

**Bourdierd v City of Yonkers**

2021 NY Slip Op 33874(U)

October 6, 2021

Supreme Court, Westchester County

Docket Number: Index No. 64208/2019

Judge: Charles D. Wood

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period 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  
**MIGUEL A. BOURDIERD,**

**Plaintiff,**

**-against-**

**DECISION & ORDER  
Index No. 64208/2019  
Sequence No. 1**

**THE CITY OF YONKERS, CITY OF YONKERS  
POLICE DEPARTMENT and ALBERT HUGHES,**

**Defendants.**

-----X  
**WOOD, J.**

New York State Courts Electronic Filing (“NYSCEF”) Document Numbers 21-46 were read in connection with defendants’ motion for summary judgment dismissing the complaint against the City of Yonkers, City of Yonkers Police Department and Albert Hughes.

Plaintiffs brought his action to recover for alleged injuries suffered on August 27, 2018, from a motor vehicle accident involving plaintiff’s black Mercedes SUV, and a Dodge Charger, marked police radio car owned by the City of Yonkers and operated by defendant Police Officer Albert Hughes. At the time of the accident, Officer Hughes was on duty and his vehicle was proceeding on Cross Hill Avenue, when he spotted a vehicle that not only had run a stop sign, but the offending motorist was also using her cell phone while driving. While Officer Hughes made a U-turn on Cross Hill Avenue to pursue the offending motorist, he struck plaintiff’s vehicle on the driver’s side, which just had made a left turn on Cross Hill Avenue from Corbalis Place. As a result, this action ensued.

Upon the foregoing papers, the motion is decided as follows:

A 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” (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakobovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is “required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion” (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy, not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

Officer Hughes testified that he had been driving westbound on Cross Hill, which was down hill, and had reached the intersection with Corbalis, when he observed the lawbreaking motorist, and immediately made a U-turn. He looked in his driver's side rear-view mirror, attempting to see the offending vehicle's license plate as she passed. When Officer Hughes looked up he saw plaintiff's black SUV in front of him making a turn from Corbalis onto Cross

Hill. He hit his brakes hard, pushing the pedal all the way down, trying to avoid the accident that ultimately occurred.(NYSCEF#30).

Plaintiff contends that he had already begun his left turn and his vehicle was pointed toward the street in which he was headed (Cross Hill Avenue) When the two vehicles were almost next to one another, the police vehicle suddenly turned to its left and accelerated . The police vehicle had no siren or lights on at the time (NYSCEF#29 at 32) Plaintiff honked his horn and slammed on his breaks (NYSCEF# 29, at 29, 31). The two vehicles collided. Plaintiff claims that defendant Hughes became focused on the alleged traffic violator and precipitously accelerated into a U-turn without checking for other vehicles. Officer Hughes should have been able to see the plaintiff and could have avoided the accident, and had not activated his lights or sirens while making his U-turn.

Angel Castillo, a bystander witness attested that he witnessed the accident:

Following the accident, I went over to the person driving the Mercedes Benz who appeared to be seriously injured and in a great deal of pain. I then gave the driver my name and phone number as a witness to the accident. Prior to the accident, I had seen the Mercedes Benz [plaintiff's vehicle] come to a complete stop at the stop sign. At which time I saw the driver start across the intersection at a normal rate of speed in a safe fashion. As the Mercedes Benz was moving across the intersection, I saw the radio car, which did not have its emergency lights or siren on, come speeding down the hill. I then saw the police officer, who did not have his directional on, make a sudden U- turn onto southbound Corbalis Place and continue to speed back up the hill. When the police officer made his U turn, the Mercedes Benz had already been moving across the intersection in front of his vehicle. As the police officer was completing his turn, he never applied his brakes, and I saw the front of the radio car run straight into the driver's side of the Mercedes Benz. As a result, it would have been impossible for the person driving the Mercedes Benz, who was moving across the intersection, to get out of the path of the radio car and avoid the accident" (NYSCEF#41).

Vehicle & Traffic Law §101, defines an authorized emergency vehicle as including "Every ambulance, police vehicle or bicycle, correction vehicle, fire vehicle." The record shows that Officer Hughes was engaged in the emergency operation of an authorized emergency vehicle at the time of the accident, as he was engaged in pursuit of a person that had broken the law and endangered the public.

The Court of Appeals has ruled that drivers of police emergency vehicles enjoy a qualified immunity for their actions taken during the course of an emergency operation of such vehicle (VTL §1104). "A police officer's conduct in pursuing a suspected lawbreaker may not form the basis of a civil liability to an injured bystander unless the officer acted in reckless disregard for the safety of others" (Saarinen v Kerr, 84 NY2d 494 [1994]).

This standard requires "evidence that 'the actor 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' " (Powell v City of Mount Vernon, 228 A.D.2d 572, 2d Dept 1996), citing, *Saarinen v. Kerr, supra*, at 501, quoting Prosser and Keeton, Torts §34, at 213 [5th ed] ).

Here, the court finds that defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the police officer's conduct was not reckless. Applying VTL §1104, Officer Hughes' conduct in pursuing the offending motorist — a suspected lawbreaker — who ran a stop sign and was using her cell phone while driving, posed a threat to the public safety, thus, the officer was authorized to "use whatever means [were] necessary, short of the proscribed recklessness, to overtake and stop the offending driver" (*Saarinen v. Kerr, supra*, at 503).

Notably, other than a momentary lapse in judgment, there is nothing in the officer's conduct demonstrating that he intentionally committed acts of an unreasonable character, in disregard of a known or obvious risk so great that harm to others was probable (Badalamenti v City of New York, 30 AD3d 452, 453 [2d Dept 2006]; Puntarich v Cty. of Suffolk, 47 AD3d 785, 786 [2d Dept 2008]).

In opposition, plaintiff failed to raise a triable issue of fact, except for conclusory allegations not of an evidentiary nature, insufficient to preclude summary judgment.

NOW, therefore for the above stated reasons, it is hereby

ORDERED, that defendants' motion for summary judgment is granted, and the Complaint is dismissed.

The Clerk is directed to enter judgment accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: October 6, 2021

White Plains, New York



HON. CHARLES D. WOOD  
Justice of the Supreme Court

TO: All Parties' Counsel by NYSCEF