Nias v City of New York
2017 NY Slip Op 30957(U)
May 8, 2017
Supreme Court, New York County
Docket Number: 153365/12
Judge: William Franc Perry
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.W. FRANC PERRY, J.S.C. PART 5

LATASHA NIAS,

Plaintiff,

-against-

THE CITY OF NEW YORK;
And TERRANCE WILLIAMS,

Defendants

INDEX NO. 153365/12

MOT. DATE May 2, 2017
MOT. SEQ. NO. 004

The following papers were read on this motion for Summary Judgment and motion To Dismiss the complaint against the Defendants

Notice of Motion/ Affidavit — Exhibits A through I	ECFS DOC No(s). 1-14
Answering Affidavit in Opposition	ECFS DOC No(s). 1-12
Reply Affidavit	ECFS DOC No(s). 1-8

This is a personal injury action arising out of an automobile accident between plaintiff and Police Officer Terrance Williams. Plaintiff alleges that on December 17, 2011 at approximately 7:23 p.m. at the intersection of Seventh Avenue and 135th Street, an accident occurred between a vehicle owned and operated by the Plaintiff and a police vehicle operated by New York City Police Department (NYPD) Officer Terrance Williams and owned by the City of New York. Defendants the City of New York and Terrance Williams (hereinafter Defendants and/or City) move for an order pursuant to CPLR §3212 granting summary judgment in favor of defendants and CPLR §3211 dismissing the complaint in its entirety.

Factual/Procedural Background and Contentions

Plaintiff filed a Notice of Claim against the City on or about February 14, 2012. On or about June 4, 2012, Plaintiff commenced this action by filing a Summons and Verified Complaint. The City served an Answer on or about June 26, 2012. Plaintiff served a Verified Bill of Particulars on or about September 3, 2013, and the parties thereafter engaged in discovery, exchanging relevant documents and conducting depositions. The City now moves for summary judgment claiming that the pleadings, documentary and testimonial evidence in the record, demonstrate that there is no legal or factual basis for liability against the defendants. Moreover, the City argues that there are no genuine and triable issues of material fact warranting a trial.

The City argues that in order to hold the defendants liable for plaintiff's accident, she must demonstrate that the police officer showed a reckless disregard for the safety of others. The City maintains that nothing in the record demonstrates Officer Terrance Williams acted recklessly. Plaintiff argues that the "reckless disregard" standard set forth in VTL§1104 is inapplicable to the facts of this case, because defendants have not demonstrated that Officer Williams was involved in an "emergency operation" as de-

fined by VTL§114-b. Specifically, plaintiff argues that Officer Williams was not "transporting prisoners" when the accident occurred because the prisoner was not in his vehicle, but rather in the lead vehicle in the convoy proceeding to the precinct, and therefore the "reckless disregard" standard does not apply.

According to Officer Williams' deposition testimony, at the time of the accident, he was assigned to the 32nd Police Precinct, Street Narcotics Unit and was involved in escorting a prisoner to the precinct for processing. (Papandrew Aff, Exhibit E, p. 16, lines 15-21; p.37, lines 19-20, 25; p.38, lines 2-3; p.40, lines 23-25). Prior to the accident, a narcotics arrest had been made near the FDR and the prisoner was being transported to the 32nd Precinct for processing. (Id. at p. 41, lines 19-25). The unmarked police vehicle operated by Officer Williams was the final vehicle in a group of three vehicles traveling together transporting the prisoner back to the precinct. (Id. at p.37, lines 9-11; p. 38. lines 9-10, 19-21). The prisoner was located in the first vehicle, a marked police car. (Id. at37, lines 21-24 and at 38, lines 5-6). The second vehicle, operated by NYPD Officer Peralta, was an unmarked vehicle in which the prisoner had been traveling prior to his arrest. (Id. at 38, lines 7-13).

The group of vehicles engaged in the prisoner transport were traveling westbound on West 135th Street prior to the accident. (Id. at 56, lines 14-18). Officer Williams' testimony was unequivocal in noting that he was "responsible for that prisoner and whatever goes down with that prisoner is held on to me, so I have to be with that prisoner, that's it. . .. Like I said before, that prisoner is my responsibility, I'm supposed to be back at the precinct when he arrives." (Id. at p. 46, lines 24-25; p. 47, lines 1-4; p. 49, lines 5-7).

Officer Williams testified that as he approached the intersection of West 135th street and Seventh Avenue, he slowed down at the traffic light; he was paying attention to the northbound traffic on Seventh Avenue, his vehicle's turret lights were on and he compressed the vehicle's horn to activate the siren. (Id. at p. 68, lines 20-23; p. 69, lines 4-9). He then checked for pedestrian and vehicle traffic before proceeding across the northbound lanes of Seventh Avenue by engaging the vehicle's horn several times as well as confirming that all northbound traffic on Seventh Avenue had stopped to allow his vehicle to safely proceed through the intersection. (Id. at p.70, lines 7-14; p.7l, lines 11-14).

According to his unrebutted testimony, Officer Williams then proceeded slowly through the northbound lanes of the intersection and came to a complete stop again as he approached the southbound lanes of Seventh Avenue. (Id. at p.72, lines 4-10). According to his testimony and the documents submitted in support of the City's motion, Officer Williams engaged the vehicle's horn to alert any vehicles traveling southbound on Seventh Avenue as he proceeded through the intersection. (Id. at72, lines 4-10); the vehicle's turret lights were still on. (Id. at p.72, lines 11-13). Officer Williams testified he observed vehicles stopped in the second and third southbound lanes of Seventh Avenue as he began to proceed slowly through the intersection. (Id. at p.72, lines 17-24; p.75, lines 4-5); he saw headlights approaching his vehicle from the first southbound lane of Seventh Avenue. (Id. at lines 7-12). A collision then occurred between that vehicle, subsequently identified as Plaintiff s vehicle, and Officer Williams' vehicle. (Id. at 17-18).

Plaintiff testified she did not see any lights or hear any sirens prior to the collision. (Papandrew Aff, Exhibit F, p. 26, lines 20-23). Plaintiff further testified the traffic light was green as she approached the intersection of Seventh Avenue and West 135th Street. (Id. at p. 29, lines20-22). Officer Williams testified that the MV-104, incorrectly noted that the light was green in his direction. (Papandrew Aff, Exhibit G, and Exhibit E, p. 107, lines 23-25; p. 108, lines 6-13). The description of the accident set forth in the MV-104 indicates that P.O. Williams "drove through the intersection with emergency lights on." (Papandrew Aff, Exhibit G).

In further support of its motion, the City has annexed the investigative report prepared by NYPD Sargent Vento, which further provides that at the time of the accident, Officer Williams was travelling to the precinct "due to an arrest situation, with lights and sirens on." (Papandrew Aff, Exhibit H). Similarly, Officer Williams' Memo Book, provides that his vehicle's emergency lights and sirens were engaged at the time of the accident. (Papandrew Aff, Exhibit I).

In support of her argument that defendant Williams was not "transporting prisoners" at the time of the accident, plaintiff cites defendant's deposition testimony indicating that when the accident occurred there were two other vehicles, a civilian car and one police vehicle, travelling ahead of him; defendant's car was in the rear. (Papandrew Aff, Exhibit E, p. 36). There was a prisoner being taken to the precinct for processing for a narcotics arrest in the first of the three cars . . . the marked patrol car. (Id. at pp. 37-38). The three cars travelled to the 32nd Precinct but the defendant testified that he did not know whether the other police cars had their lights on. (Id. at p. 39). As the cars proceeded westbound on 135th Street at Lenox Avenue they were in that same order. (Id. at p. 57).

As he approached the intersection where the accident occurred, defendant noted that the light was changing and he slowed his car while the civilian car, the second car in the detail, made it through the intersection. (Id. at pp. 64-65). He stopped and then began compressing the horn to engage the siren and his emergency lights were still on; the sirens in the car were not on up to this point. (Id. at pp. 66, 69-70). While stopped there he looked for traffic coming in the northbound lanes of Seventh Avenue and pedestrian traffic. (Id. at pp. 69-70). The defendant did not have the green light while travelling through the intersection and he had a red light in his direction. (Id. at pp. 108, 150).

Discussion of Legal Standard and Analysis

When deciding a summary judgement motion, the Court's role is solely to determine if there are any triable issues of fact, not to determine the merits of any such issues. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, 144 NE2d 387, 165 NYS2d 498 (1957). The Court must view the evidence in the light most favorable to the nonmoving party, and must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Sosa v. 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 (1st Dept. 2012). If there is any doubt as to the existence of a triable fact, the motion for summary judgement must be denied. CPLR §3212[b]; *Grossman v. Amalgamated Housing Corp.*, 298 AD2d 224, 226, 750 NYS2d 1 (1st Dept. 2002). The court's function on these motions is limited to "issue finding", not "issue determination" (*Sillman* v. *Twentieth Century Fox Film*, 3 NY2d 395 [1957]); *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 NYS2d 316 (1985).

A party opposing a motion for summary judgment may not rely upon conclusory allegations, but must present evidentiary facts sufficient to raise a triable issue of fact. *Mallad Construction Corp. v. County Federal Savings & Loan Assoc.*,32 N.Y.2d285, 290 (1973); *Tobron Office Furniture Corp. v. King World Productions,* 161 A.D.2d 355, 356 (1st Dept. 1990). The opposing party has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. *Zuckerman* v. *City of New York*, 49 NY2d 557, 562 (1980).

Based upon the evidence submitted in support of its motion, the Court finds that Defendants have established that Officer Williams was engaged in an "emergency operation" as defined by VTL §114-b at the time of the accident and as such the "reckless disregard" standard of care set forth in VTL §1104 (e) applies.

Vehicle and Traffic Law ("VTL") §1104, states in pertinent part:

> (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:
>
> 2. Proceed past a steady red signal, . . . but only after slowing down as may be necessary for safe 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 provision protect the driver from the consequences of his reckless disregard for the safety of others.

VTL §101 defines "authorized emergency vehicle" broadly as "every police vehicle" and VTL §132-a designates every vehicle owned by the City of New York and operated by the police department as a "police vehicle." Pursuant to VTL §114-b, the "emergency operation" of a police vehicle includes, the operation . . . of an authorized emergency vehicle, when such vehicle is engaged in..., transporting prisoners . . .".

In *Saarinen v. Kerr*, 84 NY2d 494, 644 NE2d 988, 620 NYS2d 297 (1994), the Court of Appeals was called upon, for the first time, to interpret the statutory language of VTL §1104 and held that the statute imposes a heightened "reckless disregard" standard of care applicable to police officers and other responders engaged in emergency operations. The Court held that "a police officer's conduct in pursuing a suspected lawbreaker may not form the basis of civil liability to an injured bystander unless the officer acted in reckless disregard for the safety of others." *Id.*, 84 NY2d at 501.

The Court reviewed the legislative history and public policy underlying the statute and explained that VTL §1104 "represents a recognition that the duties of police officers and other emergency personnel often bring them into conflict with the rules and laws that are intended to regulate citizens' daily conduct and that, consequently, they should be afforded a qualified privilege to disregard those laws where necessary to carry out their important responsibilities." *Id.* at 502. The Court went on to note that "the possibility of incurring civil liability for what amounts to a mere failure of judgment could deter emergency personnel from acting decisively and taking calculated risks in order to save life or property or to apprehend miscreants" and would thereby undermine the "evident legislative purpose of Vehicle and Traffic Law §1104, i.e., affording operators of emergency vehicles the freedom to perform their duties unhampered by the normal rules of the road." *Id.*

In *Criscione v. City of New York*, 97 N.Y.2d 152 (2001), NYPD officers were responding to a "10-52 radio call from a dispatcher," which was classified by NYPD as a "non-crime incident." Id. at 155. The driver testified that because of the NYPD policy regarding "non-crime" calls, he did not increase the speed of the vehicle or activate the siren or turret lights. Id. The Court of Appeals held that, pursuant to VTL §114-b, the NYPD officers were involved in an "emergency operation," and it was irrelevant how

the Police Department categorized this type of call. *Id.* at 157-158. Accordingly, the "reckless disregard" standard of liability applied to the officer's conduct. *Id.* See, also *McCarthy v. City of New York*, 250 AD2d 654 (2d Dep't 1998) (officer responding to radio call from driver of another police vehicle engaged in "emergency operation" as defined by VTL §114-b); *Gonyea v. City of Saratoga,* 2005 NY Slip Op 8232,1 (3d Dep't 2005) (sheriff's vehicle parked partly in a two-lane roadway while investigating an accident was engaged in an emergency operation).

Based on the holdings in these cases, Defendants argue that Officer Williams' vehicle, with emergency lights and sirens on, was engaged, along with the two other police vehicles, in transporting a prisoner. As such, Defendants argue that, as a matter of law, Officer Williams was involved in an "emergency operation" pursuant to VTL §114-b and thus, his actions are entitled to the "reckless disregard" standard afforded by VTL §1104.

Defendants have established, and Plaintiff does not dispute, that the accident occurred while Defendant was driving an emergency vehicle as defined by VTL §§101 and 132-a. Plaintiff also concedes that Officer Williams had engaged his siren and his turret lights were still on as he proceeded through the intersection. (Marrone Affirmation in Opposition, p. 4, paragraph 7). Plaintiff's opposition to the defendants' motion rests solely on the claim that Officer Williams was not actually engaged in an emergency operation as defined by VTL §114-b, because the prisoner being transported to the 32nd Precinct was not physically located in defendant Williams' vehicle, but rather was located in the lead vehicle of a three car detail. Therefore, Plaintiff argues that defendant Williams was not "transporting prisoners" at the time of the accident and as such, he is not entitled to the heightened "reckless disregard" standard of care applicable to police officers engaged in emergency operations.

In support of her argument Plaintiff attempts to distinguish the cases cited by Defendants, arguing that those cases involved officers engaged in the actual "emergency operation". The Court finds plaintiff's argument unconvincing and, on this record, the fact that the prisoner being transported was not in Officer Williams' vehicle amounts to nothing more than a distinction without a difference. Officer Williams' testimony confirms that when the accident occurred there were two other vehicles, a civilian car and one police vehicle, travelling ahead of him; defendant's car was in the rear. (Papandrew Aff, Exhibit E, p. 36). There was a prisoner being taken to the precinct for processing for a narcotics arrest in the first of the three cars . . . the marked patrol car. (Id. at pp. 37-38). Officer Williams was "responsible for that prisoner and whatever goes down with that prisoner is held on to me, so I have to be with that prisoner, that's it. . .. that prisoner is my responsibility; I'm supposed to be back at the precinct when he arrives." (Id. at p. 46, lines 24-25; p. 47, lines 1-4; p. 49, lines 5-7).

As he approached the intersection where the accident occurred, defendant noted that the light was changing and he slowed his car while the civilian car, the second car in the police detail, made it through the intersection. (Id. at pp. 64-65). He stopped and then began compressing the horn to engage the siren and his emergency lights were still on. (Id. at pp. 66, 69-70). While stopped there he looked for traffic coming in the northbound lanes of Seventh Avenue and pedestrian traffic. (Id. at pp. 69-70).

In *Kabir v. County of Monroe,* 16 NY3d 217, (2011), the Court of Appeals again examined the statutory language and policy underlying the privileges identified in VTL §1104(b) to determine whether the road patrol deputy involved in the accident with plaintiff, was entitled to the "reckless disregard" standard. Specifically, the Court was asked to determine the type of conduct that is exempt under §1104 (b) and held that the reckless disregard standard of care in VTL §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 VTL §1104 (b). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence. *Id.* at 220.

Unlike the defendant in *Kabir,* here the defendant did not rear-end the plaintiff while he "looked down for two to three seconds"; nor did defendant Williams fail to "activate the emergency lights or siren on his vehicle". *Id.* at 221. To the contrary here, the City has shown that defendant Williams sounded his siren and activated his turret lights; he slowed down as he approached the intersection, noting that the light was changing from green to red. The documentary evidence corroborates Officer Williams' testimony; plaintiff has simply failed to meet her burden to oppose the City's motion. Indeed, plaintiff relies solely on the evidence submitted by defendants, offering no independent rebuttal in opposition to the City's motion, and producing no evidence demonstrating the existence of triable and material issues of fact. *Zuckerman* v. *City of New York,* 49 NY2d 557, 562 (1980).

Rather, plaintiff argues that VTL §1104 does not apply because the prisoner being transported at the time of the accident was not in Officer Williams' vehicle. To support her narrowly restrictive interpretation of the plain statutory language, plaintiff relies on case law setting forth the general rules of statutory construction. Plaintiff's claim is simply not supported by the record evidence and her narrow construction of the plain statutory language would, in the Court's view, frustrate the public policy behind VTL §1104, and thus violate the rules of statutory construction upon which plaintiff relies.

The "reckless disregard" standard afforded by the VTL is necessary to enable police and other emergency personnel to "carry out their important responsibilities." *Frezzell v. City of New York,* 24 NY3d 213, 217 (2014). Plaintiff's proposed construction of the plain statutory language would undermine the "evident legislative purpose of Vehicle and Traffic Law §1104, i.e., affording operators of emergency vehicles the freedom to perform their duties unhampered by the normal rules of the road." *Saarinen v. Kerr*, 84 NY2d at 502.

A review of the statute demonstrates that the operative language, "transporting prisoners", is not qualified or restricted in any way. There is no language in the statute which limits its applicability solely to the vehicle in which the prisoner is physically located, the narrow construction proffered by plaintiff, here. As Plaintiff argues, "the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation, . . . and courts have no right to add to or take away from that meaning." (Marrone Aff, at p. 6, citing *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 (1998)).

The plain language at issue, "transporting prisoners" encompasses the facts presented by this record; Officer Williams testified that he was responsible for the prisoner and he was part of the police detail assigned to ensure that the prisoner was transported to the 32nd Precinct for processing. This testimony is unrebutted and presents the precise "emergency operation" that VTL §114-b was intended to cover. To limit the applicability of the statute to cover only the vehicle in which the prisoner is physically located, would frustrate the public policy as articulated by the Legislature and cited by the Court of Appeals in *Saarinen v. Kerr;* "the possibility of incurring civil liability for what amounts to a mere failure of judgment could deter emergency personnel from acting decisively and taking calculated risks in order to save life or property or to apprehend miscreants". 84 NY2d at 502.

The narrow interpretation of the operative statutory language proposed by plaintiff would lead to an "absurdity" and would violate the very rules of statutory construction cited by plaintiff. The record demonstrates that the police officers involved in this "emergency operation" made the decision to assign a three car detail to transport the prisoner who had been arrested near the FDR, back to the precinct for processing. Officer Williams was part of that police detail transporting the prisoner and as such he is entitled to have his conduct reviewed by the heightened "reckless disregard" standard of care set forth in VTL §1104 (e). As the City points out, situations involving the transportation of prisoners have the po-

tential for creating dangerous circumstances at any point during the duration of the transport which threaten not only public safety but the safety of those officers responsible for their custody. Plaintiff has simply failed to produce any evidence or legal authority to demonstrate that the statute does not apply.

Moreover, the City has met its burden to establish that Officer Williams, during his participation in this "emergency operation", exercised caution and sound judgment by activating his vehicle's lights and compressing his horn as he entered the intersection where the accident with plaintiff's vehicle occurred. Plaintiff has not produced any evidence in opposition to the City's motion demonstrating the existence of triable and material issues of fact, that would require a trial in this matter. *Frezzell v. City of New York*, 24 NY3d 213 (2014); *Szczerbiak v. Pilat*, 90 NY2d 553 (1997); *Asante v. Asante*, 22 NYS3d 848 (1st Dept. 2016). Accordingly, the City's motion for summary judgment is granted and the complaint is dismissed.

Conclusion

The Court finds that Defendants have met their burden demonstrating that they are entitled to summary judgment, dismissing the complaint. The record before the Court establishes that Officer Williams was operating an emergency vehicle in an emergency operation and as such, he is entitled to the "reckless disregard" standard set forth in VTL §1104 (e). The record demonstrates that defendant Williams exercised caution as he approached the intersection. Accordingly, Defendants' motion is granted in its entirety.

ORDERED, that Defendants' The City of New York and Terrance Williams, motion for summary judgment seeking dismissal of the complaint is granted in its entirety, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

SO ORDERED:

Dated: May 8, 2017
New York, New York

HON.W. FRANC PERRY, J.S.C.

1. Check one: ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**