SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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Eduardo Guzman,

Plaintiff,

- v -

The City Of New York, New York City Police Department, John Doe the names being fictitious but intended to be the NYPD Undercover Police Officer and operator of the motor vehicle with the unknown NYS license plate number, Kelber Cabrera, Lydia E. Lopez, Mar-Can Transportation Company, Inc.,

Defendants.

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INDEX NO. 155590/2015

MOTION DATE 09/06/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123 were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

This is an action in which plaintiff seeks to recover monetary damages for personal injuries allegedly sustained on January 5, 2015, at approximately 3:00 p.m. on West 204th Street near its intersection with Sherman Avenue, New York, New York. It is alleged that defendant KELBER CABRERA (the "Driver") was driving a stolen 2013 Range Rover as he was fleeing police officers who were pursuing him in an unmarked police car. The Driver hit plaintiff's 2010 Toyota Camry and a Mar-Can Transport Co. school bus, driven by defendant Lydia E. Lopez.

Now pending before the court is a motion wherein defendants THE CITY OF NEW YORK and the NEW YORK CITY POLICE DEPARTMENT (collectively, the "City") seek an order, pursuant to Civil Practice Law and Rules ("CPLR") Section 3211(a)(7), dismissing the complaint for failure to state a cause of action or in the alternative an order, pursuant to CPLR 3212, granting the City summary judgment.

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, the New York Court of Appeals has "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]).

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction […] We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83 [NY Ct. of Appeals 1994]).

City's *prima facie* case

The City argues, first, that the City was not the proximate cause of plaintiff's injuries, as plaintiff himself admitted that his vehicle was hit only by the stolen vehicle, which was operated by defendant Driver. It is undisputed that the unmarked police car never made contact with any other vehicle and was not physically involved in the accident. The City argues that plaintiff's collision with the stolen vehicle was entirely the Driver's fault; that the police officers did not cause the Driver to hit plaintiff's taxi; and that the City's only involvement was following the stolen vehicle up until the officers saw the accident occur.

The City argues, second, that the City is immune from liability because the officer's actions did not evidence a "reckless disregard" for the safety of others. Specifically, the City argues that they are immune from liability for the police officers' discretionary decision to pursue the stolen

vehicle after it fled an attempted vehicle stop. Thus, the City argues, the only available basis for liability would be the officers driving with "reckless disregard for the safety of others" during the pursuit, as provided in Vehicle and Traffic Law ("VTL") Section 1104(e), and that here, the facts show no such reckless disregard.

In opposition, plaintiff does not oppose the City's argument that the City was not the proximate cause of plaintiff's injuries. Instead, plaintiff argues that under the VTL, a government vehicle is only held to the "reckless disregard" standard when such vehicle is involved in an "emergency operation," and the operation here did not constitute an emergency, as evidenced by the fact that the police took no action to search for the stolen vehicle in the two days after it was reported stolen. Next, plaintiff argues that the officers acted in reckless disregard by engaging in a high-speed pursuit in a busy residential area. In support of this argument, plaintiff submitted, *inter alia*, a video recording of the subject accident, (NYSCEF Document #123), which plaintiff contends shows that the police were driving at a high speed. Plaintiff also argues that the City, as the movant here, has the burden to provide all relevant evidence to allow a court to decide a dispositive motion, and that the City's failure to submit the video should be interpreted as the City conceding that the officers did indeed act in "reckless disregard."

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) Except for an authorized emergency vehicle operated as a police vehicle or bicycle, 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 operated as a police, sheriff or deputy sheriff vehicle may exceed the maximum speed limits for the purpose of calibrating such vehicles' s speedometer. Notwithstanding any other law, rule or regulation to the contrary, a police, sheriff or deputy sheriff bicycle operated as 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 [emphasis added].

(f) Notwithstanding any other law, rule or regulation to the contrary, an ambulance operated in the course of an emergency shall not be prohibited from using any highway, street or roadway; provided, however, that an authority having jurisdiction over any such highway, street or roadway may specifically prohibit travel thereon by ambulances if such authority shall deem such travel to be extremely hazardous and would endanger patients being transported thereby.

The New York Court of Appeals has held that 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 e.g.*, Saarinen v Kerr, 84 NY2d 494 (1994)(holding that a police officer's conduct in pursuing a suspected lawbreaker may not form the basis of civil liability to an injured bystander unless the officer acted in reckless disregard for the safety of others). This standard demands more than a showing of a lack of "due care under the circumstances" . . . but 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" and has done so with conscious indifference to the outcome).

Here, plaintiff's claims, as asserted in opposition, are belied by the record and wholly without merit. First, it is undisputed that the City vehicle was not the proximate cause of plaintiff's accident. Second, it is undisputed that the vehicle that struck plaintiff's car had been stolen and that the Driver of that vehicle was a suspected lawbreaker at the time the officers were following him. This court neither takes judicial notice of nor finds evidence to support, upon review of the video, that the officers were driving at an unusually high speed. Such claims by plaintiff are contradicted both by the video and by the officer's testimony. Officer Fox denied that he was speeding (transcript at NYSCEF Document #108) and Officer Walsh, who was in the passenger seat of the police vehicle, testified that Officer Fox complied with the rules of the road (transcript at NYSCEF Document #110). There is nothing on this record to indicate that the City officers intentionally or otherwise engaged in 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 did so with conscious indifference to the outcome.

See also Gervasi v Peay, 254 AD2d 172 (1st Dept 1998); Perez v City of New York, 80 AD3d 543 (1st Dept 2011); Rodriguez v City of New York, 105 AD3d 623 (1st Dept 2013); Fuchs v City of New York, 186 AD3d 459 (2d Dept 2020).

Accordingly, it is hereby:

ORDERED that (Motion #003) filed by defendants THE CITY OF NEW YORK and the NEW YORK CITY POLICE DEPARTMENT (the "City") is **GRANTED** in its entirety; and it is further

ORDERED that plaintiff's complaint and any/all cross-claims are dismissed with prejudice as against defendants THE CITY OF NEW YORK and the NEW YORK CITY POLICE DEPARTMENT; and it is further

ORDERED that the caption is amended as to remove THE CITY OF NEW YORK and the NEW YORK CITY POLICE DEPARTMENT as defendants; and it is further

ORDERED that this action is randomly reassigned to a General IAS part; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This is the Decision and Order of this court.

10/19/2022
DATE

J. MACHELLE SWEETING, J.S.C.

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