Sylla v County of Westchester
2021 NY Slip Op 33763(U)
October 1, 2021
Supreme Court, Westchester County
Docket Number: Index No. 68607/2019
Judge: Damaris E. Torrent
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

RAGINA SYLLA,

Plaintiff,

-against-

COUNTY OF WESTCHESTER, WESTCHESTER COUNTY DEPARTMENT OF PUBLIC SAFETY, WESTCHESTER COUNTY POLICE DEPARTMENT, and JEROME SCHULMAN,

Defendants.

----------X

DECISION AND ORDER
Index No.: 68607/2019
Motion Date: 08/10/2021
Seq. No. 1

DAMARIS E. TORRENT, A.J.S.C.

The following papers numbered 1 to 24 were read on this motion (Seq. No. 1) by defendants for an order granting summary judgment dismissing the complaint:

PAPERS	NUMBERED
Notice of Motion / Statement of Material Facts / Affirmation (Silver) / Memorandum of Law / Exhibits A – N	1 – 18
Affirmation in Opposition (Stumer) / Statement of Material Facts / Exhibits A – C	19 – 23
Reply Affirmation (Chapman-Langrin)	24

Upon the foregoing papers, the motion is granted, and the complaint is dismissed.

This action arises out of a motor vehicle accident that occurred on December 3, 2018 in Yonkers, Westchester County. On that date, defendant Jerome Schulman, a Westchester County Police Officer, was operating a marked patrol vehicle and was responding to a radio call regarding a motor vehicle accident which had taken place on the exit ramp from northbound Saw Mill River Parkway to westbound Executive Boulevard. When Police Officer (now Sergeant) Schulman approached the scene of the accident, he observed that traffic was stopped in both exit

lanes. He then drove his patrol car on the grass between the exit lanes and the northbound Saw Mill River Parkway lanes in order to reach the accident scene. Sergeant Schulman testified that as he drove, both his emergency lights and siren were activated. As he exited the grassy area and attempted to re-enter the roadway in front of plaintiff's vehicle, driving at less than 5 miles per hour, he "sideswiped" the plaintiff's vehicle. He "believed" the plaintiff's vehicle was moving, but he was not certain. The impact was very light.

The plaintiff testified that she did not see the police vehicle before the accident, nor did she see lights or hear a siren. She stated that her vehicle was stopped at the time of the impact.

By Notice of Motion filed on April 16, 2021, defendants seek an order granting summary judgment dismissing the complaint. Defendants assert two grounds for dismissal. Defendants argue that plaintiff failed to suffer a serious injury as defined in Insurance Law § 5102(d) in the subject accident. Further, defendants maintain that, even if plaintiff did suffer such an injury, defendants are immune from liability pursuant to Vehicle and Traffic Law § 1104.

The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). "[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 demonstrate the absence of any material issues of fact… . Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers… . 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted].)

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]). As stated in *Scott v. Long Island Power Auth.* (294 AD2d 348, 348 [2d Dept. 2002]):

> It is well established that on a motion for summary judgment the court is not to engage in the weighing of evidence. Rather, the court's function is to determine whether 'by no rational process could the trier of facts find for the nonmoving party' (*Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 678 [internal quotation marks omitted]). It is equally well established that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (see *Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366).

Vehicle and Traffic Law § 1104 (a) exempts the drivers of authorized emergency vehicles from the requirements of certain traffic laws when they are involved in an "emergency operation" (VTL §§ 114-b, 1104[a]; *see Criscione v City of New York*, 97 NY2d 152, 156-157 [2001]). Section 1104 provides, in part, that the driver of an emergency vehicle may stop, stand or park (VTL § 1104[b][1]); 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 (VTL § 1104[b][2]); exceed the maximum speed limits so long as he (sic) does not endanger life or property (VTL § 1104[b][3]); and disregard regulations governing directions of movement or turning in specified directions… . (VTL § 1104[b][4]).

This statutory qualified immunity "precludes the imposition of liability for otherwise privileged conduct except where the conduct rises to the level of recklessness" (*Saarinen v Kerr*, 84 NY2d 494, 497 [1994]; *O'Banner v County of Sullivan*, 16 AD3d 950, 952 [2005]). By statute, every police vehicle is an authorized emergency vehicle within the meaning of section 1104

(VTL § 101). Responding to the scene of an accident or to a police call are among the statutorily-enumerated emergency operations (VTL § 114-b). As was made clear in *Kabir v. County of Monroe* (16 NY3d 217, 220 [2011]), "the reckless disregard standard of care in Vehicle and Traffic Law § 1104(e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence."

In the matter at bar, it is not disputed that Sergeant Schulman was operating a police vehicle, traveling to the scene of an accident in response to a police call, and proceeding at a speed of approximately three to five miles per hour upon the grassy area to the left of the two exit lanes so as to move past stopped traffic and reach the scene of the accident, when he struck the side of plaintiff's vehicle. The issue presented is whether the officer's conduct was reckless as opposed to merely negligent. For the purpose of applying VTL § 1104(e), conduct is reckless when the officer has "'intentionally done 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 done so with conscious indifference to the outcome" (*Saarinen v Kerr*, 84 NY2d 494, 501 [1004]).

The defendants have presented a prima facie case that the officer was involved in an emergency operation, and that his conduct was negligent, not reckless.[1] In opposition, plaintiff failed to raise a triable issue of fact. As an initial matter, plaintiff asserts that defendants failed

[1] Plaintiff disputes whether the officer acted recklessly. She does not, however, challenge the defendants' argument that a standard of recklessness applies, as opposed to a standard of negligence. In this regard, a recklessness standard applies because the officer, in driving off the road and then back into the traffic lane, was disregarding regulations governing directions of movement or turning in specified directions.

to make the required prima facie showing because their motion is supported by deposition transcripts which are not in admissible form. However, the transcripts both are certified by the stenographers, and plaintiff does not challenge their accuracy. Thus, the transcripts are admissible and properly considered on defendants' motion (*Thomas v City of New York*, 124 AD3d 872, 873 [2d Dept 2015]).

It is undisputed that Sergeant Schulman was operating an authorized emergency vehicle and was engaged in an emergency operation. However, plaintiff asserts that triable issues of fact exist as to whether Sergeant Schulman's conduct in driving his patrol vehicle on the grassy area between the Saw Mill River Parkway and the two exit lanes was reckless, so as to deprive defendants of the qualified immunity offered by Vehicle and Traffic Law § 1104. In this regard, plaintiff asserts that the lights and siren on Sergeant Schulman's patrol car were not activated at the time of the accident, and that the plaintiff could not have anticipated being passed on the side from an area outside of the roadway.

Contrary to plaintiff's arguments, a police vehicle is not required to activate its lights and sirens to be afforded the statutory exemptions (VTL § 1104[c]). The absence of lights and sirens, albeit not a *sine qua non* for application of a standard of recklessness, could nevertheless impact a determination as to whether the officer's conduct is reckless. For example, in one case, the Second Department considered an accident between two police vehicles, both responding to an emergency. The evidence indicated that one officer attempted to "cut off" the other police vehicle as they both turned left, on a wet roadway in the fog with no emergency signals in use, and that the vehicles collided with enough force to push the plaintiff's vehicle 20 to 30 feet onto the lawn of the house on the corner. The Court found issues of fact as to whether the driver's

conduct rose to a level of recklessness (*McCarthy v City of New York*, 250 AD2d 654, 655 [2d Dept 1998]).

Based on the testimony of the defendant driver, there would be little trouble in finding that he was negligent, i.e., that he failed to keep a proper distance from the plaintiff's vehicle as he re-entered the roadway. However, even assuming that the driver had not activated his lights and siren, Sergeant Schulman's conduct did not rise to a level of recklessness as a matter of law. Plaintiff could have reasonably anticipated being passed by an emergency vehicle in view of the fact that she was passing the scene of an accident, with cars on the side of the roadway. Further, the focus is not on what plaintiff could have anticipated, but on the defendant driver's conduct. It is not disputed that Sergeant Schulman was driving at a very slow rate of speed, nor that the impact was light, as plaintiff admitted that her car sustained only "cosmetic" damages. The slow rate of speed, and the fact that Sergeant Schulman unintentionally made contact as he attempted to re-enter the roadway, indicates that Sergeant Schulman's conduct was not reckless.

Courts have found that conduct which is objectively more dangerous than that of Sergeant Schulman does not meet the recklessness standard (*see e.g. Frezzell v City of New York*, 24 NY3d 213 [2014] [officer drove 15 to 20 miles per hour against flow of traffic on one-way street in Manhattan]; *Cable v State*, 182 AD3d 569 [2d Dept 2020] [State Trooper parked on northbound right shoulder of divided four-lane Palisades Interstate Parkway made U-turn across both northbound lanes and over grassy median into southbound lane]). Plaintiff submitted no evidence to rebut Sergeant Schulman's sworn testimony that he drove his patrol vehicle slowly on the grassy area between the Saw Mill River Parkway and the exit lane in which plaintiff's vehicle was stopped in traffic behind the accident to which Sergeant Schulman was called. Under

the circumstances, Sergeant Schulman cannot be found to have acted with reckless disregard for the safety of others.

In light of the finding that defendants are immune from liability pursuant to VTL § 1104, the Court need not and does not reach the remaining contentions of the parties.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted, and the complaint is dismissed; and it is further

ORDERED that, within ten (10) days of the date hereof, defendants shall serve a copy of this Decision and Order, with notice of entry, upon plaintiff; and it is further

ORDERED that defendants shall, within ten (10) days of service of notice of entry as aforesaid, file proof of said service via NYSCEF.

The foregoing constitutes the Decision and Order of the Court.

Dated: October 1, 2021
White Plains, New York

E N T E R:

Damaris E. Torrent

HON. DAMARIS E. TORRENT, A.J.S.C.

FILED VIA NYSCEF