

<b>Rodriguez v City of New York</b>
2019 NY Slip Op 32260(U)
June 11, 2019
Supreme Court, Richmond County
Docket Number: 100412/2015
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND: PART C-2

-----X  
MIGUEL RODRIGUEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY  
POLICE DEPARTMENT, GREGORY VALENTIN  
IN HIS CAPACITY AS EMPLOYEE AND  
LICENSEE OF THE NEW YORK CITY POLICE  
DEPARTMENT,

Defendants.

-----X  
FRANK MATTHEW BOSA, JR.

Plaintiff,

-against-

GREGORY VALENTIN AND  
THE CITY OF NEW YORK,

Defendants.

-----X

**DECISION AND ORDER**

Action No. 1

Index No. 100412/2015

Motion No. 5259 - 004

Action No. 2

Index No. 150519/2015

Motion No. 5258 - 001

The following papers numbered "1" through "5" were marked fully submitted on the 10<sup>th</sup>  
day of April 2019.

Papers  
Numbered

Notice of Motion (No. 004) for Summary Judgment or to Dismiss by Defendants  
THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT,  
GREGORY VALENTIN in his capacity as employee and licensee of the NEW  
YORK CITY POLICE DEPARTMENT, with Supporting Papers, Exhibits  
(dated December 16, 2018).....1

Notice of Motion (No. 001) for Summary Judgment or to Dismiss by  
Defendants, GREGORY VALENTIN and THE CITY OF NEW YORK,  
with Supporting Papers, Exhibits  
(dated December 16, 2018).....2

Plaintiff FRANK MATTHEW BOSA, JR., to the motion by Defendants GREGORY VALENTIN and THE CITY OF NEW YORK, with Exhibits (dated March 28, 2019).....3

Affirmation in Opposition by Plaintiff MIGUEL RODRIGUEZ to the motion by Defendants THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, GREGORY VALENTIN, in his capacity as employee and Licensee of the NEW YORK CITY POLICE DEPARTMENT, (dated April 1, 2019).....4

Reply Affirmation of Defendant GREGORY VALENTIN and THE CITY OF NEW YORK to the Affirmation in Opposition by Plaintiff FRANK MATTHEW BOSA, JR. (dated April 9, 2019).....5

Upon the foregoing papers, the motion (No. 004) (Index No. 100412/15) by defendants THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, GREGORY VALENTIN, in his capacity as employee and Licensee of the NEW YORK CITY POLICE DEPARTMENT, for summary judgment is granted, as is the motion (No. 001) (Index No. 150519/15) for summary judgment by defendants GREGORY VALENTIN and THE CITY OF NEW YORK.

Plaintiff/police officer MIGUEL RODRIGUEZ (hereinafter “RODRIGUEZ”) commenced an action (Index No. 100412/25) against defendants THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, and GREGORY VALENTIN, in his capacity as employee and licensee of the NEW YORK CITY POLICE DEPARTMENT (hereinafter collectively referred to as “defendants”) to recover damages for injuries he sustained when the police vehicle in which he was a passenger collided with a vehicle driven by defendant FRANK MATTHEW BOSA, JR., (hereinafter “BOSA”). At the time of said collision, defendant

GREGORY VALENTIN (hereinafter "VALENTIN"), who was a rookie police officer, was driving the police vehicle in which RODRIGUEZ was riding, and RODRIGUEZ was allegedly training VALENTIN. Another police officer, Ryan Smith, was also a passenger in the vehicle.

It appears that the VALENTIN vehicle was traveling on Union Avenue and was responding to an emergency call with lights and sirens engaged<sup>1</sup>. Another vehicle driven by plaintiff BOSA was also traveling on Union Avenue in front of VALENTIN. It is alleged that RODRIGUEZ used the police microphone to instruct BOSA to move over to the right. When VALENTIN attempted to pass BOSA on the left and make a left turn onto Leyden Avenue, BOSA apparently also made a left turn at Leyden Avenue instead of moving to the right, and the two vehicles collided. BOSA claims that he did not see or hear the VALENTIN vehicle approaching and denies the claim that its lights and sirens were engaged. As a result of said collision, both RODRIGUEZ and BOSA claimed to have sustained serious injuries.

Thereafter, RODRIGUEZ commenced an action under Index No. 100412/2015, claiming that VALENTIN and BOSA<sup>2</sup> were negligent in the operation of their vehicles and had violated numerous provisions of the Vehicle and Traffic Law ("VTL"), giving rise to a General Municipal Law §205-e claim ("GML"). RODRIGUEZ further asserts violations of the Labor Law, Employer Liability Law, and General Obligations Law, and ordinary negligence against defendants. BOSA also commenced an action against defendants under Index No. 150519/2015 claiming, *inter alia*, negligence in VALENTIN's operation of the subject police vehicle.

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<sup>1</sup> BOSA denies seeing flashing lights or that he heard sirens glaring.

<sup>2</sup> Plaintiff RODRIGUEZ' claims against defendant BOSA have settled.

Defendants now move for summary judgment dismissing the complaint by RODRIGUEZ under Index No. 100412/2015 and argue that (1) RODRIGUEZ' negligence claims are barred by the firefighter's rule; (2) the reckless disregard standard of VTL §1104 applies to GML §205-e claims relying on violations of the VTL, and that VALENTIN was not reckless in his operation of the subject police vehicle; and (3) any other alleged statutory violations cited are inapplicable to the subject occurrence. More particularly, it is argued that RODRIGUEZ cannot maintain a negligence cause of action against THE CITY for injuries occurring in the line of duty, or as a result of the risks associated with his employment with THE CITY (*see* General Obligations Law §11-106[1], also known as the Firefighter's Rule). Here, it is uncontested that RODRIGUEZ was on duty at the time of the occurrence and was riding as a passenger in a police vehicle while the vehicle was responding to an emergency call, with lights and sirens engaged. Accordingly, RODRIGUEZ was clearly injured during the performance of acts which pose a heightened risk associated with his employment as a police officer.

It is further argued that RODRIGUEZ' GML § 205-e claim must also be dismissed since he has failed to establish both a statutory predicate for the GML claim as well as a statutory violation. Here, RODRIGUEZ improperly relies on Labor Law § 27-a (3) (a) (1) which requires an employer to provide a safe place of employment for its employees, one that is free from recognized hazards which are likely to cause death or physical harm to its employees. According to defendants, motor vehicle accidents do not constitute recognized hazards in the workplace, absent a defective condition. In this case, there is no proof of any defect existing in the police vehicle prior to the time of the subject accident, nor does the fact that the police vehicle was being driven by an inexperienced police officer constitute an unsafe workplace. The same is true

for Labor Law § 200 in regard to negligence claims where there is no proof of any defect in the subject police vehicle.

Defendants further argue that the alleged violations of the Vehicle and Traffic Law must be dismissed since police officers are exempt from the central rules of the road in order to properly and quickly respond to emergency situations (*see Saarinen v. Kerr*, 84 NY2d 494, 502 [1994]). As a result, police officers are shielded from liability so long as the officer does not act with a “reckless disregard” for the safety of others (*see* VTL § 1104 [b]). In this case, it is argued that VALENTIN was engaged in an emergency situation at the time of the subject incident and was responding to an emergency call. Accordingly, the reckless disregard standard applies. There is also no proof establishing that VALENTIN acted recklessly, intentionally, or so unreasonably under the circumstances in responding to the emergency call so as to put others in harm's way. Instead, defendants argue that proof indicates that lights and sirens were engaged; that the police microphone was used to alert the BOSA vehicle to move over to the right; and VALENTIN proceeded cautiously through the intersection.

Finally, defendants argue that RODRIGUEZ has failed to satisfy the condition precedent required by GML §50-e (2) by failing to allege any theory of liability against THE CITY in his notice of claim. In addition, RODRIGUEZ failed to comply with GML § 50-i when he failed to wait the required 30 days before serving his complaint. Accordingly, for the above-stated reasons, defendants argue that RODRIGUEZ’s complaint against them must be dismissed.

In opposition, RODRIGUEZ concurs with the arguments made by BOSA in his opposition to defendants’ motion, and further argues that defendants have misapplied VTL § 1104 (e) in this case. According to RODRIGUEZ, defendants’ reliance upon Quock v. City of New York, 110 AD3d 488 (1<sup>st</sup> Dept. 2013), Salzano v. Korba, 296 AD2d 393 (2d Dept.

2002), and Stanton v. State of New York, 26 NY2d 990 (1970) is misplaced since these cases are factually distinguishable in that they all involve highly-pressured situations and split-second decisions that resulted in damages to unknown third-parties. In this case, there were known and obvious dangers to VALENTIN in passing the BOSA vehicle on the left. RODRIGUEZ argues that the deposition testimony of the parties indicates that VALENTIN had seen the BOSA vehicle from a significant distance, and had noticed his left turn signal, yet proceeded directly into his path at the subject intersection, causing serious injuries to four people and damaging two vehicles.

Moreover, VALENTIN was in-training and had not yet ripened into an officer capable of making such split-second decisions requiring the highest level of judgment. Instead, RODRIGUEZ, as VALENTIN's field training officer, and a NYPD veteran of nearly ten years, had instructed VALENTIN not to proceed, but to slow down and to reevaluate the situation. VALENTIN chose to ignore those instructions, causing said collision. Accordingly, such actions are to be considered under the "reckless" standard, and therefore defendants' motion must be denied.

In another motion, defendants move for summary judgment dismissing the claims of plaintiff BOSA on the ground that the Vehicle and Traffic Law exempts police officers from certain rules of the road, *e.g.*, while responding to an emergency call. In this case, it is uncontested that VALENTIN was responding to an emergency call regarding a suicidal, emotionally disturbed person. Defendants argue that there is no proof that VALENTIN's actions were either reckless, intentional, or so unreasonable in disregard of known, obvious risks to make it probable that harm would follow. In particular, VALENTIN testified at his deposition that he was responding to an emergency call with his lights and sirens engaged and that other

vehicles in front of his police vehicle had already pulled over to the right side of the road to allow VALENTIN's vehicle to pass. In addition, his fellow police officer and passenger, RODRIGUEZ used the police vehicle's "PA system" to alert cars ahead of them, to move over to the right side of the road, and that other vehicles had complied by moving to the right.

Defendants further argue that VALENTIN was engaged in conduct that is exempted from the rules of the road set forth in VTL § 1104, *e.g.*, operating the police vehicle at an increased rate of speed, and crossing over the double yellow lines into the opposite lane of traffic when attempting to go around the BOSA vehicle. In doing so, there is no proof that VALENTIN acted recklessly, intentionally, or unreasonably under the circumstances in the existing emergency situation. In fact, VALENTIN testified that when he was about to pass the BOSA vehicle, he noticed that there were no vehicles approaching from the opposite direction. Accordingly, defendants argue that they are entitled to dismissal of the BOSA complaint against them as well.

In opposition, BOSA argues that the privileges afforded to emergency vehicles by VTL § 1104 are not absolute and that parties have been found to have acted recklessly, while not intending to cause a particular injury, by deciding to ignore a grave risk which will likely cause harm to others. In support, BOSA submits a video which it claims refutes both defendant's claims and the deposition testimony of VALENTIN regarding his version of the facts concerning the subject accident. In particular, it is claimed that contrary to VALENTIN's contentions, the video allegedly shows that the BOSA, with his left turn signal flashing, never stopped at the subject intersection at Union and Leyden Avenues. In addition, it is claimed that the video shows the police vehicle traveling behind BOSA at a higher rate of speed, and he too never slowed down or waited for BOSA to move to the right. Accordingly, BOSA contends that VALENTIN acted in disregard of a known or obvious risk that was so great as to make it highly



probable that harm would follow. In particular, that VALENTIN ignored the obvious danger presented by turning left to pass BOSA and by entering the opposite lane of traffic. In addition, BOSA argues that the deposition testimony of police officers RODRIGUEZ and Ryan Smith both indicate that they told VALENTIN to “slow down” before the impact occurred and that immediately preceding the impact, RODRIGUEZ told VALENTIN to pass or go to the right. Therefore, BOSA argues that the deposition testimony, as well as the video tape serves to raise triable issues of fact regarding VALENTIN’s actions in causing the subject accident and whether such actions can be viewed as reckless under the circumstances.

It is well settled that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of triable issues of fact (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500, 500-501 [2d Dept. 2003]). The party moving for summary judgment has been held to bear the initial burden of establishing its right to judgment as a matter of law (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) and, in this regard, “the evidence is to be viewed in a light most favorable to the party opposing the motion, giving [it] the benefit of every favorable inference” (*Cortale v. Educational Testing Serv.*, 251 AD2d 528, 531 [2d Dept. 1998]). Nevertheless, upon a *prima facie* showing by the moving party, it is incumbent upon the party opposing the motion to produce “evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial” (*Alvarez v. Prospect Hosp.*, 68 NY2d at 324).

Here, in the opinion of this Court, defendants have submitted sufficient proof to establish their *prima facie* entitlement to summary judgment. In opposition, both RODRIGUEZ and BOSA have failed to raise a triable issue of fact regarding the actions of the police officer concerning the cause of the subject accident.

It is well settled that Vehicle and Traffic Law § 1104 grants the driver of an authorized emergency vehicle special driving privileges during its emergency operation, and that those privileges include passing through red lights and stop signs, exceeding the speed limit and disregarding regulations governing, *e.g.*, the direction of traffic, as long as certain safety precautions are observed (*see* VTL §1104 [a] [b] [c]). The privileges afforded by this statute are circumscribed by the provisions of subdivision (e) thereof, which states that “[t]he 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 provisions protect the driver from the consequences of his reckless disregard for the safety of others.” Accordingly, notwithstanding the provisions of subdivisions (b) and (c), a violation of § 1104 (e) will expose THE CITY and its operator to civil liability for damages resulting from the operation of an emergency vehicle where, *e.g.*, recklessness can be proved (*see Saارين v. Kerr*, 84 NY2d 494 [1994]). However, as interpreted by the Court of Appeals, [t]his standard [of liability] demands more than a showing of a lack of due care under the circumstances ... it requires evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known risk or obvious risk that was so great as to make it highly probably that harm would follow and has done so with conscious indifference to the outcome” (*id.*, at 50) [internal quotation marks omitted]; *see Szczerbiak v. Pilat*, 90 NY2d 553, 557 [1997]). Here, in the opinion of this Court, there is no proof sufficient to establish that VALENTIN was reckless in the operation of the police vehicle when the subject collision occurred.

In this case, it is obvious that VALENTIN’s (and therefore defendants’) liability is subject to the “reckless disregard” standard of liability, since VALENTIN was operating a police

vehicle engaged in an emergency operation as defined in Vehicle and Traffic Law § 114-b.<sup>3</sup> In accordance therewith, he was permitted to proceed through the intersection with caution. In opposition, neither RODRIGUEZ nor BOSA have submitted any proof sufficient to raise triable issues suggesting that VALENTIN's operation of said police vehicle was reckless, in order to hold him liable for causing harm to others. The mere fact that VALENTIN had intended to pass BOSA on the left is of no consequence since he was making a left turn in order to proceed to his destination. Moreover, his assumption that BOSA was going to move to the right was not with reckless disregard for the safety of others as it was based upon the fact that other vehicles heading in the same direction had done so as they heard the emergency vehicle approaching.

Moreover, while VALENTIN did notice that BOSA's left turn signal was flashing, it appeared as though BOSA had stopped his vehicle, in anticipation of the approaching police vehicle. In addition, since VALENTIN observed that there were no other vehicles approaching him from the opposite direction, he proceeded to pass BOSA on the left. Accordingly, VALENTIN evaluated the situation when approaching the subject intersection, and therefore, under the circumstances, his operation of said vehicle cannot be considered as a reckless disregard for the safety of others (*see Saarinen v. Kerr*, 84 NY2d at 502).

There is also no proof rebutting VALENTIN's testimony that he employed both lights and sirens upon receiving the emergency call. Moreover, the rule is not whether BOSA actually heard the siren, but whether the siren was employed (*see County of Broome v. Binghamton Taxicab Co.*, 276 AD 438 [3d Dept. 1950]). Here, all of the officers testified during their

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<sup>3</sup> As stated in *Elnakib v. County of Suffolk* (90 AD3d 596, 597 [2d Dept. 2011]), "[t]he manner in which a police officer operates his or her vehicle in an emergency situation may not form the basis of civil liability to an injured third party unless the officer acted in reckless disregard for the safety of others" (*quoting Puntarich v. County of Suffolk*, 47 AD3d 785, 786 [2d Dept. 2008]).

depositions that both lights and sirens were engaged upon receiving the emergency call which is corroborated by the fact that other drivers did, in fact, move to the right. Accordingly, no triable issue exists with regard thereto.

With regard to the video proffered by BOSA, in the opinion of this Court, the surveillance excerpt must be precluded in opposition to THE CITY's motions since it has not been properly authenticated. It is without question that a videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted (*see Read v. Ellenville Nat. Bank*, 20 AD3d 408 [2d Dept 2005]). In addition, evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for an acceptable inference of reasonable accuracy and freedom from tampering (*see People v. Patterson*, 93 NY2d 80, 84 [1999]). In this case, there has been no proof attesting to the validity and/or accuracy of the subject video excerpt submitted by BOSA. Neither can the deposition testimony of BOSA serve to authenticate the video since neither BOSA nor VALENTIN can attest to the accuracy of the images contained on the video. Accordingly, since the video excerpt has not been properly authenticated, it cannot be used to portray or refute the incident as it is claimed to have occurred.

Finally, any remaining arguments made in the opposition papers (in regards to various violations of statutes as predicates to the General Municipal Law §205-e), have been considered and rejected by the Court as inapplicable to the case at bar.

Accordingly, it is

ORDERED that the motion (No. 004) (Index No. 100412/2015) by defendants THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, GREGORY

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VALENTIN in his capacity as employee and licensee of THE NEW YORK CITY POLICE DEPARTMENT for summary judgment is granted, and the complaint against them is hereby severed and dismissed; and it is further

ORDERED that the motion (No. 001) (Index No. 150519/2015) by defendants GREGORY VALENTIN and THE CITY OF NEW YORK for summary judgment is granted, and the complaint against them is hereby severed and dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

E N T E R,



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Hon. Thomas P. Aliotta, J.S.C.

Dated: June //, 2019