

Kubanik v City of New York
2023 NY Slip Op 35112(U)
December 14, 2023
Supreme Court, Bronx County
Docket Number: Index No. 27951/2016E
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 3/33-----X
KUBANIK,

Index No. 27951/2016E

-against-

Hon. Mitchell J. Danziger

Justice Supreme Court

CITY OF NEW YORK, et al.,

-----X
The following papers were read on this motion (Seq. No.) for summary judgment/dismissal noticed for June 22, 2023, and submitted on August 25, 2023

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 35-59
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 64-66
Reply Affirmation	NYSCEF Doc. # 67

Motion by defendants, the City of New York, and the New York City Police Department ("City") for an order pursuant to CPLR §§3212 and 3211, granting summary judgment and dismissing plaintiff's claims, is decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff on September 13, 2015, wherein plaintiff, an on-duty police officer passenger in a marked police car ("RMP"), was involved in a two-car accident. The RMP driven by on-duty Police Officer William Harvey was struck by a vehicle driven by non-party, Kelmend Rugova ("Rugova"), as the officers were on Williamsbridge Road crossing the intersection with Pelham Parkway South, Bronx, New York.

According to plaintiff's testimony, at the time of the accident, the officers were responding to an emergency call for a burglary in progress. Plaintiff testified that he activated the lights and sirens in the vehicle as they headed to the emergency. As the officers approached the subject intersection, plaintiff testified that they were traveling approximately 40-45 mph. They approached a steady red light. With the exception of a black sedan, all other traffic yielded to their vehicle. Plaintiff testified that he yelled at P.O. Harvey to stop the vehicle, but P.O. Harvey did not and instead drove the vehicle at approximately 40 mph through the intersection without slowing down or taking any steps to prevent the collision with the black sedan. In addition, plaintiff testified the passenger seatbelt was lodged between the seats of the patrol car and stuck. He was unable to pull the seatbelt out and was not wearing the seatbelt at the time of the accident.

P.O. Harvey testified that the officers were responding to burglary in progress with lights and sirens engaged. As he was driving on Williamsbridge Road, there was stop and go traffic. As they reached the

intersection with Pelham Parkway, they had the red light in their direction of travel. P.O. Harvey testified that he stopped. He looked left and his partner checked the right side. He proceeded when his partner gave him the go ahead. When he entered the intersection, he looked everywhere. He did not see the black sedan prior to the accident. There was an obstruction on the right side that affected his ability to see the black sedan. He was traveling at 5 mph when the collision occurred.

Non-party, Kelmend Rugova testified that he was traveling approximately 20 mph prior to the accident. He had the green light. The police vehicle came through the red light. He did not know how fast they were going. The police car was utilizing flashing lights but not sirens. Mr. Rugova was issued a ticket for failure to yield which was dismissed.

The information from the Crash Data Recorder ("CDR") present in the NYPD RMP, shows that there were two collision events, one for non-deployment and one for deployment. In the seconds before the first collision event the police vehicle was accelerating from 16 mph to 23 mph at .5 seconds prior to the crash. Seconds before the second collision event, the police vehicle was traveling at 22 and 23 mph and at .5 seconds before the second collision, the vehicle was traveling at 20 mph.

The City moves for summary judgment and/or dismissal on the grounds that plaintiff's claims for defective seatbelt must be dismissed since plaintiff failed to allege the same in his Notice of Claim; plaintiff's claims pursuant to General Municipal Law ("GML") §205-e must be dismissed as plaintiff cannot show there was a defective condition or that the City had notice of a defective condition; and plaintiff's complaint should be dismissed because the NYPC vehicle was not being operated recklessly as a matter of law. Plaintiff opposes the City's motion and submits that Vehicle and Traffic Law ("VTL") violations can serve as predicates for a GML §205-e claim and defendants failed to meet their prima facie burden eliminating all questions of fact as to whether P.O. Harvey was reckless in his operation of the RMP.

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 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [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 non-moving party. (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [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 [1957]). Once movant has met his initial burden on a motion for summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key

to summary judgment. (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]). However, to defeat a motion for summary judgment, the non-moving party must establish the existence of triable issues of fact that are, “real, not feigned since a sham or frivolous issue will not preclude summary relief. (*Kornfeld v. NRX Technologies, Inc.* 93 A.D.2d 772 [1st Dept. 1983]). “It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owed a duty to the plaintiff.” (*Pulka v. Edelman*, 40 N.Y.2d 781, 781 [1976]). “In the absence of a duty, there is no breach and without a breach there is no liability. (Id., see also, *Daubert v. Flyte Time Regency Limousine*, 1 A.D. 3d 396, 396 [2d Dept. 2003]).

As an initial matter, plaintiff does not address the City’s argument that plaintiff failed to include allegations related to a defective seatbelt in his Notice of Claim and therefore, any claim related to a defective seatbelt, is dismissed.

GML §205-e provides, in relevant part, as follows:

“In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury... occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any police department injured...”

Plaintiff alleges that his injuries were caused, directly or indirectly, by P.O. Harvey’s failure to comply with various sections of the VTL, Labor Law Section 27-a(3) and §4-03 of the Traffic Regulations of the City of New York.

Plaintiff’s 205-e claim as predicated on Labor Law §27-a(3) is dismissed. In the case of a traffic accident, a public employee must offer specific evidence of a defective condition or faulty equipment in vehicle, which contributed to the injury. (*Balsamo v. City of New York*, 287 A.D.2d 22 [2d Dept. 2001]). Here, plaintiff testified that the seatbelt was jammed but thought it was intentionally done by an officer, so the seatbelt did not get caught on the officer’s gun belt as was typically done. Further, the records show that the vehicle was checked, and adjustments and repairs were made prior to the accident. Plaintiff sets forth no evidence that the City had actual or constructive notice of a defect thereafter and plaintiff testified he did not report it to anyone but his partner that day.

VTL 1104 states in pertinent part:

The driver of an authorized vehicle, when involved in emergency operation....may...proceed past a

steady red signal, a flashing red signal, but only after slowing down as may be necessary for safe operation...exceed the maximum speed limits as long as he does not endanger life or property.... except for an authorized vehicle operated as a police vehicle, the exceptions herein shall apply only when audible signals are sounded and 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.

In his opposition papers, plaintiff concentrates on VTL §1104(e) as the predicate for his S205-e claim. A fellow officer's violation of VTL §1104 may allow recovery to an injured officer against the City under GML §205-e. (*Gonzalez v. Iocovello*, 93 N.Y.2d 539 [1999]). The trier of fact must determine whether "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." (*Id.*).

Here, P.O. Harvey testified that he entered the subject intersection against a red light but that his view to the right side was obstructed by his partner. He could not see completely through his side of the window. P.O. Harvey testified that his peripheral vision was obstructed. He relied on plaintiff to tell him it was clear to go. P.O. Harvey testified that he himself did not look on the right side before he drove the car into the intersection. (EBT Harvey, page 32). He testified that plaintiff told him to go and then said, "wait, wait." The vehicle was then struck by the black sedan. P.O. Harvey testified at the time of impact he was traveling 5 mph. Plaintiff testified that P.O. Harvey did not slow down prior to entering the intersection where the incident occurred. Plaintiff told P.O. Harvey several times to stop the car or hit the brakes. Plaintiff testified P.O. Harvey was going between 40-45 mph. The CDR shows that P.O. Harvey was accelerating prior to the time of the accident and proceeding from 16 mph 2.5 seconds before the accident to 23 mph at .5 seconds before the collision. At the time of the second collision event, the RMP was traveling at 20 mph.

Where a plaintiff submits evidence that a police officer consciously and unjustifiably ignores a known risk while involved in an emergency operation, liability under VTL §1104 should be left for jury determination. (*Rockhead v. Troche*, 17 A.D.3d 118 [1st Dept. 2005]; *Krulik v. County of Suffolk*, 62 A.D.3d 669 [2d Dept. 2009]). The party's version of events here sharply differs and raise an issue of fact. A jury could find that if P.O. Harvey's entered the intersection against a red light with an obstructed view and while accelerating from 16-23 mph as reckless. Further, plaintiff testified he told him to stop and brake and P.O. Harvey failed to do so.

The Court notes that plaintiff submits the expert affidavit of Nicholas Bellizzi, P.E, to opine that P.O. Harvey was reckless. However, Mr. Bellizzi does not attest that he inspected the vehicle, the accident scene, photographs of the accident, and fails to address the CDR data and yet, Mr. Bellizzi reaches a legal conclusion that P.O. Harvey was reckless. The Court finds Mr. Bellizzi's affidavit as insufficient for the purposes of this motion.

Accordingly, the City's motion is granted in part and denied in part. Plaintiff's GML §205-e claim pursuant to VTL §1104 remains. Plaintiff is directed to serve a copy of this order with Notice of Entry on all parties within 30 days.

This constitutes the decision and order of the Court.

Dated:

12/14/23
Bronx, New York


HON. MITCHELL J. DANZIGER, J.S.C.

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| 1. CHECK ONE..... | ☐ CASE DISPOSED IN ITS ENTIRETY | ☒ CASE STILL ACTIVE |
| 2. MOTION IS..... | ☐ GRANTED | ☐ DENIED ☒ GRANTED IN PART ☐ OTHER |
| 3. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER | ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE |
| | ☐ FIDUCIARY APPOINTMENT | ☐ REFEREE APPOINTMENT |