

Aybar v Dimeglio

2024 NY Slip Op 34948(U)

June 27, 2024

Supreme Court, Bronx County

Docket Number: Index No. 26847/2020E

Judge: Mitchell J. Danziger

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 3/33

VICTOR AYBAR,

Index No. 26847/2020E

-against-

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#002

Hon. Mitchell J. Danziger

GENNARO DIMEGLIO, et. al.,

Justice Supreme Court

The following papers were read on this motion (Seq. No. 2) for SJ noticed for November 30, 2023 and submitted on February 28, 2024

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 23-34
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 37
Reply Affirmation	NYSCEF Doc. # 41
Notice of Cross-Motion	NYSCEF Doc. # 38-39
Affirmation in Opposition to Cross-Motion	NYSCEF Doc. # 42
Reply Affirmation	NYSCEF Doc. # 43

Motion by Gennaro DiMeglio, the City of New York and the City of New York s/h/a New York City Police Department (“NYPD”), (collectively “City”), for an order pursuant to CPLR §§3211 and 3212, granting summary judgment and/or for dismissal, and cross-motion by plaintiff for an order pursuant to CPLR §3212, granting plaintiff partial summary judgment as to liability as against as against the defendants, granting plaintiff partial summary judgment as to plaintiff’s lack of liability, and dismissing the defendants affirmative defenses alleging comparative negligence, contributory negligence, and culpable conduct on the part of the plaintiff, is decided as follows:

This is an action stemming from a motor vehicle accident that occurred on September 15, 2019, between a vehicle being operated by plaintiff, Victor Aybar and an NYPD vehicle operated by P.O. Gennaro DiMeglio.

The City submits they are entitled to summary judgment because the incident involved an authorized emergency vehicle engaged in emergency operation and within the privileged conduct enumerated in Vehicle and Traffic Law (“VTL”) §1104. Further, the City contends that defendant, DiMeglio’s operation of the NYPD vehicle was not reckless as a matter of law.

Plaintiff opposes the City’s application and contends that the City has failed to meet its prima facie burden and that there is a question of fact as to whether defendant, DiMeglio was responding to an emergency and whether he was reckless as a matter of law. The Court notes that plaintiff does not oppose the portion of the City’s motion seeking to dismiss NYPD from the action as a non-suable entity and as such, that portion of the City’s motion is granted without opposition.

Pursuant to the testimony of P.O. DiMeglio, on September 15, 2019, he was the driver of his assigned police vehicle and Police Officer Hernandez was his passenger and recorder. The accident occurred at Eastchester Road and Pelham Parkway. At the time of the accident, the witness or victim of a hit and run was in the vehicle with he and Officer Hernandez. The hit and run had occurred a couple of minutes before about one block away. The person who

had hit the victim had left his car at the intersection and took off running up Pelham Parkway in the direction DiMeglio was driving. The perpetrator also lived in that direction. DiMeglio testified that “we were actively looking for the person that hit, not only her car, it was multiple cars that this person hit and fled from the scene.” The victim gave the officers a description of the man who fled and he was apprehended by other officers shortly after DiMeglio’s accident with Mr. Aybar. At the time of the accident, the police lights were on. DiMeglio testified that the sirens were probably not a constant until he needed to engage them. He would use the sirens when entering the intersection.

When DiMeglio turned onto Eastchester Road, the light at the intersection where the incident occurred was green, however, it was then turning red as he approached the intersection. As they went into the intersection, the lights were on and he would have pressed the siren. All of the other cars stopped in the three lanes of traffic, but plaintiff, who was travelling in the bus lane, continued on into the intersection. DiMeglio testified he slammed on the brakes at that time. The front “push bar” area of the grill was hit by the driver’s side wheel well of the plaintiff’s vehicle.

Plaintiff testified that he was traveling on Pelham Parkway as he traveled through the intersection of Pelham Parkway and Eastchester Road. He crossed the green light and was driving 20-25 mph. He had the green light at the intersection. He was more than halfway through the intersection when his vehicle and the police vehicle made contact. He testified he saw the police lights but did not hear sirens. The front left side of his vehicle came in contact with the police vehicle.

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]).

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.

Pursuant to VTL §114-b, emergency operation of an authorize emergency vehicle includes “the pursuit of an actual or suspected violator of the law.” According to P.O. DiMeglio’s testimony, the victim of the hit and run was in the vehicle with the officers as they were looking for the person who fled and they were traveling in the direction he fled. It happened that the perpetrator fled in the direction of his address. The fact that the officers ran the license plate and were going in the same direction of the perpetrator address does not negate that they were actively pursuing him. As such, the Court finds that DiMeglio was engaged in an emergency operation while in an authorized vehicle. Further, it is undisputed that the police vehicle was operating its police lights at the time of the incident. Plaintiff and DiMeglio testified that DiMeglio was proceeding through a red light. As such, the Court finds that the reckless standard applies here since DiMeglio was operating an authorized emergency vehicle (Vehicle and Traffic Law §101), performing an emergency operation by pursuing an actual or suspected violator of the law (Vehicle and Traffic Law §114-b), he was authorized to proceed through a red light, once he slowed down “as may be necessary for safe operation” (Vehicle and Traffic Law §1104(a), (b)(2)). The City is entitled to the “reckless” standard. (*Flynn v. Sambuca Taxi, LLC*, 123 A.D.3d 501 [1st Dept. 2014]). “Thus, in order to hold the municipal defendants liable, plaintiff must demonstrate that the officer driving the police vehicle acted with ‘reckless disregard for the safety of others,’ which requires a showing that he ‘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 probably that harm would follow and has done so with conscious indifference to the outcome.” (*Id.*, citing, *Saarinan v. Kerr*, 84 N.Y.2d 494 [1994]).

Plaintiff has failed to raise a triable issue of fact to defeat the City’s motion. Plaintiff submits that there is a question of fact as to whether P.O. DiMeglio was engaged in a pursuit at the time of the incident, because DiMeglio

testified that he was “just driving to the address of someone who may have been involved in a motor vehicle accident.” However, that was not his testimony and was taken out of context. DiMeglio testified that the person who had hit the cars had left his car at the intersection and took off running up Pelham Parkway in the direction DiMeglio was driving. He was looking for him. In addition, they had run his license plate and his address also happened to be in that direction.

Plaintiff next points to the lack of siren as a reason to deny the City’s motion. However, the Court finds this immaterial. Pursuant to the First Department’s decision in both *Lewis v. City of New York*, 155 AD3d 441 (1st Dept. 2017) and *Deno v. Belliard*, 165 AD3d 602 (1st Dept. 2018), lights and sirens are not required for a police car engaged in an emergency operation to be entitled to the statutory privilege of passing through a red light.

Lastly, there is no evidence presented here that DiMeglio acted recklessly. In order to find DiMeglio’s driving reckless, there must be proof that the officer “intentionally committed 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. (*Frezzell v. City of New York*, 24 N.Y.3d 213 [2014]). DiMeglio testified that because the light was changing from green to red, he slowed or stopped prior to entering the intersection and it is undisputed that his lights were activated. As he saw plaintiff’s vehicle approaching, he slammed on his brakes. As such there is no evidence that DiMeglio’s actions rose to the level of reckless disregard.

Accordingly, the City’s motion is granted, and plaintiff’s cross-motion is denied. The City is directed to serve a copy of this order with Notice of Entry on all parties within 30 days of its upload to NYSCEF.

This constitutes the decision and order of the Court.

Dated: 6/27/24

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