and it is further

ORDERED that the motion (motion sequence no. 001) by defendants County of Suffolk, Suffolk County Police Department, and Kevin Ford, Jr., for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion by plaintiff Rosemary Riccardi for summary judgment dismissing defendants' affirmative defenses of comparative negligence, assumption of risk, and failure to use a seatbelt is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Rosemary Riccardi, as a result of a motor vehicle accident, which occurred on December 15, 2017, on William Floyd Parkway, at or near its intersection with McGraw Street, in the Town of Brookhaven, New York. The accident allegedly occurred when a police vehicle operated by defendant Kevin Ford, Jr. ("Officer Ford"), a police officer for defendant Suffolk County Police Department, collided with the minibus in which plaintiff was a passenger.

Officer Ford testified that on the morning of the accident, he conducted a check of the police vehicle and found that the anti-lock braking system ("ABS") light was activated, and that he did not speak to the precinct mechanic. He stated that he had no difficulty in operating the vehicle before the accident occurred. Officer Ford testified that the accident occurred while he was on patrol and responding to a "10-34" call, which he explained is "a call for suspicious persons or circumstances," in nearby Mastic. He stated that his siren and emergency lights were activated as he drove. He explained that a "couple of hundred feet" from the subject intersection, the traffic light changed from green to yellow, so he applied his brakes firmly in order to slow and ultimately stop at the intersection. He further testified that all four wheels of his vehicle "locked up," and that his police vehicle slid at least 100 feet before it reached the intersection. He further testified that the traffic light changed to red before his vehicle reached the intersection. Officer Ford stated that he tried to avoid the collision with the minibus, but he could not steer the vehicle while the wheels were locked. He stated that he did not feel the fast pumping or "choppiness" of the ABS. He also stated that he first saw the minibus already in the intersection before the collision occurred and that there was no ice or precipitation on the roadway.

Defendants move for summary judgment dismissing the complaint on the ground that they can not be held liable, as Officer Ford was not reckless in the operation of his police vehicle pursuant to Vehicle and Traffic Law § 1104. They submit, in support of the motion, copies of the pleadings, photographs, the transcript of plaintiff's General Municipal Law § 50-h testimony, the transcripts of the deposition testimony of plaintiff and Officer Ford, and the witness statements of Richard Satter, Jr., and Khamran Ramesar. In opposition, plaintiff argues that Officer Ford was not engaged in conduct that qualifies for the reckless disregard standard, and that triable issues of fact remain as to whether Officer Ford was negligent in the operation of his vehicle.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508

NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

In order to preserve life and property and to enforce criminal laws, Vehicle and Traffic Law § 1104 qualifiedly exempts drivers of emergency vehicles from certain traffic laws when they are involved in emergency operation and may not be held liable to an injured third party unless the driver acted with reckless disregard of other's safety (*see Frezzell v City of New York*, 24 NY3d 213, 997 NYS2d 367 [2014]; *Saarinen v Kerr*, 84 NY2d 494, 602 NYS2d 297 [1994]; *Rodriguez-Garcia v Southampton Police Dept.*, 185 AD3d 744, 124 NYS3d 870 [2d Dept 2020]). "This approach avoids judicial second-guessing of the many split-second decisions that are made in the field under highly pressured conditions and mitigates the risk that possible liability could deter emergency personnel from acting decisively and taking calculated risks in order to save life or property or to apprehend miscreants" (*Frezzell v City of New York*, *supra*, at 217, *quoting Saarinen v Kerr*, *supra*, at 502 [internal quotations omitted]). Every police vehicle is an "authorized emergency vehicle" (*see* Vehicle and Traffic Law § 101), and "emergency operation" of a police vehicle includes "pursuing an actual or suspected violator of the law" (Vehicle and Traffic Law §114-b; *see Portalatin v City of New York*, 165 AD3d 1302, 87 NYS3d 73 [2d Dept 2018]; *Mouzakes v County of Suffolk*, 94 AD3d 829, 941 NYS2d 850 [2d Dept 2012]). The "reckless disregard" standard requires evidence that the police officer intentionally acted unreasonably in disregard of a known or obvious risk that was so great as to make it highly probable that harm would be done and did so with conscious indifference to the outcome (*see Frezzell v City of New York*, *supra*; *Fuchs v City of New York*, 186 AD3d 459, 126 NYS3d 652 [2d Dept 2020]; *Alexander v City of New York*, 176 AD3d 659, 107 NYS3d 688 [2d Dept 2019]). If the conduct which caused the accident is not privileged under Vehicle and Traffic Law § 1104 (b), the standard of care is ordinary negligence (*see Kabir v County of Monroe*, 16 NY3d 217, 920 NYS2d 268 [2011]; *Edwards v Menzil*, 186 AD3d 797, 127 NYS3d 784 [2d Dept 2020]; *Rodriguez-Garcia v Southampton Police Dept.*, *supra*; *Martinez v Incorporated Vil. of Freeport*, 181 AD3d 947, 119 NYS3d 892 [2d Dept 2020]; *Portalatin v City of New York*, *supra*).

Defendants failed to establish *prima facie* entitlement to summary judgment dismissing the complaint, as they failed to demonstrate that Officer Ford's conduct was entitled to the reckless disregard standard of care pursuant to Vehicle and Traffic Law § 1104 (*see Kabir v County of Monroe*, *supra*; *Edwards v Menzil*, *supra*; *Martinez v Incorporated Vil. of Freeport*, *supra*; *Reid v City of New York*, 148 AD3d 739, 48 NYS3d 462 [2d Dept 2017]). Specifically, a

triable issue of fact remains as to whether Officer Ford "[p]roceed[ed] past a steady red signal . . . but only after slowing down as may be necessary for safe operation" (Vehicle and Traffic Law § 1104 [b] [2]). Defendants also failed to establish that Officer Ford's conduct in ignoring the ABS warning light on his police vehicle was entitled to the reckless disregard standard of care. Further, there can be more than one proximate cause of an accident, and it is generally for the trier of fact to determine the issue of proximate cause (*Searless v Karczewski*, 153 AD3d 957, 60 NYS3d 431 [2d Dept 2017]). Having determined that defendants failed to meet their *prima facie* burden, it is unnecessary to consider whether plaintiff's papers in opposition are sufficient to raise a triable issue of fact (*Winegrad v New York Univ. Med. Ctr.*, *supra*).

Plaintiff cross-moves for summary judgment dismissing defendants' affirmative defenses of comparative negligence (first), assumption of risk (second), and failure to use a seatbelt (fourth). She submits, in support of the motion, copies of the pleadings, the transcript of plaintiff's General Municipal Law § 50-h testimony, and the transcripts of the deposition testimony of plaintiff and Officer Ford. In opposition, defendants argue that plaintiff's motion is not a proper cross motion, as it failed to comply with CPLR 2214 and 2215, and that triable issues of fact remain as to whether plaintiff wore a seatbelt.

When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law" (*Bank of N.Y. v Penalver*, 125 AD3d 796, 797, 1 NYS3d 825 [2d Dept 2015]; *South Point, Inc. v Redman*, 94 AD3d 1086, 1087, 943 NYS2d 543 [2d Dept 2012]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference . . . [and] if there is any doubt as to the availability of a defense, it should not be dismissed" (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723, 869 NYS2d 597 [2d Dept 2008]; *see Greco v Christoffersen*, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]).

In this case, plaintiff made a *prima facie* case that she was not comparatively negligent, as she stated that she was a passenger on the minibus that collided with defendants' vehicle (*see Romain v City of New York*, 177 AD3d 590, 112 NYS3d 162 [2d Dept 2019]), and that the assumption of risk doctrine is not applicable under the circumstances of this action (*see Custodi v Town of Amherst*, 20 NY3d 83, 957 NYS2d 268 [2012]; *Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 901 NYS2d 127 [2010]). Plaintiff's sworn statements also established that she was wearing a seatbelt at the time of the accident. Therefore, plaintiff met her burden for dismissal of the affirmative defenses of comparative negligence (first), assumption of risk (second), and failure to wear a seatbelt (fourth).

In opposition, defendants contend that plaintiff's motion should be dismissed for failure to comply with CPLR 2214 and 2215. A cross motion can only be made for relief against a

"moving party," and must be made returnable at the same time as the original motion (CPLR 2215; *Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986, 801 NYS2d 376 [2d Dept 2005]; *see Williams v Sahay*, 12 AD3d 366, 783 NYS2d 664 [2d Dept 2004]). Pursuant to CPLR 2214 (b), a notice of cross motion "shall be served at least seven days before [the time at which the original motion is noticed to be heard] if a notice of motion served at least sixteen days before such time so demands." Pursuant to CPLR 2215, a cross motion must be served at least three days prior to the time the motion is noticed to be heard. However, if the moving party set a return date at least 16 days after the date of service and demanded that the other parties serve answering papers at least seven days before the return date, the cross-moving party must serve the cross-motion at least 10 days before the return date. In this case, defendants' motion was served June 22, 2020 with notice to be heard on June 30, 2020, and plaintiff's cross motion was served on August 13, 2020, with notice to be heard on August 20, 2020. On June 29, 2020, the parties agreed, by stipulation, to adjourn defendants' motion to August 18, 2020. On August 14, 2020, the parties agreed, by stipulation, to adjourn both motions to September 17, 2020. Therefore, plaintiff's cross motion is timely.

Defendants withdraw their affirmative defenses of comparative negligence (first) and assumption of risk (second). They correctly assert that the issue of whether plaintiff used a seatbelt does not present an issue of fact with regard to liability, but instead is relevant at a damages trial (*see Romain v City of New York*, *supra*). However, defendants have not submitted admissible evidence to raise a triable issue of fact as to whether plaintiff used a seatbelt. Thus, defendants' affirmative defense of failure to wear a seatbelt (fourth) is dismissed.

Accordingly, defendants' motion is denied and plaintiff's motion is granted.

Dated: February 25, 2021

J.S.C.