

**Asante v Asante**

2013 NY Slip Op 30540(U)

March 5, 2013

Supreme Court, New York County

Docket Number: 403318/2010

Judge: Geoffrey D. Wright

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

JUDGE GEOFFREY B. WRIGHT

PRESENT: \_\_\_\_\_  
Justice

PART 602

Index Number : 403318/2010  
ASANTE, EMMA O.  
vs.  
ASANTE, PRINCE  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 5, were read on this motion to/for Summary judgment  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1, 2  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 3, 4  
Replying Affidavits \_\_\_\_\_ No(s) 5

Upon the foregoing papers, it is ordered that this motion is decided in accordance  
with the annexed hereto decision

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

**FILED**  
MAR 19 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

G  
GEOFFREY B. WRIGHT  
AJSC

Dated: 3/5/13

\_\_\_\_\_, 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

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

-----x  
EMMA O. ASANTE,

Plaintiff,

Index # 403318/2010

-against-

DECISION

PRINCE ASANTE, THE CITY OF NEW YORK,  
NEW YORK CITY POLICE DEPARTMENT, and  
GREYLI GIL

Defendants.

**Present:**

Hon. Geoffrey D. Wright

-----x Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS	<b>FILED</b>	NUMBERED
Notice of Motion and Affidavit Annexed.....	<b>NEW YORK COUNTY CLERK'S OFFICE</b>	1, 2
Order to Show Cause and Affidavits Annexed		_____
Answering Affidavits.....MAR.19.2013		3, 4
Replying Affidavits.....		5
Exhibits.....		_____
Other.....cross-motion.....		_____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Co-Defendant, The City of New York, New York Police Department and Greyli Gil, ("The City") move pursuant to CPLR 3212 granting summary judgment dismissing the claims of the Plaintiff Emma O. Asante ("Plaintiff") and the cross-claims of co-defendant Prince Asante ("Prince").

Co-defendant, Prince Asante ("Prince") moves for an order pursuant to CPLR 3212 granting summary judgment, dismissing the Plaintiff's complaint and all cross-claims on the grounds of liability.

This is a personal injury action arising from a motor vehicle accident between a vehicle operated by Prince, and a police vehicle owned by co-defendants' the City of New York and New York City Police Department, and operated by co-defendant Greyli Gil on Sunday, October 11,

2009, at the intersection of 8<sup>th</sup> Avenue and West 124<sup>th</sup> Street, New York, New York. At the time of the accident, Plaintiff was a front seat passenger in the vehicle being driven by her husband, Prince.

The City moves for dismissal of the complaint and any cross-claims, relying on deposition testimony and documentary evidence. At issue is whether the police vehicle entered the intersection with lights and sirens activated and whether Prince failed to yield to her vehicle. It appears it is undisputed that the traffic light was red for Officer Gil and green for Prince.

In support of their motion, The City provides the deposition testimony of Officer Gil who testified she was in the precinct prior to the accident when she heard a radio call come over the radio stating an officer was in need of assistance. She stated she jumped in her police vehicle and turned the lights on. She stated she kept the lights on for the entire time and that additionally, she turned on the sirens as soon as she entered the car to respond to the call. She testified that as she was approaching the intersection of 124<sup>th</sup> Street and Eight Avenue at approximately 15 to 20 miles per hour, she noticed the light facing her was red. When she reached the red signal she came to a complete stop in front of it for several minutes then proceeded with caution through the intersection. She further testified that the vehicle being driven by Prince which had been traveling east on 124<sup>th</sup> Street through the intersection also stopped approximately 10 feet away. Gil testified that she attempted to go around Prince's vehicle as it was stopped and that she honked her horn several times in an attempt to get the attention of Prince. As she attempted to pass in front of his vehicle Prince began moving his vehicle thus colliding with hers.

In addition, The City includes the New York State Department of Motor Vehicles Police Accident Report (MV-104) completed by Sergeant Taveras which shows the police responding to an emergency situation at the time of the accident. Specifically, Officer Gil was responding to an officer in need of assistance. In addition, a statement from Mr. Upshaw a witness to the accident is included as evidence. In his statement, Mr. Upshaw stated that he saw the police vehicle with lights and sirens as they were approaching the intersection, and that Mr. Asante was not paying attention and did not see the police vehicle.

The City argues they can not be held liable under the these circumstance. City contends that Officer Gil was the driver of an "authorized emergency vehicle and was not acting with "reckless disregard" for the safety of others. The City argues that Officer Gil was involved in a high priority assignment, which subjected her to a special standard of care, pursuant to section 1104 of the Vehicle and Traffic Law (VTL). Under section 1104, the driver of an authorized emergency vehicle in an emergency operation, can only be liable if the driver acted with reckless disregard for the safety of others at the time of the accident. The City argues that, based on the proof provided, there is no indication Officer Gil displayed recklessness at the time of the accident, and there are no issues of fact as to any possible misconduct.

Plaintiff opposes the City's and Prince's motion on the grounds that there are genuine

issues of fact presented in this action. In reference to the City's motion, Plaintiff argues that the MV-104 prepared by Sergeant Taveras recites facts given to him by Officer Gil as Sergeant Taveras did not actually witness the accident. In addition Plaintiff questions the reliability of the statements made by the witness, Mr. Upshaw. Plaintiff argues that in his statement, Mr. Upshaw, does not indicate the vantage/focal point of his view, nor does he explain how he was able to determine Prince was not paying attention to the police vehicle. Additionally, Plaintiff points to the fact that both she and Prince testified they did not observe Officer Gil's vehicle before impact and did not recall hearing a horn, sirens or seeing lights on the vehicle driven by Officer Gil.

In his motion for summary judgment Prince essentially argues he had the right of way, as the vehicle he was driving entered the intersection with a green light in this direction and the City defendants negligently failed to yield to him and thus are responsible for the accident. Additionally, Prince argues that neither he or Plaintiff saw or heard, lights, sirens, or horn at the time of the accident.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1<sup>st</sup> Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material question of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Grossman v Amalgamated Houings. Corp.*, 298 AD2d 224 (1<sup>st</sup> Dept 2002).

Here, the primary dispute is whether or not Officer Gil was driving in emergency mode at the time of the accident, absolving her of liability under the circumstances. Plaintiff and the Prince argue that the driver did not apply her sirens or lights prior to the collision, or that they did not hear the sirens.

Section 1104 (c) states that "[e]xcept 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 devise or exhaust whistle as may be reasonably necessary." If Officer Gil was involved in an emergency situation and had appropriately activated the vehicle's lights and sirens prior to the collision, she would have received broad discretion to disregard a wide range of normal traffic rules, provided she did not act in reckless disregard of the safety of others.

The deposition testimony of the parties, Mr. Upshaw's statement and the MV-104 Report by Sergeant Taveras all raise questions about the cause of the accident. The issue of whether Officer Gil, operated the police sirens, lights and the horn is an issue of fact. Moreover, the failure to use such appropriate signals during an emergency operation would consign Officer Gil

to the application of a lower standard of conduct, namely that of ordinary negligence. Further, if indeed Prince was not paying attention and did not hear or see the sirens, lights and horn, he could be liable. Summary judgment, in effect, is issue-finding, not issue-determination. *See Brunnetti v Musallam*, 11 AD3d 280, 281 (1<sup>st</sup> Dept 2004). The court shall deny City's and Prince's motion at this time due to this disputed issues.

Accordingly, it is ORDERED that co-defendant City of New York's motion for summary judgment dismissing the claims of the Plaintiff and the cross-claims of Prince is denied.

Further, it is ORDERED that co-defendant Prince Asante's motion for summary judgment dismissing the Plaintiff's complaint and all cross-claims against him is denied.

This constitutes the decision and order of the Court.

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

Dated: March 5, 2013

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JUDGE GEOFFREY D. WRIGHT  
Acting Justice of the Supreme Court

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