At an I.A.S. Part 52 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 80 Centre Street, Borough of New York, City and State of New York, on the 17th day of AUGUST 2018

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

DANGUI FOFANA,

Plaintiff,

-against-

THE CITY OF NEW YORK, et al.,

Defendant(s)

MOTION SEQ. NO.2

INDEX NO.:
152036/2016

The following papers read on this motion:	NYSCEF Doc. Nos.
Notice of Motion, Affirmation, Exhibits	19-28
Affirmation in Opposition	34
Reply Affirmation	36

ALEXANDER M. TISCH, J.:

Upon the foregoing papers, defendants move this Court for an order granting them summary judgment pursuant to CPLR 3126 dismissing the complaint. For the reasons set forth below, the motion is denied.

Plaintiff commenced this action seeking to recover damages from personal injuries allegedly sustained as a result of a motor vehicle accident on July 28, 2015 at the intersection of First Avenue and 42nd Street in New York, New York. Plaintiff testified he was traveling northbound on First Avenue and was stopped at the red light on 42nd Street for a few minutes.[1] After the light turned green, he proceeded into the intersection at about five miles per hour and, approximately two to five seconds later, was impacted by the defendants' vehicle, a white and blue New York City Police Department vehicle, operated by defendant police officer Sean Maxwell (Maxwell), that was traveling eastbound on 42nd Street at approximately forty-five

[1] The Court summarizes the relevant facts taken from plaintiff's GML § 50-h hearing and examination before trial (EBT).

miles per hour. Plaintiff did not see the defendants' vehicle, nor did he see any lights or hear any sirens.

Maxwell testified that he observed a third-party driver texting while driving at or near the intersection of 42nd Street and Second Avenue, where he was stationed at the time. He turned on his lights and does not remember whether he turned on his sirens, to pursue the vehicle. He traveled eastbound on 42nd Street at approximately forty-five to fifty miles per hour, and claims he had a green light at the subject intersection. Maxwell further testified that he swerved to the left upon seeing plaintiff's vehicle to prevent a t-bone.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The "evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (Valentin v Parisio, 119 AD3d 854, 855 [2d Dept 2014]). "In considering a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist" (Rivers v Birnbaum, 102 AD3d 26, 42 [2d Dept 2012]; see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]), and the motion "should not be granted where there are facts in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (Ferguson v Shu Ham Lam, 59 AD3d 388, 389 [2d Dept 2009]).

Under plaintiff's version of the events, plaintiff had the green light and Maxwell went through the red light. Assuming that an emergency situation existed, VTL § 1104(b)(2) specifically states that the officer is permitted to go through the red light while involved in an emergency situation "but only after slowing down as may be necessary for safe operation."

There is no evidence that Maxwell slowed down; rather, he testified that he was traveling at 45–50 miles per hour. Thus, it cannot be said that Maxwell's conduct qualified as privileged (cf. Spencer v Astralease Associated, Inc., 89 AD3d 530 [1st Dept 2011]). While operating a vehicle beyond the speed limit may also be privileged conduct under the statute, it cannot be read to undermine the other provision and effectively render it as meaningless. Additionally, plaintiff did not see any lights or hear sirens, and Maxwell testified he had his lights on but could not recall if he had his sirens on.[2] Under the circumstances, defendants failed to eliminate material issues of fact as to whether Maxwell acted with a reckless disregard for the safety of others (see Saarien v Kerr, 84 NY2d 494 [1994]). Under plaintiff's version of the events, traveling at 45–50 miles per hour, without lights or sirens on, and without slowing down before going through a red light, may be considered as unreasonable acts in the face of known or obvious risk of harm to others (see Baines v City of New York, 269 AD2d 309, 309 [1st Dept 2000] [finding the jury verdict against the defendant as legally sufficient where evidence was submitted "to the effect that the police officer in question drove his police vehicle into the subject intersection at an unsafe speed and against the red light without sounding his siren or adequately reducing speed before suddenly stopping and blocking plaintiff's lane of traffic, making no attempt to avoid colliding with plaintiff's oncoming vehicle"]).

Because defendants' evidence presents two different versions of the incident, there exists an issue of fact, which requires the denial of the motion (see Mazzio v Highland Homeowners Assn. & Condos, 63 AD3d 1015, 1016 [2d Dept 2009] ["In view of this conflicting evidence, [the parties contradictory deposition testimonies], the defendants failed to sustain their burden of demonstrating the absence of any material issue of fact"]). "Failure

[2] Although the police reports indicate that both sirens and lights were on, the Court finds the report(s) to be without probative value on this issue of fact, as it is unlikely that the preparer of the report actually saw the vehicle at the time of the collision.

to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Alvarez, 68 NY2d at 324).

Even if defendants had met their burden, plaintiff points to, inter alia, evidence in the record demonstrating that Maxwell may have had an obstructed view. In which case, Maxwell's conduct under plaintiff's version (traveling at a high rate of speed, through a red light, without lights and sirens) with an obstructed view further demonstrates that due regard was not given for the safety of others (see, e.g., Ham v City of Syracuse, 37 AD3d 1050, 1052 [4th Dept 2007] [where the police officer did, in fact, slow down to "creep through" the intersection, but there was "an issue of fact whether defendant acted in reckless disregard for the safety of others by entering a blind intersection against the red traffic light at a questionable speed without first activating his emergency lights and siren"]).

Accordingly, the motion is denied. The parties are directed to appear in the Early Settlement Conference Part, Room 103 of 80 Centre Street, on Tuesday, September 4, 2018 at 9:30 AM.

This shall constitute the decision and order of the Court.

Dated: August 17, 2018
New York, New York

ENTER,

ALEXANDER M. TISCH A.J.S.C.

HON. ALEXANDER M. TISCH