

Mu Hang Chen v Gaines
2024 NY Slip Op 35443(U)
May 10, 2024
Supreme Court, Queens County
Docket Number: Index No. 711410/2021
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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MU HANG CHEN,

Index No.:711410/2021

Plaintiff,

Motion

Date: March 11, 2024

-against-

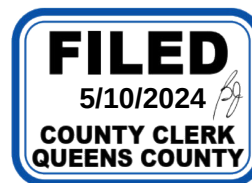
Motion Cal. No.: 6 & 7

SHOUNTE U. GAINES, CITYWIDE MOBILE
RESPONSE CORP., MICHAEL A. MARDEN
and THE CITY OF NEW YORK,

Motion Sequence No.: 2 & 3

Defendants.

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The following efile papers numbered 44-79, 82, 86-87, 89 submitted and considered on this motion by Defendants Shounte U. Gaines and Citywide Mobile Response Corp. (hereinafter "Gaines," "Citywide" or collectively referred to as "Defendants" seeking an Order pursuant to Civil Practice Law and Rules (CPLR) 3212 granting summary judgment, thereby dismissing Plaintiff Mu Hang Chen's (hereinafter "Plaintiff") complaint on grounds that Defendants cannot be found liable for the accident in question (sequence 2); and the motion of Plaintiff seeking an Order pursuant to CPLR 3212 granting summary judgment on the issue of liability in favor of Plaintiff and against Defendants; or in the alternative, pursuant to CPLR 3212 granting summary judgment on the issue that Gaines and co-defendant Michael A. Marden (hereinafter "Marden") were negligent as a matter of law; pursuant to CPLR 3212 on the issue that Gaines and Marden were both negligent and both were a proximate cause of the subject collision as a matter of law; striking the affirmative defense of comparative negligence since Plaintiff was an innocent passenger at the time of the collision and free from comparative negligence for the happening of the incident (sequence 3.)

Papers
Numbered

Motion Sequence 2

Notice of Motion-Affidavits-Exhibits.....	EF 44-55
Affirmation in Opposition-Affidavits-Exhibits.....	EF 69-70, 71-73, 86-87
Reply Affirmation-Affidavits-Exhibits.....	EF 82

Motion Sequence 3

Notice of Motion-Affidavits-Exhibits.....	EF 56-68
Affirmation in Opposition-Affidavits-Exhibits.....	EF 74-79, 69-70
Reply Affirmation-Affidavits-Exhibits.....	EF 89

This personal injury litigation stems from a motor vehicle collision. On May 13, 2020, Chen was a passenger in an ambulance being operated by defendant Shounte U. Gaines (hereinafter “Gaines”) and owned by defendant Citywide Mobile Response Corp. (hereinafter “Mobile”) which came into contact with a police vehicle operated by defendant Michael A. Marden (hereinafter “Marden”) and owned by The City of New York (hereinafter “City”.) The accident occurred at the intersection of 164th Street and Horace Harding Expressway, County of Queens, State of New York. Discovery is now complete. Although EF 69-70 were submitted under motion sequence 2, the papers are opposition papers to Plaintiff’s motion under sequence number 3, and will be considered under that motion.

Under sequence 2, Gaines and Mobile move for summary judgment pursuant to CPLR 3212 on the grounds that Gaines was operating Mobile’s vehicle, which was an authorized emergency vehicle as described in Vehicle and Traffic Law (“VTL”) §101, performing an emergency operation with its lights and sirens activated at the time of the accident, therefore, they are immune from liability under VTL § 1104, as Gaines did not act with a reckless disregard for the safety of others while operating the ambulance. Under motion sequence 3, Plaintiff moves for summary judgment as an innocent passenger in the Mobile vehicle which was being driven by Gaines.

DISCUSSION

Summary judgment is a drastic remedy (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The burden is on the party moving for summary judgment to demonstrate a prima facie entitlement to judgment as a matter of law by submitting sufficient documentary evidence to demonstrate the absence of any material issue of fact. (*See Ferrante v Amer. Lung Assn.*, 90 NY2d 623 [1997]; *Ayotte v Gervasio*, 881 NY2d 1062 [1993].) On a motion for summary judgment facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2013]). There can be more than one proximate cause of an accident. (*See Bien-Aime v Clare*, 124 AD3d 814 [2d Dept 2015]; *Cox v Nunez*, 23 AD3d 427 [2d Dept 2005]).

Vehicle and Traffic Law § 101 titled “ Authorized emergency vehicle” states the following:

Every ambulance, police vehicle or bicycle, correction vehicle, fire vehicle, civil defense emergency vehicle, emergency ambulance service vehicle, blood delivery vehicle, human organ delivery vehicle, county emergency medical services vehicle, environmental emergency response vehicle, sanitation patrol vehicle, hazardous materials emergency vehicle and ordnance disposal vehicle of the armed forces of the United States.

Vehicle and Traffic Law § 114-b titled “ Emergency operation” states the following:

The operation, or parking, of an authorized emergency vehicle, when such vehicle is engaged in transporting a sick or injured person, transporting prisoners, delivering blood or blood products in a situation involving an imminent health risk, transporting human organs and/or medical personnel for the purpose of organ recovery or transplantation in a situation involving an imminent health risk where undue delay would jeopardize such recovery or transplantation, pursuing an actual or suspected violator of the law, or responding to, or working or assisting at the scene of an accident, disaster, police call, alarm of fire, actual or potential release of hazardous materials or other emergency. Emergency operation shall not include returning from such service.

Vehicle and Traffic Law § 1104 titled “Authorized emergency vehicles” states the following:

- (a) 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.
- (b) The driver of an authorized emergency vehicle may:
 - 1. Stop, stand or park irrespective of the provisions of this title;
 - 2. Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation;
 - 3. Exceed the maximum speed limits so long as he does not endanger life or property;
 - 4. Disregard regulations governing directions of movement or turning in specified directions.
- (c) Except for an authorized emergency vehicle operated as a police vehicle or bicycle, the exemptions herein granted to an authorized emergency vehicle shall apply only when audible signals are sounded from any 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.

(d) An authorized emergency vehicle operated as a police, sheriff or deputy sheriff vehicle may exceed the maximum speed limits for the purpose of calibrating such vehicles'1 speedometer. Notwithstanding any other law, rule or regulation to the contrary, a police, sheriff or deputy sheriff bicycle operated as an authorized emergency vehicle shall not be prohibited from using any sidewalk, highway, street or roadway during an emergency operation.

(e) 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.

(f) Notwithstanding any other law, rule or regulation to the contrary, an ambulance operated in the course of an emergency shall not be prohibited from using any highway, street or roadway; provided, however, that an authority having jurisdiction over any such highway, street or roadway may specifically prohibit travel thereon by ambulances if such authority shall deem such travel to be extremely hazardous and would endanger patients being transported thereby.

§ 1144. Operation of vehicles on approach of authorized emergency vehicles

(a) Upon the immediate approach of an authorized emergency vehicle equipped with at least one lighted lamp exhibiting red light visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle other than a police vehicle or bicycle when operated as an authorized emergency vehicle, and when audible signals are sounded from any said vehicle by siren, exhaust whistle, bell, air-horn or electronic equivalent; the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to the right-hand edge or curb of the roadway, or to either edge of a one-way roadway three or more lanes in width, clear of any intersection, and shall stop and remain in such position until the authorized emergency vehicle has passed, unless otherwise directed by a police officer.

(b) This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with reasonable care for all persons using the highway.

Vehicle and Traffic Law § 1104 affords drivers of authorized emergency vehicles certain privileges when involved in an emergency operation (see *McGough v City of Long Beach*, 174 AD3d 698, 699 [2d Dept 2019]; citing *Frezzell v City of New York*, 24 NY3d 213, 217 [2014]; *Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]). “When a driver of an authorized emergency vehicle is involved in an emergency operation and engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b), a reckless disregard standard of care applies in determining civil liability for damages resulting from the privileged operation of the emergency vehicle” (see *McGough v City of Long Beach*, 174 AD3d 698, 699 [2d Dept 2019]; citing *Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]). “The manner in which an authorized emergency vehicle is operated in an emergency situation may not form the basis for civil liability unless the driver acted in reckless disregard for the safety of others.” (See *Jobson v SM Livery, Inc.*, 175 AD3d 1510 [2d Dept 2019]; *Hemingway v City of New York*, 81 AD3d 595 [2d Dept 2011].)

It is well settled that an authorized emergency vehicle is engaged in an “emergency operation” when responding to an emergency call. VTL 114-b defines an emergency operation as the “operation, or parking, of an authorized emergency vehicle, when such vehicle is engaged in transporting a sick or injured person.” (See *Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]; *Proce v Town of Stony Point*, 185 AD3d 975 [2d Dept 2020]; *Williams v Fassinger*, 119 AD3d 1368 [4th Dept 2014].)

Addressing first the merits of motion sequence number 2, Gaines and Mobile assert that Gaines was engaged in qualified privileged conduct under VTL § 1104(b) which allows the driver of an authorized emergency vehicle to “proceed past a steady red signal” and “disregard regulations governing directions of movements or turning in specified directions.” Gaines testimony was that she approached the intersection and did not observe the color of the traffic light, however, she stopped at the intersection, looked both ways prior to entering the intersection, then proceeded while blowing the horn. The video footage of the incident depicts that Marden had the green light at the time. “A violation of a standard of care imposed by the [VTL] constitutes negligence per se (see *Barbieri v Vokoun*, 72 AD3d 853 [2d Dept 2010]). “In order to demonstrate that [Defendant] acted recklessly, plaintiff was required to show 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 probable that harm would follow and has done so with conscious indifference to the outcome” (see *Jones v Albany County Sheriff's Dept.*, 123 AD3d 1331, 1334 [3d Dept 2014]).

The Court finds that Gaines and Mobile failed to established their entitlement to judgment as a matter of law (see VTL §§1104; 1144; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Quock v The City of New York*, 110 AD3d 488 [1st Dept 2013]; *Spencer v Astralease Assoc., Inc.*, 89 AD3d 530 [1st Dept 2011]; *Mulholland v Nabisco, Inc.* 264 AD2d 411 [2d Dept 1999]). On these papers their exist triable issues of fact. Gaines asserted that she did not act with a reckless disregard of others at the time of the collision, that she was traveling at a speed of five to ten mph before stopping at the intersection and looking both ways, and that the ambulance’s emergency lights and sirens were activated (see *Saarinan v Kerr*, 84 NY2d 494 [1994]; see also *Frezzell v City of New York*, 24 NY3d 213, 217 [2014]; *Jobson v SM Livery, Inc.*, 175 AD3d 1510 [2d Dept 2019]; *Hemingway v City of*

New York, 81 AD3d 595 [2d Dept 2011]; *Rascelles v State of New York*, 187 AD3d 953 [2d Dept 2020]). Gaines maintained that the accident was caused by Marden, City's employee, who failed to yield the right of way to an emergency vehicle (see VTL §§ 114-b, 1104; 1144; *Jimenez-Cruz v City of New York*, 170 AD3d 975 [2d Dept 2019]). However, the evidence submitted demonstrated that there was an issue of fact as to whether Gaines stopped or slowed the ambulance before entering the intersection against a red light. Chen testified that from the time the ambulance left the dialysis center and the ambulance was heading to the hospital with another passenger who was ill, it did not stop or slow down.

Assuming Gaines and Mobile had established their prima facie case, in opposition, Plaintiff argued that Gaines and Mobile failed to set forth a prima facie case. That the evidence demonstrated that Gaines failed to stop or slow the ambulance before entering the intersection against a red light, therefore operating the ambulance with a reckless disregard of others. Therefore, she is not entitled to the protections of VTL §1104. Chen testified that prior to the impact, the ambulance never slowed down or stopped. Chen also alleged that Gaines failed to sufficiently look because she saw Marden's vehicle only one second prior to the impact and was unable to avoid the collision. Therefore, there is a question of fact as to whether Gaines stopped or slowed the ambulance prior to entering the intersection, and therefore acted in reckless disregard for the safety of the general public. (See *Sanicola v Wantagh Fire Dist., Inc.*, 187 AD3d 1232 [2d Dept 2020].) In the case *Ferrara v Village of Chester*, 57 AD3d 719 [2d Dept 2008], the Appellate Division, Second Department, held that an operator merely slowing an emergency vehicle rather than coming to a complete stop to check for oncoming traffic, where, given the circumstances then and there existing, the operator's view that traffic would be proceeding through the intersection was obstructed, may amount to reckless disregard for the safety of others (see *Robinson v County of Suffolk*, 219 AD3d 1542 [2d Dept 2023]; see also *Corallo v Martino*, 58 AD3d 792 [2d Dept 2009]; *Klayman v City of New York*, 130 AD2d 551 [2d Dept 1987]). Marden and City also opposed the motion, also arguing that there is an issue of fact based upon the evidence as to whether Gaines and Mobile are entitled to the privilege under VTL §1104. Gaines did not give an audible warning against a steady red signal (see *Abood v Hosp. Ambulance Serv., Inc.*, 30 NY2d 295 [1972]). Also, Marden testified that just prior to the impact, he did not observe any emergency lights on the vehicle. Moreover, whether the reckless standard applies, there is an issue of fact as to whether Gaines' actions were reckless. (See *Saarinén v Kerr*, 84 NY2d 494 [1994]; *Szczerbiak v Pilat*, 90 NY2d 553 [1997]; *Krulik v County of Suffolk*, 62 AD3d 669 [2d Dept 2009]; *Campbell v City of Elmira*, 84 NY2d 505 [1994].) Marden and City pointed to testimony of Gaines adduced herein indicated that seconds before the collision, Gaines had not observed the traffic light, had not observed the police van traveling down Horace Harding Expressway, was using the two way radio and had one hand on the steering wheel while entering the intersection against a red light, therefore, whether or not her actions rise to the level of reckless disregard for the safety of others is an issue of fact and cannot be decided as a matter of law.

Turning next to the merits of motion sequence 3, upon the Court's review of the papers submitted herein, the Court finds that Chen has not established that she is entitled to summary judgment on the issue of liability against Defendants (see *Phillip v D & D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]). However, Chen has established that she is entitled to relief under CPLR

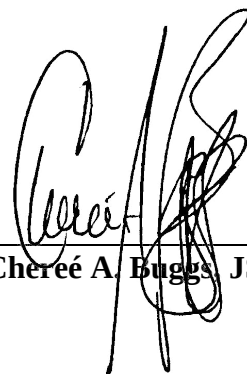
3212(g) and the Court finds that Chen was an innocent passenger seated in the rear of the ambulance with her seat belt fastened when the accident occurred and as such was free from comparative fault in the happening of the accident. “A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant’s negligence was a proximate cause of the alleged injuries.” (See *Tsyganash v Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033 [2018]). “If the plaintiff fails to demonstrate, prima facie, that the operator of the offending vehicle was at fault, or if triable issues of fact are raised by the defendants in opposition... summary judgment on the issue of liability must be denied, even if the moving plaintiff was an innocent passenger.” (see *Quintero v Boyle*, 221 AD3d 925 [2d Dept 2023]; see also *Guido v Dagnese*, 214 AD3d 715 [2d Dept 2023]).

Therefore it is

ORDERED, that the motion for summary judgment of by Defendants Shounte U. Gaines and Citywide Mobile Response Corp. seeking an Order pursuant to CPLR 3212 granting summary judgment, thereby dismissing Plaintiff Mu Hang Chen’s complaint on grounds that Defendants cannot be found liable for the accident in question is denied (motion sequence 2); and it is further

ORDERED, that Plaintiff’s motion is granted to the extent that the Court grants Plaintiff relief pursuant to CPLR 3212(g) and finds that Plaintiff was an innocent passenger seated in the rear of the ambulance with her seat belt fastened when the accident occurred and as such was free from comparative fault in the happening of the accident (motion sequence 3).

Date: May 10, 2024



Hon. Chereé A. Buggs JSC

