

Malo v City of Yonkers
2023 NY Slip Op 35260(U)
August 23, 2023
Supreme Court, Westchester County
Docket Number: Index No. 55002/2022
Judge: Joan B. Lefkowitz
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SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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JORGE MALO, VERONICA MALO, VILMA
SUAREZ, MARINA SUAREZ,

DECISION & ORDER

Plaintiffs,

Index No: 55002/2022

-against-

Motion Sequence No. 1

THE CITY OF YONKERS, YONKERS POLICE
DEPARTMENT and OFFICER JOHN DOE,

Defendants.
-----X

The following electronically filed papers (NYSCEF Doc Nos. 20-42) were read on the motion by the defendants, the City of Yonkers and Yonkers Police Department, for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint.

Motion Sequence No. 1

Notice of Motion-Affirmation in Support-Exhibits (A-O)-Statement of Facts
Affirmation in Opposition-Response to Statement of Facts-Exhibit (1)
Affirmation in Reply-Exhibits (A-B)

Upon reading the foregoing papers, the motion is determined as follows:

By way of background, on March 9, 2021, at approximately 8:00 p.m., two City of Yonkers Police Officers, James Menton and Ryan Wasylenko, conducted a traffic stop of a Porsche vehicle driving erratically. Before the officers were able to approach the driver, the Porsche fled. The officers activated the emergency lights and siren of their vehicle and pursued the Porsche. Officer Menton notified headquarters about the pursuit. The officers observed the Porsche speeding on Rumsey Road in Yonkers and almost hitting multiple vehicles along the way. When the Porsche turned onto Park Hill Avenue from Rumsey Road, the officers lost sight of the Porsche. At this point, the officers abandoned the pursuit. At deposition, Officer Menton testified that because "we had lost visual of the vehicle...and due to the rate of speed from the driver[,] we felt that it was unsafe at that time to continue pursuing" (Officer Menton deposition tr at p. 22, NYSCEF Doc No. 27). Officer Menton also testified that headquarters directed that the pursuit be terminated (*see id.*).

Once the pursuit was terminated, the officers turned off the emergency lights and siren and “continued driving at a normal speed...not in pursuit” (*id.* at p. 23). Officer Menton testified that about one minute following termination of the pursuit, he and Officer Wasylenko observed the Porsche in an accident. The Porsche had evidently crashed into a utility pole after it had rear-ended a stopped vehicle in which the plaintiffs were traveling. The occupants of the Porsche fled the scene on foot and were not apprehended. A police investigation revealed that the Porsche was stolen.

Alleging, *inter alia*, that the Porsche was in a high-speed pursuit with Yonkers Police at the time the Porsche collided with the rear of the vehicle in which the plaintiffs were traveling, and that Yonkers Police were reckless in their pursuit of the Porsche, which proximately caused the rear-end collision and the plaintiffs’ resulting injuries, this action ensued. Following the completion of discovery, the defendants, City of Yonkers and Yonkers Police Department (collectively, the City), now move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint upon the grounds that, pursuant to Vehicle and Traffic Law § 1104, the City is immune from liability because Officer Wasylenko was not recklessly operating the police car while in pursuit of the Porsche or thereafter. Plaintiffs oppose the motion arguing, *inter alia*, that the record raises triable issues of fact as to whether the City had terminated its high-speed pursuit of the Porsche prior to the occurrence of the rear-end collision between the Porsche and the plaintiffs’ vehicle and whether the operation of the police vehicle was reckless.

On a motion for summary judgment the court’s function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant’s favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, *prima facie*, the absence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make a *prima facie* showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, if the *prima facie* burden is met, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial (*see Zuckerman*, 49 NY2d at 562). “Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it should only be employed when there is no doubt as to the absence of triable issues” (*Owens v City of New York*, 183 AD3d 903, 906 [2d Dept 2020] [internal quotation marks omitted]).

“Vehicle and Traffic Law § 1104 qualifiedly exempts drivers of emergency vehicles from certain traffic laws when they are involved in an ‘emergency operation’ (*Anderson v*

Suffolk County Police Dept., 181 AD3d 765, 766 [2d Dept 2020]). “The ‘emergency operation’ of a police vehicle includes ‘pursuing an actual or suspected violator of the law’ (*Portalatin v City of New York*, 165 AD3d 1302, 1302 [2d Dept 2018], quoting Vehicle and Traffic Law § 114-b). “The manner in which a police officer operates his or her vehicle in an emergency situation may not form the basis for civil liability to an injured third party unless the officer acted with reckless disregard for the safety of others” (*Thompson v City of New York*, 210 AD3d 1031, 1033 [2d Dept 2022] [internal quotation marks omitted]; see Vehicle and Traffic Law § 1104 [e]). “Such standard demands more than a showing of a lack of due care under the circumstances—the showing typically associated with ordinary negligence claims. It 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” (*Rodriguez-Garcia v Southampton Police Dept.*, 185 AD3d 744, 745 [2d Dept 2020] [internal quotation marks omitted]).

“The reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence” (*Bourdierd v City of Yonkers*, 213 AD3d 899, 900 [2d Dept 2023] [internal quotation marks and brackets omitted]). “Those privileges set forth in Vehicle and Traffic Law § 1104 include passing through red lights and stop signs, exceeding the speed limit, and disregarding regulations governing the direction of movement or turning in specified directions” (*Anderson*, 181 AD3d at 766, citing Vehicle and Traffic Law § 1104 [a], [b]).

“Whether the reckless disregard standard is met is a ‘fact-specific inquiry’ that focuses on ‘the precautionary measures taken by [the officer] to avoid causing harm to the general public weighed against his [or her] duty to respond to an urgent emergency situation’ ” (*Handelsman v Llewellyn*, 208 AD3d 1, 5-6 [1st Dept 2022], quoting *Frezzell v City of New York*, 24 NY3d 213, 217-218 [2014]). In addition, “[w]here 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” (*Handelsman*, 208 AD3d at 6, citing *Campbell v City of Elmira*, 84 NY2d 505, 508 [1994]; see *Torres v Saint Vincent’s Catholic Med. Ctrs. of N.Y.*, 117 AD3d 717, 718-719 [2d Dept 2014]).

Here, in moving for summary judgment, the City failed to establish, *prima facie*, its entitlement to judgment as a matter of law. The City’s submissions tendered in support of the motion including, the deposition transcript of Officer Menton and the deposition transcripts of the plaintiffs, failed to eliminate all questions of material fact as to whether the pursuit of the Porsche had been terminated. As outlined above, Officer Menton testified that the pursuit of the Porsche was abandoned because of safety reasons (see Officer

Menton deposition tr at p. 22, NYSCEF Doc No. 27). Officer Menton further testified that once the pursuit was abandoned, the emergency lights and siren of the police vehicle were deactivated and that he and Officer Wasylenko proceeded to drive “at a normal speed” while canvassing the area for the Porsche (*see id.* at pp. 22-23). In contrast, the plaintiffs, Jorge Malo, Veronica Malo and Vilma Suarez, each testified at their respective depositions that, immediately prior to the impact between the Porsche and their vehicle, they heard police sirens engaged (*see* Jorge Malo deposition tr at pp. 18-19, NYSCEF Doc No. 33; Veronica Malo deposition tr at p. 17, NYSCEF Doc No. 34; Vilma Suarez deposition tr at p. 11, NYSCEF Doc No. 35). Further, the plaintiff, Vilma Suarez, testified that after the accident occurred, she observed a police officer on the scene “right away” (Vilma Suarez deposition tr at p. 12), and the plaintiff, Jorge Malo, testified that once his car came to a stop following the rear-end collision with the Porsche, a police car almost ended up striking his vehicle as well (*see* Jorge Malo deposition tr at p. 22, NYSCEF Doc No. 33). Viewing this evidence in a light most favorable to the plaintiffs, as the nonmovants on this motion, the proffered evidence raises factual questions as to whether the pursuit had been terminated at the time of the rear-end collision between the Porsche and the plaintiffs’ vehicle and, consequently, whether the operation of the police vehicle was appropriate under the circumstances (*see Bourdierd*, 213 AD3d at 901; *Quintana v Wallace*, 95 AD3d 1287, 1287-1288 [2d Dept 2012]; *Ferrara v Village of Chester*, 57 AD3d 719, 720 [2d Dept 2008]; *Burrell v City of New York*, 49 AD3d 482, 483 [2d Dept 2008]). Accordingly, the motion is denied without regard to the sufficiency of the plaintiffs’ opposing papers (*see Alvarez*, 68 NY2d at 324; *Winegrad*, 64 NY2d at 853; *Bourdierd*, 213 AD3d at 901; *cf. Chesney v City of Yonkers*, 167 AD3d 567, 568 [2d Dept 2018]).

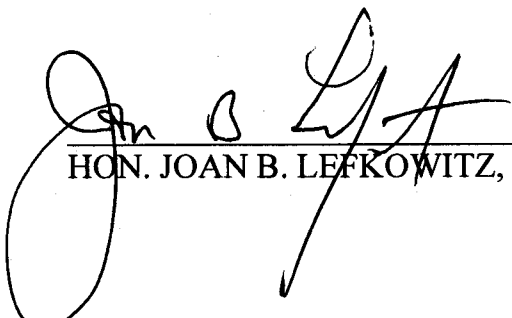
All other arguments raised on the motion and evidence submitted by the parties in connection therewith have been considered by the court, notwithstanding the specific absence of reference thereto. Based on the foregoing, it is hereby:

ORDERED the motion is denied; and it is further

ORDERED that the parties shall appear for a settlement conference on a date and time as set by the clerk.

ENTER,

Dated: White Plains, New York
August 23, 2023



HON. JOAN B. LEFKOWITZ, J.S.C.

To:

Counsel of record via NYSCEF