

Casillas v Moore
2024 NY Slip Op 35648(U)
August 28, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 604719/2015
Judge: Robert F. Quinlan
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SHORT FORM ORDER

INDEX No. 604719/2015
 CAL. No. 202301599MV

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 27 - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT F. QUINLAN
 Justice of the Supreme Court

MOTION DATE 3/26/24 (006)
 MOTION DATE 3/26/24 (007)
 ADJ. DATE 3/26/24
 Mot. Seq. # 006 MD
 Mot. Seq. # 007 MD

-----X
 JONATHAN CASILLAS,

Plaintiff,

- against -

BRIAN P. MOORE, SUFFOLK COUNTY
 POLICE DEPARTMENT and THE COUNTY
 OF SUFFOLK,

Defendants.
 -----X

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendants Brian P. Moore, Suffolk County Police Department, and the County of Suffolk, filed February 16, 2024; Notice of Cross-Motion and supporting papers by plaintiff, filed March 8, 2024; Answering Affidavits and supporting papers by plaintiff, filed March 8, 2024; Answering Affidavits and supporting papers by defendants Brian P. Moore, Suffolk County Police Department, and the County of Suffolk, filed March 19, 2024; Replying Affidavits and supporting papers by plaintiff, filed March 20, 2024; Replying Affidavits and supporting papers by defendants Brian P. Moore, Suffolk County Police Department, and the County of Suffolk, filed March 22, 2024; Other ; it is

ORDERED that these motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (006) by defendants County of Suffolk, Suffolk County Police Department, and Brian P. Moore for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint is denied; and it is further

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ORDERED that the cross-motion (007) by plaintiff for an order pursuant to CPLR 3212 and 2215, granting summary judgment on the issue of liability and to strike certain affirmative defenses, is denied.

Plaintiff Jonathan Casillas commenced this action to recover damages for injuries he allegedly sustained on October 4, 2014, when he was traveling by bicycle on Waverly Avenue at or near its intersection with Sunrise Highway South Service Road, Patchogue, New York, and the motor vehicle owned and operated by defendants came into contact with him. Plaintiff claims, among other things, that defendant Brian P. Moore, was acting within the scope of his employment with defendants Suffolk County Police Department and County of Suffolk at the time of the accident, and that defendants were negligent, careless and reckless in the ownership, operation, maintenance, management and/or control of the motor vehicle.

Defendants County of Suffolk, Suffolk County Police Department, and Brian P. Moore (hereinafter referred to collectively as the "Suffolk defendants") now move for summary judgment dismissing the complaint against them on the grounds that plaintiff's actions were the sole proximate cause of the accident; that at the time of the accident, Officer Moore was engaged in conduct protected by Vehicle and Traffic Law § 1104; and that Officer Moore did not act with reckless disregard for the safety of others. In support of their motion, the Suffolk defendants submit, among other things, copies of the notice of claim, the transcript of plaintiff's General Municipal Law § 50-h hearing, and transcripts of the parties' deposition testimony.

Plaintiff opposes the Suffolk defendants' motion and cross-moves for summary judgment on the issue of liability and to strike defendants' sixth, eighth and tenth affirmative defenses, arguing, among other things, that the Suffolk defendants' conduct should be held to an ordinary negligence standard as Vehicle and Traffic Law § 1104 does not apply to the injury-causing conduct. In support of his cross-motion, plaintiff submits, among other things, copies of the notice of claim, the transcript of plaintiff's General Municipal Law § 50-h hearing, and transcripts of the parties' deposition testimony. The Suffolk defendants oppose the cross-motion.

The record reveals that at approximately 11:00 p.m. on October 4, 2014, a marked police vehicle, operated by defendant Officer Brian Moore, collided with a bicycle operated by plaintiff. Plaintiff testified at an examination before trial that, at the time of the accident, he was traveling home on a bicycle equipped with reflectors and an additional battery-operated rear light. He stated that he was heading south on Waverly Avenue in Patchogue, New York, and riding on the sidewalk located on the east side of the roadway prior to the accident. Plaintiff testified that just prior to the accident, he slowed almost to a stop as he approached the light on the south side of the bridge crossing over Sunrise Highway, that the light in his direction of travel was red, and that he looked both ways before proceeding into the intersection. Plaintiff stated that he saw the police car a split second before he was struck. He testified that prior to the impact, he did not see flashing lights and did not hear sirens. He further stated that, after being propelled onto the hood of the police car as a result of the collision, he did not observe the overhead lights on the vehicle to be activated.

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Officer Moore testified that, prior to the subject accident, he was traveling northbound on Waverly Avenue in Patchogue, New York, when he received a call regarding a violent domestic disturbance. He testified that he turned his vehicle around to head south in response to the call, and he then activated his lights. Officer Moore further stated that he activated his sirens as he traveled over the bridge heading south on Waverly Avenue, towards the subject intersection. He testified that he moved from the far right lane into the left southbound lane, and then into the right-most left turning lane, to turn onto the Sunrise Highway South Service Road. Officer Moore stated that he was going approximately 30-35 miles per hour while driving over the bridge, and that he slowed down to 15-20 miles per hour before arriving at the intersection. He testified that the intersection was “fairly lit,” but only in certain areas. He further testified that he did not remember the color of the traffic light governing the left turning lanes, but that the light governing the lanes heading southbound on Waverly Avenue was green. Officer Moore testified that he did not see plaintiff at any time before the contact with his vehicle occurred, as he was in the process of turning.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 937 NYS2d 157 [2011]). Once such proof has been offered, the burden then shifts to the opposing party, who must then proffer evidence in admissible form showing facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Vehicle and Traffic Law § 1104 qualifiedly exempts drivers of authorized emergency vehicles from certain traffic laws when they are involved in an emergency operation (*see Frezzell v City of New York*, 24 NY3d 213, 997 NYS2d 367 [2014]; *Robinson v County of Suffolk*, 219 AD3d 1542, 196 NYS3d 543, 545 [2d Dept 2023]; *see also Kabir v County of Monroe*, 16 NY3d 217, 920 NYS2d 268 [2011]). Responding to a radio call from dispatch constitutes an emergency operation (Vehicle and Traffic Law § 114-b; *see Criscione v City of New York*, 97 NY2d 152, 157-158, 736 NYS2d 656 [2001]; *Robinson v County of Suffolk*, 219 AD3d 1542, 196 NYS3d 543, 545; *Rodriguez-Garcia v Southampton Police Department*, 185 AD3d 744, 124 NYS3d 870 [2d Dept 2020]). “[W]hen drivers are not involved in emergency operations, they must operate their vehicles pursuant to the normal rules of the road and with the same reasonable care as other drivers” (*Anderson v Commack Fire District*, 39 NY3d 495, 502, 191 NYS3d 292 [2023], citing *Kabir v County of Monroe*, 16 NY3d 217, 220, 920 NYS2d 268; *Modica v City of New York*, 193 AD3d 845, 142 NYS3d 399 [2d Dept 2021]). Conversely, when section 1104 is fully satisfied, drivers’ actions are privileged and governed by a “reckless disregard” standard (*see Vehicle and Traffic Law § 1104[b][3]; [e]; Anderson v Commack Fire District*, 39 NY3d 495, 191 NYS3d 292; *Saarinen v Kerr*, 84 NY2d 494, 620 NYS2d 297 [1984]).

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In light of this court's prior determination, dated April 27, 2022, ordering an adverse inference against defendants that would allow the jury to infer that the memo book of Officer Moore would not have supported his position that he was on an emergency call at the time of the incident, the Suffolk defendants have failed to demonstrate that Officer Moore was engaged in an emergency operation at the time of the accident (*see Modica v City of New York*, 193 AD3d 845, 142 NYS3d 399). Further, the Suffolk defendants failed to establish that the injury-causing conduct is conduct protected by Vehicle and Traffic Law § 1104 (*see* Vehicle and Traffic Law § 114–b; *see McLoughlin v City of Syracuse*, 206 AD3d 1600, 169 NYS3d 428 [4th Dept 2022]; *Santana v City of New York*, 169 AD3d 578, 92 NYS3d 877 [1st Dept 2019]; *Oddo v City of Buffalo*, 159 AD3d 1519, 72 NYS3d 706 [4th Dept 2018]; *Reid v City of New York*, 148 AD3d 739, 48 NYS3d 462 [2d Dept 2017]). In any event, even if afforded the heightened protections of Vehicle and Traffic Law § 1104, the Suffolk defendants have failed to eliminate all issues of fact as to whether or not Officer Moore operated the police vehicle in reckless disregard for the safety of others (*see Krulik v County of Suffolk*, 62 AD3d 669, 878 NYS2d 436 [2d Dept 2009]; *Lupole v Romano*, 307 AD2d 697, 762 NYS2d 838 [3d Dept 2003]), and likewise, failed to establish, prima facie, that under principles of ordinary negligence, Officer Moore was not at fault in the happening of the accident (*see Rojas v Solis*, 154 AD3d 985, 62 NYS3d 511 [2d Dept 2017]; *Katanov v County of Nassau*, 91 AD3d 723, 936 NYS2d 285 [2d Dept 2012]; *Nuziale v Paper Transp. of Green Bay Inc.*, 39 AD3d 833, 835 NYS2d 316 [2d Dept 2007]).

Plaintiff cross-moves for summary judgment on the issue of liability, and to strike defendants' sixth, eighth and tenth affirmative defense, on the grounds that defendants must be held to an ordinary negligence standard because the injury-causing conduct is not covered by Vehicle and Traffic Law § 1104. Here, plaintiff's cross-motion for summary judgment is untimely inasmuch as it was not served within 120 days of the filing of the note of issue, dated October 19, 2023 (*see* CPLR 3212 [a]). Instead, the cross-motion was filed three weeks late, on March 8, 2024. Plaintiff's counsel has provided no explanation or "good cause" for serving the cross-motion late. Nevertheless, an untimely cross-motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds (*see Alexander v Gordon*, 95 AD3d 1245, 945 NYS2d 397 [2d Dept 2012]; *Grande v Peteroy*, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]).

Under the circumstances, the issue as to whether a reckless disregard standard of care would apply to the Suffolk defendants' conduct raised by the untimely cross-motion is already properly before the court. Thus, the nearly identical nature of the grounds may provide the requisite good cause (*see* CPLR 3212 [b]) to review on the merits that portion of the untimely cross-motion which is for summary judgment on the issue of defendants' liability (*see Alexander v Gordon*, 95 AD3d 1245, 945 NYS2d 397). Plaintiff's cross-motion on the issue of defendants' liability, however, is denied, as discussed above, on the grounds that triable issues of fact exist with respect to whether the Suffolk defendants will be afforded the protections of Vehicle and Traffic Law § 1104, and thus, whether their conduct should be reviewed under the heightened "reckless disregard" standard (*see Kabir v County of Monroe*, 16 NY3d 217, 920 NYS2d 268; *Bourdierd v City of Yonkers*, 213 AD3d 899, 184 NYS3d 808 [2d Dept 2023]; *McLoughlin v City of Syracuse*, 206 AD3d 1600, 169 NYS3d 428; *Santana v City of New York*, 169 AD3d 578, 92 NYS3d 877). As to those portions of plaintiff's cross-motion which seek dismissal

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of certain affirmative defenses, the cross-motion is denied as untimely (*see Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]).

Accordingly, the Suffolk defendants' motion for summary judgment is denied, and plaintiff's cross-motion for summary judgment on liability and to dismiss certain affirmative defenses is denied.

Dated: August 28, 2024


J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION