SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART 52**

Justice

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ISSAKA MOHAMMED,

Plaintiff,

- v -

FLAVIO A. CHAUCA, NEW YORK CITY POLICE DEPARTMENT, AND THE CITY OF NEW YORK

Defendant.

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INDEX NO. 452205/2021

MOTION DATE 4/11/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

Documents filed under NYSCEF document numbers 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 were reviewed on this motion for partial summary judgment.

Upon the foregoing documents, it is

Plaintiff ISSAKA MOHAMMED, herein "plaintiff", moves for an Order pursuant to CPLR § 3212, granting summary judgment against Defendants FLAVIO A. CHAUCA ("Chauca"), NEW YORK CITY POLICE DEPARTMENT ("NYPD"), AND THE CITY OF NEW YORK ("the City"), herein "defendants", on the issue of liability.

This action arises from an accident that occurred on August 1, 2019, when a marked NYPD vehicle ("RMP") driven by defendant Police Officer Flavio A. Chauca came into contact with the rear of the taxicab driven by the plaintiff (*see* Plaintiff's Exh F, Mohmmed Aff; Defendants' Exh B, Chuaca Aff). The collision occurred after the plaintiff braked to avoid another NYPD vehicle (*Id.*).

Plaintiff alleges he suffered personal injuries when the taxicab he was driving was rear-ended by a marked NYPD vehicle ("RMP"). The accident occurred August 1, 2019, at 3:07 p.m., at the intersection between Third Avenue and East 105th Street. Plaintiff alleges he was driving on Third Avenue when he stopped to make way for a RMP driving westbound on East 105th Street. Shortly after coming to a stop, his taxicab was struck from behind by an RMP being driven by NYPD Officer Flavio A. Chauca.

Plaintiff contends that summary judgment on the issue of liability is warranted here because the incident in question is a rear-end collision and plaintiff's vehicle was not moving at the time of the accident. Plaintiff relies upon the presumption that, in a rear-end collision, the driver of the following car acted negligently (*see Young v City of New York*, 113 AD2d 833 [2d Dept 1985]). Therefore, plaintiff contends that the defendants are liable as a matter of law.

Defendants oppose the plaintiff's motion on the basis that negligence is not the applicable standard of care under the facts of this case. Defendants assert that Vehicle and Traffic Law ("VTL") § 1104 applies, in which the driver of an authorized emergency vehicle is granted a qualified privilege to disregard the ordinary rules of the road, so long as the driver does not act with "reckless disregard toward the safety of others" (VTL § 1104[a], [e]). Defendants posit that, as Officer Chauca was responding to an emergency, the conduct should be evaluated under the heightened standard of "reckless disregard" rather than the ordinary standard of negligence. Defendants maintain that plaintiff's motion for summary judgment should accordingly be denied, as plaintiff did not acknowledge, nor carry the burden, required of the party moving for summary judgment.

Discussion

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 (CPLR § 3212[b]). The proponent of a summary judgment motion, herein "moving party", must make a prima facie showing of entitlement as a matter of law, producing sufficient evidence to demonstrate an absence of any material issues of fact from the case (*see Pullman v Silverman*, 28 NY3d 1060, 1062-1063 [2016]). 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 (*See Tatishev v City of New York,* 84 AD3d 656 [1st Dept 2011]; *Indig v Finkelstein,* 23 NY2d 728 [1968]; *see also 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 moving party 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:

Ordinarily, the applicable standard of care in a rear-end collision is that of negligence. Pursuant to VTL § 1129(a), the driver of a motor vehicle shall not follow another vehicle more

closely than is reasonable and prudent, and shall have due regard for the speed, traffic, and condition of the highway. Plaintiff cites several cases in which rear-end collisions, especially those involving stationary vehicles, create a *prima facie* case of liability because such collisions come with a presumption of negligence on the part of the defendants (*Benyarko v Avis Rent A Car Sys.*, 162 AD2d 572 [1990]; *Young v City of New York*, 113 AD2d 833 [1985]; *Rebecchi v Whitmore*, 172 AD2d 600 [1991]). Since the taxi was stationary and the vehicle was rear-ended, plaintiff has established, *prima facie*, that the defendant was negligent.

However, the plaintiff has not demonstrated that negligence, rather than reckless disregard, is the applicable standard of care here. VTL § 1104 "grants drivers of 'authorized emergency vehicles' a qualified privilege to disregard the ordinary rules of prudent and responsible driving" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). VTL § 1104 does "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]). Furthermore, The statute does not create a reckless disregard standard of care for engaging in conduct outside of the privileges outlined in VTL § 1104(b) (*see Kabir v Cnty. Of Monroe,* 16 NY3d 217, 227 [2011]). 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.*). Therefore, if Officer Chauca was engaging in any of the conduct privileged by VTL § 1104, while operating an authorized emergency vehicle involved in an emergency operation, the defendants cannot be found liable due to mere negligence – they can only be found liable if the vehicle was operated with reckless disregard for the safety of others.

By statute, every police vehicle is an authorized emergency vehicle (*see* VTL §101). Additionally, "emergency operation" includes 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 [2001]).

As set forth in the sworn affidavit of Police Officer Flavio Chauca (Def. Exh. B, NYSCEF Doc. No. 29), the accident occurred Officer Chauca was operating the RMP while responding to a police dispatch regarding an assault with a knife in progress (NYSCEF Doc. No. 29). The affidavit is supported by the Police Accident Report (MV-104), submitted by plaintiff, which states the Chauca was responding to an assault with a knife at the time the two vehicles collided (NYSCEF Doc. No. 20). Responding to a police call constitutes an emergency operation, per VTL § 114-b. Defendants allege that the evidence shows that Chauca was exceeding the speed limit in a non-excessive manner, driving no more than 10 mph faster than the 25-mile per hour limit. Exceeding the maximum speed limit is one of the privileged activities entitled to the protection of VTL § 1104 (VTL § 1104[b][3]). Therefore, defendants' conduct would be privileged under VTL § 1104(b), and the standard of care should be recklessness rather than ordinary negligence.

Reckless Conduct

Under this heightened standard, the plaintiff, as the moving party, has the burden of establishing that defendants' conduct amounted to a "reckless disregard for the safety of others" (*Saarinen v Kerr*, 84 NY2d 494 [1994]). The standard of "reckless disregard" is exacting, requiring a showing of something more than mere negligence (*McAndrews v City of New York,*

100 NY2d 603, 605 [2003]). Under VTL § 1104, reckless disregard requires that the officer 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 did so with conscious indifference toward the outcome (*Szczerbiak v Pilat*, 90 NY2d 553 [1997]).

Plaintiff fails to address the issue of liability under the standard of recklessness or whether it would apply. As such, there are outstanding questions of fact as to whether Chauca's conduct amounts to reckless disregard, precluding summary judgment (*see Allstate Ins. Co. v City of New York*, 15 Misc 3d 450 [Civ Ct 2007] [Where a police car rear-ended another vehicle, the plaintiff's motion for summary judgment was denied upon finding that there were questions of fact as to whether the driver's conduct was reckless]). Further, the cases upon which plaintiff relied, while involving rear-end collisions, do not involve police or emergency vehicles engaged in an emergency operation.[1] Therefore, these cases are largely inapplicable to the instant case as they do not apply the legal standard for liability arising from the facts of this case. Furthermore, defendants have demonstrated there are outstanding questions of fact regarding causation and whether the plaintiff sustained a "serious injury" as required by Insurance Law § 5102(d). Considering, summary judgment in favor of plaintiff on the issue of liability would be wholly inappropriate here.

[1] *Shahally v Hussain*, [NYLJ, August 19, 1993, page 21, col 1][involved privately owned nonemergency vehicles];[*Young v City of New York*, 113 A.D.2d 833 [2d Dept. 1985][City fire truck slid on a wet pavement, facts did not indicate it was engaged in an emergency operation]; Silberman v Surrey Cadillac Limousine Serv., Inc., 109 AD2d 833 [2d Dept 1985][involved a limousine passenger injured as a result of a collision between the limousine and another vehicle]).

Conclusion:

Accordingly, for the reasons set forth herein, it is hereby

ORDERED that the plaintiff's motion for summary judgment on the issue of liability is denied.

This constitutes the decision and order of the court.

7/13/2023
DATE

NICHOLAS W. MOYNE, 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