Haque v City of New York
2022 NY Slip Op 31945(U)
June 22, 2022
Supreme Court, New York County
Docket Number: Index No. 155163/2018
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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AMINUL HAQUE,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY FIRE DEPARTMENT, JAMES MILLS

Defendants.

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INDEX NO. 155163/2018

MOTION DATE 10/12/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for JUDGMENT - SUMMARY.

Pending before the court is a motion wherein defendants the City of New York, the New York City Fire Department and James Mills (collective, the "City") seek an order, pursuant to CPLR 3212, granting summary judgment in favor of the City, and dismissing the complaint against all defendants.

In the underling action, plaintiff seeks to recover monetary damages for personal injuries he allegedly sustained on September 3, 2017, at approximately 5:00am when an FDNY fire truck collided and made physical contact with plaintiff's car at the intersection of 36th Street and 1st Avenue, at or in front of 416 East 36th Street, in the County, City and State of New York.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). 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 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 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 the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 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 [NY Ct. of Appeals 1957]).

The 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, and 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 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Arguments made by the parties

The City argues that at the time of the accident, defendant James Mills (the "City Driver") was operating the FDNY fire truck that struck plaintiff's car, and that the City Driver was responding to an emergency. The City argues that the City Driver was operating an emergency vehicle in a non-reckless manner and that, pursuant to the Vehicle and Traffic Law ("VTL"), the City is not liable for plaintiff's injuries.

In support of their argument, the City attaches, *inter alia*, the transcripts from plaintiff's 50-h hearing (NYSCEF Document #26), plaintiff's EBT (NYSCEF Document #27) and the City Driver's EBT (NYSCEF Document #28). The City also attached the Chief Officer's Apparatus Investigation Report by the FDNY and an NYPD Police Accident Report (also known as MV-104) (collectively, NYSCEF Document #23).

In opposition, plaintiff argues that there is an issue of fact as to whether the City Driver engaged the emergency lights and sirens prior to entering the intersection, as plaintiff contends he did not see any emergency lights or hear any sirens prior to the accident. Plaintiff also argues that there is an issue of fact as to whether the City Driver negligently failed to observe plaintiff driver in the intersection in front of him.

With regard to the parties' account of event, the City Driver testified as follows: On the accident date, he was operating an FDNY ambulance in response to an emergency call. He was en route to West 46th Street and Broadway, to render service to a male bleeding from a fight. Upon leaving the station, the City Driver activated the ambulance's lights and siren; drove westbound on 26th Street; turned onto First Avenue; and then drove in a northerly direction up the Avenue. It was raining at the time. First Avenue is a one-way street with four lanes for vehicle travel, and if the lanes were numbered one through four, from left to right, he was travelling in the third lane prior to the incident. As he approached the intersection of 36th Street and First Avenue, with lights and sirens activated, the traffic light was changing from yellow to red. The City Driver then slowed down to under 10 miles per hour, changed tones on the siren, and checked the intersection for oncoming traffic. Specifically, prior to entering the intersection, he checked for traffic and saw a black "SUV style vehicle" to his left with no headlights on. The vehicle had stopped in order for the City vehicle to proceed. Because the black vehicle appeared to be stopped, the City Driver began to accelerate again and proceeded through the intersection at approximately 15 miles per hour. The City Driver then felt an impact from his left and realized that the City vehicle and the black vehicle had collided. The accident occurred in the middle of the intersection of First Avenue and East 36th Street. Following the impact, the City Diver checked on his partner and plaintiff, and reported the accident to his dispatcher.

In contrast, plaintiff testified as follows: At the time of the accident, plaintiff was working as an Uber driver and was operating his 2008 Toyota Rav4, on his way to pick up a passenger. Plaintiff was driving on 36th Street when the light at the intersection of First Avenue turned red, and he came to a stop. While plaintiff waited, traffic proceeded on First Avenue. When the light

turned green, plaintiff attempted to drive across First Avenue when his vehicle was struck on the front passenger side. Plaintiff testified that he did not see lights or hear sirens prior to the impact.

Conclusions of Law

VTL § 1104 (Authorized emergency vehicles), provides, in part:

> (a) The driver of an authorized emergency vehicle, when involved in an emergency operation, may exercise the privileges set forth in this section, but subject to the conditions herein stated.
>
> (b) The driver of an authorized emergency vehicle may:
> 1. Stop, stand or park irrespective of the provisions of this title;
> 2. 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;
> 3. Exceed the maximum speed limits so long as he does not endanger life or property;
> 4. Disregard regulations governing directions of movement or turning in specified directions.
>
> (c) … the exemptions herein granted to an authorized emergency vehicle shall apply only when audible signals are sounded from any 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.
>
> (d) An authorized emergency vehicle shall not be prohibited from using any sidewalk, highway, street or roadway during an emergency operation.
>
> (e) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

The applicable standard in assessing liability for injuries sustained by a plaintiff during an emergency operation of an emergency vehicle is "reckless disregard for the safety of others" (*see* Saarinen v Kerr, 84 NY2d 494 [1994] [holding that to form a basis of civil liability, conduct must rise to the level of a reckless disregard for the safety of others. This standard demands more than a showing of a lack of due care but requires evidence that "the actor intentionally committed an act of 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]).

The "reckless disregard" standard applies not only to police vehicles, but also to FDNY ones (*see, e.g.*, Gonzalez v City of New York, 91 AD3d 582, 582 [1st Dept 2012] [holding that had the driver of the defendant fire truck been engaged "in any of the specific conduct that the driver of an authorized emergency vehicle in an emergency operation is permitted by Vehicle and Traffic Law § 1104(b)," then the reckless disregard standard of care per VTL § 1104 would have applied).

Here, the parties gave disparate accounts as to the circumstances giving rise to the accident, which raise questions as to whether defendants acted in reckless disregard for the safety of others, as such conduct is proscribed under the VTL. While the City Driver contends that he had his lights and sirens activated and proceeded through the intersection only when it was safe to do so, plaintiff maintains that the City Driver did not have lights or sirens activated.

Conclusion

Based on this record, and for the reasons set forth herein, it is hereby

ORDERED that defendants' motion for summary judgment is DENIED.

6/22/2022
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		**CASE DISPOSED**			[X]	**NON-FINAL DISPOSITION**	
		GRANTED	[X]	**DENIED**		**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**