

**Frezzell v City of New York**

2011 NY Slip Op 34148(U)

April 9, 2011

Supreme Court, New York County

Docket Number: 116366/07

Judge: Geoffrey D. Wright

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Geoffrey D.S. Wright

Part 62

*Justice*

KENT FREZZELL,

INDEX NO. 116366/07

MOTION DATE

Plaintiffs)

- v -

MOTION SEQ. NO.

002

THE CITY OF NEW YORK and STEVEN TOMPOS,

MOTION CAL. NO.

Defendant(s).

The following papers, numbered 1 to 3 were read on this motion to/for dismiss the complaint against City of New York and Steven Tompos,

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits \_\_\_\_\_

2


Replying Affidavits \_\_\_\_\_

3

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that the motion by the Defendants City of New York and Steven Tompos to dismiss the complaint is granted a/p/o.

Dated: April 9, 2011

  
GEORGEY D. WRIGHT  
AJSC

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

**FILED**

APR 14 2011

NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 62

-----X

KENT FREZZELL,

Plaintiff(s),

-against-

CITY OF NEW YORK, and STEVEN TOMPOS,

Defendant(s).

-----X

Index #116366/07  
Motion C6366/07al. #  
Motion Seq. #  
**DECISION/ORDER**  
Present:  
Hon. Geoffrey Wright  
Judge, Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: dismiss the complaint

PAPERS  
Notice of Motion, Affidavits & Exhibits Annexed  
Order to Show Cause, Affidavits & Exhibits  
Answering Affidavits & Exhibits Annex  
Replying Affidavits & Exhibits Annexed  
Other (Cross-Motion) & Exhibits Annexed

NUMBERED  
**FILED**  
APR 14 2011

NEW YORK  
COUNTY CLERK'S OFFICE  
Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The Plaintiff, a New York City policeman, sues the City of New York and Steven Tompos, another New York City policeman as because of an automobile accident, in which a police vehicle, driven by Tompos, ran head on into the police vehicle that was being driven by Frezzell. At the time of the accident, which occurred on September 20, 2006, at approximately 10:00 P.M., on 104<sup>th</sup> Street, between Columbus Avenue and Amsterdam Avenue a one way street on which traffic travels east. Both vehicles were responding to a radio call that advised of a third police officer who was chasing a man wielding a gun. The Plaintiff's vehicle was traveling eastward, the direction for traffic on West 104<sup>th</sup> Street. The Tompos vehicle, also responding to the radio call, had come through Central Park, and turned north on Columbus Avenue, against the southbound flow of traffic, and on reaching 104th Street, turned west, also against the legal traffic flow. The accident happened two-three car lengths into the block. The two cars hit almost head on even though both drivers tried to turn to the right to avoid contact. Both drivers allege that they had turned on their sirens and dome roof lights

The City now moves to dismiss the complaint. In the motion and in the opposing papers, two statutes collide. The first is *GENERAL MUNICIPAL LAW 205-E*, and *GOL § 11-106*

(L. 1996, CH. 703) which grants to police a right of action in personal injury matters that were previously prohibited under the Firefighter's rule. [*SANTANGELO v. STATE OF NEW YORK*, 71 N.Y.2d 393, 526 N.Y.S.2d 812, 521 N.E.2d 770 (1988)]. In conflict with the foregoing is section 1104(e), which bars hindsight in analyzing an officer's spur of the moment reaction to an exigent situation. In order for there to be a recovery when VTL 1104(e) comes into play, there must be a finding 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" [*GONZALEZ v. IOCOVELLO*, 93 N.Y.2d 539, 715 N.E.2d 489, 693 N.Y.S.2d 486, 1999 N.Y. Slip Op. 06304, quoting *SAARINEN v. KERR*, 84 N.Y.2d 494, 644 N.E.2d 988, 620 N.Y.S.2d 297, 620 N.Y.S.2d 297, 644 N.E.2d 988].

In another interpretation of the statute, we find these words "The "reckless disregard" standard requires 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 ( see *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 557, 664 N.Y.S.2d 252, 686 N.E.2d 1346; *Saarinen v. Kerr*, 84 N.Y.2d at 501, 620 N.Y.S.2d 297, 644 N.E.2d 988; *Campbell v. City of Elmira*, 84 N.Y.2d 505, 510, 620 N.Y.S.2d 302, 644 N.E.2d 993)." [*BURRELL v. CITY OF NEW YORK*, 49 A.D.3d 482, 853 N.Y.S.2d 598, 2008 N.Y. Slip Op. 01905].

In this case, there are two police vehicles, each traveling at 15-20 miles per hour, each, in addition to having to be aware to the conditions of traffic, was also looking for an armed suspect and/or a fellow police officer who may have been in peril. Each, it appears, saw the other and tried to avoid an accident, but could not because the width of the roadway did not permit sufficient room to avoid contact.

At best, the Plaintiff has alleged mere negligence, which under the Vehicle and Traffic Law is not sufficient in this case. The motion to dismiss is granted. This constitutes the decision and order of the Court.

Dated: April 9, 2011



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**GEOFFREY D. WRIGHT**  
**AJSC**

**FILED**

APR 14 2011

NEW YORK  
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