

Khalique v City of New York

2019 NY Slip Op 33874(U)

December 18, 2019

Supreme Court, Queens County

Docket Number: 709807/16

Judge: Kevin J. Kerrigan

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This opinion is uncorrected and not selected for official publication.

Short Form Order

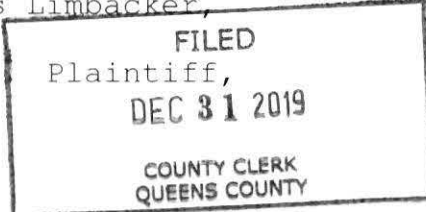
NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X
Darius Khalique - James Limbacher,

Index
Number: 709807/16

- against -



Motion
Date: 12/2/19

The City of New York, New York City
Police Department and Frank Italiano,

Motion Seq. No.: 1

Defendants.

-----X

The following papers numbered 1 to 9 read on this motion by defendants for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibit.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendants for summary judgment dismissing the complaint is granted.

Plaintiff allegedly sustained injuries in a motor vehicle accident on October 5, 2015 at the intersection of Jamaica Avenue and 168th Street in Queens County when the vehicle he was operating collided with an NYPD vehicle operated by defendant police officer Italiano.

Plaintiff testified in his deposition that he was on Jamaica Avenue, which is a two-way roadway, at the intersection of 168th Street stopped at a red light, and that when the light turned green and he proceeded, he intended to drive straight through the intersection and continue on Jamaica Avenue, but there was a bus blocking the intersection, and so proceeded to drive around the back of the bus notwithstanding that he could not see the opposing traffic on Jamaica Avenue. As he did so, he saw the police vehicle approaching in the opposing lane for the first time a fraction of a second before impact when the police vehicle was approximately one foot away from plaintiff that had turned onto 168th Street. When asked if he saw any lights or heard any siren, he answered in the

negative.

Italiano testified in his deposition that at the time of the accident he was responding to a radio call of an assault with a firearm in progress at 109th Street and Merrick Boulevard. He testified that he had his lights and siren activated and was driving west on Jamaica Avenue toward 168th Street, intending to turn left onto 168th Street. There was a bus at the intersection facing east attempting to turn left onto 168th Street northbound, but it stopped in response to his lights and siren. The bus blocked Italiano's view of traffic traveling eastbound on Jamaica Avenue. He testified that he stopped and waited for pedestrians crossing in the crosswalk before proceeding to make the turn onto 168th Street. He related that as he inched forward by easing his foot off the brake, he saw plaintiff enter the intersection at which time the impact occurred.

Pursuant to Vehicle and Traffic Law § 1104(b) and (c) and as defined in Vehicle and Traffic Law §§ 101 and 114-b, an authorized emergency vehicle involved in an emergency operation may disregard certain traffic laws if safety precautions are taken (See, Criscione v City of New York, 97 NY2d 152 [2001]; Baines v City of New York, 269 AD2d 309 [2000]). A driver of an authorized emergency vehicle is not relieved of the obligation to drive with "due regard for the safety of all persons" nor does the statute protect reckless conduct (Vehicle and Traffic Law § 1104[e]). Thus, a police officer will be provided with a qualified exemption from civil liability for injuries to a third party "unless the officer acted in reckless disregard for the safety of others" (Mouzakes v County of Suffolk, 94 AD 3d 829 [2nd Dept 2012]; Saarinen v Kerr, 85 NY2d 494, 501 [1994]). A finding of reckless disregard requires proof that the officer has 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" (Saarinen v Kerr, at 501; Puntarich v County of Suffolk, 47 AD3d 785 [2008]). A momentary lapse of judgment is insufficient to attach liability to the driver of the emergency vehicle (Szczerbiak v Pilat, 90 NY2d 553 [1994]).

In the instant case, it clear and undisputed that Italiano was involved in an emergency operation when he was responding to a call of an assault in progress involving a gun (Vehicle and Traffic Law § 114-b; see, Criscione, 97 NY2d at 157). The issue, therefore, is whether his conduct in turning onto 168th Street constituted reckless conduct.

Plaintiffs' counsel argues in opposition that VTL 1104 is inapplicable to shield Italiano from liability because his turning left and failing to yield the right of way to plaintiff in the intersection was a violation of the VTL and presents a case of

liability under ordinary principles of negligence. Counsel's argument is without merit. VTL 1104(b)(4) allows the driver of an emergency vehicle involved in an emergency operation to disregard the VTL regarding the making of turns, including left turns such as in the present case (see also Jimenez-Cruz v City of New York, 170 AD 3d 975 [2nd Dept 2019]).

Counsel also argues that even if this case were to be analyzed under the recklessness standard of VTL 1104, there is an issue of fact as to whether Italiano acted recklessly by making a left turn blindly without activating his emergency lights and siren and, consequently, defendants failed to establish that their responsibility is governed by the recklessness standard as opposed to the ordinary negligence standard. Counsel's argument is again without merit. There is no requirement under VTL 1104 that a police vehicle engaged in an emergency operation have its lights and siren activated in order to be exempt from liability. VTL 1104(c) does provide that the exemptions apply "only when audible signals are sounded", "[E]xcept for an authorized emergency vehicle operated as a police vehicle" (emphasis added). Thus, although activation of lights and sirens by emergency vehicles are ordinarily key elements in meeting the recklessness standard (see Saarinen v Kerr (supra); see also Krulik v County of Suffolk, 62 AD 3d 669 [2nd Dept 2009]), such are not key elements when the vehicle is not a police vehicle. Police vehicles engaged in an emergency operation, may, under the proper circumstances, be afforded the privileges under the statute even if audible signals, and even if lights, are not in use (Vehicle and Traffic Law § 1104[c]). The relevant inquiry is whether the police officer took sufficient precautionary measures under the circumstances presented to avoid injury to the public (see Frezzell v City of New York, 24 NY 3d 213 [2014]). The undisputed testimony of Italiano that he stopped at the intersection so as to allow pedestrians to clear the intersection, before inching his way forward around the bus did not rise to the level of recklessness. Moreover, his testimony that his emergency lights were activated is not disputed. Plaintiff testified that he did not see any lights. He did not testify that the police vehicle did not have its lights activated. This observation is not merely a semantical argument. Plaintiff testified that the bus blocked his view and he could not see any traffic around it, and did not see the police vehicle until a millisecond before impact. The evidence presented on this record does not raise any issue of fact as to whether Italiano operated his vehicle with reckless disregard. On the contrary, it establishes that the conduct of Italiano in the operation of his police vehicle did not rise to the level of recklessness and, therefore, he and the City are entitled to the exemption from liability afforded by VTL 1104.

Finally, inasmuch as the New York City Police department is not a distinct entity, it is not a cognizable party and, therefore,

the action must be dismissed against it as a matter of law for this reason alone.

Accordingly, the action is dismissed.

Dated: December 18, 2019



KEVIN J. KERRIGAN, J.S.C.

FILED
DEC 31 2019
COUNTY CLERK
QUEENS COUNTY