

Chiu-Yu v Chin

2023 NY Slip Op 30668(U)

March 7, 2023

Supreme Court, New York County

Docket Number: Index No. 450003/2020

Judge: Nicholas W. Moyne

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52TR

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YUET C. CHIU-YU,

Plaintiff,

- v -

DANIEL CHIN, THE CITY OF NEW YORK, THE NEW
YORK CITY POLICE DEPARTMENT

Defendant.

INDEX NO. 450003/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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HON. NICHOLAS W. MOYNE:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is

Defendants DANIEL CHIN, THE CITY OF NEW YORK, and THE NEW YORK CITY POLICE DEPARTMENT("NYPD"), herein "Defendants," move for an Order pursuant to CPL2 § 3212, granting summary judgment and dismissing Plaintiff's complaint. The plaintiff alleges that she sustained personal injuries when she was struck by an NYPD vehicle while crossing the street. The accident occurred October 14, 2017, at 6:41 p.m., on 34th Street before its' intersection with Avenue of the Americas. Plaintiff was crossing midblock, moving north to south across the roadway, when she was struck by an NYPD vehicle traveling westbound in an eastbound lane and driven by NYPD Officer Daniel Chin.

Defendants contend they have established as a matter of law that at the time of the accident (1) the NYPD vehicle was an emergency vehicle; (2) engaged in an emergency operation; (3) engaged in conduct privileged under the applicable statute;

(4) the actions of the officer were not reckless and; (5) evidence establishes that it was the plaintiff's conduct in entering the crosswalk without looking that proximately caused the accident. In support of their motion, defendants offer the transcripts of plaintiff's 50-h hearing, plaintiff's Examination Before Trial ("EBT") testimony, defendants' EBT testimony, and documentary evidence in the form of a Police Accident Report (MV-104) and Sprint Report. The police report and Sprint report initially provided to the court were uncertified. Certified copies have since been provided.

Plaintiff opposes the defendant's motion. Plaintiff contends that summary judgment is not warranted as defendants have not established as a matter of law their entitlement to the reckless standard. Alternatively, plaintiff argues that there are issues of fact regarding whether the defendants' conduct was reckless.

Discussion:

Under CPLR 3212(b), summary judgment shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. (N.Y. C.P.L.R. 3212[(b)]. The proponent of a summary judgment motion must make prima facie showing of entitlement as a matter law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegard v NYU Med. Ctr.*, 64 NY2d 851, 853 [1985]). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that a claim or defense is real and can be established at trial (*Tatishev v City of New York*, 32 Misc 3d 1241[A], 938 NYS2d 230 [Sup Ct 2009], *aff'd*, 84 AD3d 656, 923 NYS2d 523 [2011], quoting *Indig v Finkelstein*, 23 NY2d 728 [1968]; *Vogel v Blade Contr. Inc.*, 293

AD2d 376, 377 [1st Dept 2002]). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment (*Id.* quoting *McGahee v Kennedy*, 48 NY2d 832, 834 [1979]). In the event the defendant meets its burden, the evidence submitted by the non-moving party must be accepted as true, and the non-moving party must be given the benefits of all favorable inferences which may be drawn therefrom (*City Line Rent a Car, Inc. v Alfess Realty, LLC*, 33 AD3d 835 [2d Dept 2006]; *Demshick v Community Hous. Mgt. Corp.*, 34 AD3d 518, 520 [2d Dept 2006]; *Marine Midland Bank, NA v Dino & Artie's Automatic Transmission Co.*, 563 NYS2d 449 [2d Dept 1990]). Accordingly, a motion for summary judgment should not be granted where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*Id.*).

Applicable Standard of Care:

Vehicle and Traffic Law § 1104 (a) proscribes that 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. The driver of an authorized emergency vehicle may disregard regulations governing directions or movement or turning in specified directions (VTL § 1104[b][4]). However, 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. (VTL § 1104[e]).

By statute, every police vehicle is an authorized vehicle within the meaning of the statute (VTL §101). Additionally, "emergency operation" may include the operation of an

authorized emergency vehicle when such vehicle is pursuing an actual or suspected violator of the law or responding to a police call (VTL §114-b). Under VTL §114-b, "police call" includes an officer operating a patrol vehicle while responding to a police dispatch to investigate a 911 call (*Criscione v City of New York*, 97 NY2d 152, 157-158, 762 NE2d 342, 345 [2001]).

Protection of the statute provided in subsection (e) is qualified. The statute does not create a reckless disregard standard of care for engaging in conduct outside of the privileges outlined in subsection (b) (*Kabir v Cnty. of Monroe*, 16 NY3d 217, 227, 945 NE2d 461, 467 [2011]). Furthermore, section 1104(e) establishes a reckless disregard standard of care for determining civil liability for damages only for accidents resulting from the privileged operation of an emergency vehicle. If the conduct causing the accident resulting in injuries and damages is not privileged under VTL § 1104(b), the standard of care for determining civil liability is ordinary negligence (*Id.* [quoting *Saarinen*, 84 NY2d at 500, 620 NYS2d 297, 644 NE2d 988]).

Therefore, to be afforded the protection of the statute defendants must conclusively demonstrate that the NYPD vehicle was an authorized emergency vehicle, that was involved in an emergency operation, and engaged in one of the privileges enumerated in the statute.

Initially, all parties agree that the vehicle involved in this incident was a marked NYPD police vehicle. Therefore, pursuant to the statute the vehicle is an authorized emergency vehicle, and the first element has been satisfied. Second, defendant's EBT, supported by the MV-104 and Sprint Report, establishes that, at the time of the incident, Officer Chin had received a signal to respond to a code 10-34: assault with a weapon.

Plaintiff challenges the credibility of the reports as they were uncertified records. However, Officer Chin's uncontroverted testimony under oath suffices to establish that at the time of the incident he was responding to a radio call. Furthermore, certified copies of the police and Sprint reports have since been provided to the court. Since the plaintiff has not offered any evidence in rebuttal to either the reports or Officer Chin's testimony, the Court concludes that Officer Chin has established that he was engaged in an emergency operation while responding to a police dispatch. Pursuant to VTL § 1104(b)(4), Officer Chin was expressly authorized to disregard the rules of the road or regulations governing direction or movement by turning and driving westbound in an eastbound lane.

Defendants have met their initial burden of demonstrating, prima facie, that they are entitled to the protection provided by VTL§ 1104(e). Absent any direct evidence to the contrary, defendants have established as a matter of law that the standard of care in determining civil liability in this case is the reckless disregard standard.

Reckless Conduct:

Defendants argue that Officer Chin's conduct and operation of the vehicle was not reckless as a matter of law. Defendants must carry the burden of establishing that Officer Chin's conduct did not amount to a reckless disregard for the safety of others.

The Court of Appeals, in the case of *Kabir v County of Monroe*, has held that VTL section 1104(e) establishes a reckless disregard standard for determining civil liability for damages resulting from the privileged conduct enumerated in the statute (*Kabir v Cnty. of Monroe*, 16 NY3d 217, 227, 945 NE2d 461, 467 [2011]). Recklessness "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" (*Saarinen v Kerr*, 84 NY2d 494, 497, 644 NE2d 988, 989 [1994] quoting Prosser & Keeton, Torts § 34 at 213 [5th ed]). The reckless standard provides that mere negligence will not suffice, the plaintiff must demonstrate a reckless disregard for the safety of others, particularly when viewed in light of the seriousness and immediacy of the situation (see *Szczerbiak v Pilat*, 90 NY2d 555, [1997]). Further, a momentary lapse in judgment does not alone rise to the level of recklessness required for liability to attach (*Id.*).

In the case of *Frezzell v City of New York*, the court determined, "whether the [reckless] standard was met is a fact specific inquiry and the analysis is focused on the precautionary measures taken by [the driver] to avoid causing harm to the general public weighed against his duty to respond to an urgent emergency situation" (*Frezzell v City of New York*, 24 NY3d 213, 217-218 [2014]). In determining whether an officer operating a police vehicle acted with reckless disregard or ignored a grave risk under the circumstances, courts consider the nature of the offense that prompted the pursuit, the conditions of the roadways or area where the pursuit occurred that added to the risk, the speed of the police vehicle, and whether police procedures have been followed (*Handelsman v Llewellyn*, 208 AD3d 1, 6, 171 NYS3d 468, 472 [2022]). Further, where there are factual issues as to whether the defendants acted in reckless disregard for the safety of others and there are credibility issues in dispute, then the inquiry should be left to a jury to decide (*Campbell v City of Elmira*, 84 NY2d 505, 508, 644 NE2d 993, 994 [1994]).

Defendants claim there is no evidence of Officer Chin's conduct that could support a finding that he was driving or operating the NYPD vehicle with a reckless disregard for the safety of others. Defendants argue that the evidence supports the conclusion that Officer Chin's operation of the vehicle was not reckless as he utilized the lights and sirens and proceeded with caution. Officer Chin testified that while he proceeded in traveling westbound down the eastbound lane, he did so with the turret lights and one siren activated. This is corroborated by the MV-104 report, which was generated shortly after the accident and states that the vehicle had lights and sirens activated. According to the defendants, Officer Chin chose to drive westbound in the eastbound lane as to avoid the traffic stopped in the westbound lane. Defendant argues that Officer Chin proceeded with caution, offering testimony that he checked before proceeding and at the time of the maneuver, there were no oncoming vehicles. Chin states he only remembers seeing one vehicle while he was driving, which pulled to the side to let him through.

Additionally, defendants argue Chin was driving safely enough that he was able to slow down and maneuver to avoid two other pedestrians on the block. Chin testified that he cannot remember the speed at which he was driving. Chin testified that the Plaintiff was less than a car length away when he first saw her, he applied the brakes but was unable to avoid the collision. Finally, defendants contend that Officer Chin attempted an evasive maneuver in an attempt to avoid the plaintiff.

In reviewing the proffered evidence in a light most favorable to the plaintiff, there is conflicting evidence as to the use of sirens or lights. Plaintiff testified that she did not see lights or hear sirens prior to the accident. Additionally, the MV-104 report

establishes that the reporting officer did not witness the accident but created the report afterwards. Further, Officer Chin admits that he did not, nor attempted to, activate the rumbler. Defendants fail to offer any corroborating evidence or testimony by any of the other five officers in the vehicle with Chin concerning any of the disputed factual allegations.

While the failure to use proscribed audible and visual signals may not alone be evidence of recklessness it does present a factual issue as to whether they were on so as to alert or make plaintiff aware of the presence of a vehicle engaged in an emergency operation (*See Green v Zarella*, 153 AD3d 1162, 1163, 61 NYS3d 6 [2017]; *Quock v. City of New York*, 110 AD3d 488, 489, 973 NYS2d 72, 73 [2013]). Additionally, a review of the entire evidence brings to light other relevant factual issues, concerning, *inter alia*, whether defendants exercised appropriate precautionary measures to avoid causing harm or whether the conduct would constitute a grave risk under the circumstances (*Frezzell v City of New York*, 24 NY3d 213, 217-218 [2014]; *Handelsman v Llewellyn*, 208 AD3d 1, 6, 171 NYS3d 468, 472 [2022]). Specifically, there is no evidence to establish the speed at which the NYPD vehicle was driving. Moreover, there is conflicting evidence as to the distance at which Officer Chin first observed the plaintiff and whether an evasive maneuver was actually attempted or would have been possible. In his EBT, Officer Chin testifies, "Then I looked left, and I took the wheel, and I was about to go left but then I worried that I was too close to her already and I would flip the van so I just stayed applying the brakes as hard as I could." In the MV-104, the reporting officer writes, "Driver of Vehicle 1 attempted to stop and make an evasive maneuver but struck pedestrian." Plaintiff offers Officer Chin's testimony that he never

steered the vehicle to the left and that the impact by plaintiff was to the center of the hood. The conflicting evidence about the circumstances of this accident constitutes triable issues of fact as to whether the defendant engaged in reckless conduct.

Finally, defendants argue that the “known and obvious risk” of driving westbound in the eastbound lane is hitting another car head-on in the opposite direction. While a known and obvious risk of driving against the flow of traffic may be contact with a car adhering to the rules of the road, that may not be the only risk of harm. The evidence offered by both parties establishes that Officer Chin had previously observed, and successfully avoided, two pedestrians that emerged in the same manner as the plaintiff. The evidence raises an issue as to whether pedestrians crossing the street in this way would also constitute a known or obvious risk that could result in harm. Viewing this inference favorably to the plaintiff, this issue would constitute a triable issue of fact for a jury.

Proximate Cause:

The Defendants argue that the testimony and documentary evidence establish that the actions of the Plaintiff, not the NYPD vehicle, were the proximate cause of the accident. Defendants argue that the Plaintiff emerged from between two vehicles, in the middle of the block and not within a sidewalk, before colliding with the vehicle. Defendant also argues that the way Plaintiff emerged left no time for Officer Chin to avoid the collision.

Defendants offer First Department cases involving pedestrians “leaving the safety of the sidewalk” and “moving into the path of the vehicle,” in support of their argument (*Brown v Muniz*, 61 AD3d 526 [1st Dept 2009]). Notably, these cases have

factual circumstances involving a child unexpectedly running into the street, failing to look, sufficient testimony by defendants establishing facts such as speed and care, and where there was concise evidence that the defendants could not have avoided contact (See *Ramirez v Molina*, 114 AD3d 540 [1st Dept 2014]; *Brown v Muniz*, 61 AD3d 526 [1st Dept 2009]; *Cunillera v Randall*, 196 AD2d 75 [1st Dept 1994]; *Jellal v Brown*, 37 AD3d 179 [1st Dept 2007]; *Fatumata B. v Pioneer Transp. Corp.*, 118 AD3d 486 [1st Dept 2014]). While relevant, the caselaw cited by defendants does not conclusively establish their entitlement to summary judgment.

As was mentioned in the discussion on recklessness, there are outstanding questions of fact. These include whether pedestrians were a known or reasonably foreseeable risk; whether sufficient visual and audible signals were engaged; and whether an attempt or maneuver to avoid was made or was possible. Additionally, there is insufficient evidence as to the rate of speed the NYPD vehicle was moving at the time of the collision, which is a factor in determining recklessness. These same factual disputes remain as to the issue of proximate cause. Additionally, a question exists as to whether the accident could have been avoided or sufficient facts alleging care in the vehicle's operation.

The evidence submitted by the defendants is insufficient to establish, as a matter of law, that the driver of the vehicle, Officer Chin, was not operating the vehicle in a reckless manner or that his recklessness was not a proximate cause of the accident. In viewing the evidence in a light most favorable to the plaintiff, a valid question remains as to whether the defendant's reckless conduct or operation of the police vehicle contributed to or caused the accident. Therefore, summary judgment must be denied.

Conclusion:

Accordingly, for the reasons set forth herein, it is hereby
ORDERED that the defendants' motion for summary judgment dismissing the
complaint is denied.

This constitutes the decision and order of the court.

3/7/2023
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

Nicholas W. Moyne
HON. NICHOLAS W. MOYNE
J.S.C.