Jean v City of New York
2021 NY Slip Op 33074(U)
December 9, 2021
Supreme Court, Bronx County
Docket Number: Index No. 6825/2006E
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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GREGORY JEAN and JULIANA JEAN,

Plaintiffs,

-against-

CITY OF NEW YORK, et. al.,

Defendants,

----------x

Index No.: 6825/2006E

DECISION/ORDER
Present:
HON. MITCHELL J. DANZIGER

Recitation as Required by CPLR §2219(a): The following papers were read on this Motion for Summary Judgment:	Papers Numbered
Notice of Motion, Affirmation in Support, Statement of Material Facts and Exhibits.....	1
Affirmation in Opposition to Motion, Memorandum of Law in Opposition, Response to Statement of Material Facts and Exhibits.....	2
Affirmation in Reply.....	3

Motion by defendants, the City of Yonkers ("Yonkers") and City of Yonkers Police Department ("YPD"), for an order pursuant to CPLR §3212, granting summary judgment in favor of the moving defendants and dismissing plaintiffs' complaint as against them, is granted.

This action stems from a motor vehicle accident which took place between a non-party driving a Buick on December 25, 2004, and plaintiffs' vehicle. During the course of a police pursuit with the YPD, the Buick driven by the non-party entered the Major Deegan Expressway northbound lanes at the East 233rd Street exit ramp proceeding in the wrong direction and drove southbound into a head-on collision with vehicle driven by plaintiff Gregory Jean.

Pursuant to the statement of material facts submitted by Yonkers and YPD and the response to moving defendants Statement of Material Facts submitted by plaintiffs, the following facts are undisputed: 1) the YPD police officers were operating an authorized emergency vehicle at the time the incident occurred; 2) at some time during the course of the pursuit, the YPD officers were engaged in an emergency operation as defined by Vehicle and Traffic Law

("VTL") §114-b; 3) the Buick attempted to evade the YPD once they began their pursuit; 4) the YPD exceeded the maximum allowable speed limits in both Yonkers and New York City during their pursuit of the Buick; and 5) the YPD vehicle did not come in contact with the plaintiffs' vehicle.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Once movant has met his initial burden on a motion for summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]). Moreover, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he [or she] is ruling on a motion for summary judgment or for a directed verdict."(*Asabor v Archdiocese of New York*, 102 AD3d 524, 527 [1st Dept 2013]).

Defendants, Yonkers and YPD argue that pursuant to VTL 1104, authorized emergency vehicles are permitted to disobey otherwise prescribed traffic regulations and can only be held liable when operating said authorized emergency vehicle with reckless disregard for the safety of others, this is otherwise known as the reckless standard.

VTL 1104 states in pertinent part:

> The driver of an authorized vehicle, when involved in emergency operation....may...proceed past a steady red signal, a flashing red signal, but only after slowing down as may be necessary for safe operation...exceed the maximum speed limits long

> as he does not endanger lift or property....
> except for an authorized vehicle operated as a police vehicle, the exceptions herein
> shall apply only when audible signals are sounded and said vehicle while in motion by bell, horn, siren, electronic device or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp so that from any direction, under normal atmospheric conditions from a distance of five hundred feet from such vehicle, at least one red light will be displayed and visible.

Pursuant to VTL §114-b, emergency operation is defined in part as....pursuing an actual or suspected violator of the law. Here, the record supports a finding that the non-party Buick driver, violated the law in that he drove at an excessive rate of speed and unsafely. The non-party driver was observed driving through multiple stop signs. The YPD officers observed the non-party Buick driver posing a threat to public safety, and therefore had the right and duty to use whatever means are necessary, short of recklessness, to stop him. (*Saarinen v. Kerr*, 84 N.Y.2d 494 [1994]). As such, the YPD officers were engaged in permissible emergency operation of their vehicle even prior to being informed that the Buick was a stolen vehicle. As such, the conduct YPD officers were engaged in is protected conduct and will be analyzed pursuant to the reckless standard.

The reckless disregard standard requires proof that the YPD 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" and "has does so with conscious indifference to the outcome." (*Frezzell v. City of New York*, 24 N.Y.3d 213 [2014]). Police vehicles do not have to have their lights and sirens activated at the time to be afforded the reckless standard. (*Lewis v. City of New York*, 155 A.D.3d 441 [1st Dept. 2017], *Deno v. Belliard*, 165 A.D.3d 602 [1st Dept. 2018]).

Plaintiff has failed to raise a triable issue of fact in opposition to defeat defendants, Yonkers and YPD's motion. Plaintiff submits that the YPD officers terminated their pursuit much further down the exit ramp than they testified to and "disregarded the safety of the public when they continued to chase the Buick onto the exit ramp and into three (3) lanes of highway traffic flowing in the opposite direction." Plaintiff further avers that YPD violated their own policies and procedures involving pursuits. The Court finds plaintiffs' arguments unavailing. As

an initial matter, YPD Policy and Procedure, is not the law, but rather an internal set of guidelines for YPD officers. A violation of an internal agency guideline that impose a higher standard of care on a defendant than those imposed by law cannot serve as a basis for liability against a governmental agency. (*Flynn v. City of New York*, 258 A.D.2d 129 [1st Dept. 1999]).

Further, the independent reckless behavior of the non-party Buick driver is the proximate cause of the accident. It is undisputed that the YPD officers ended their pursuit at some point before the Major Deegan Expressway. At the intersection of East 233rd Street and Jerome, the non-party Buick driver was not forced to enter the Major Deegan Expressway in the wrong direction. He could have made a left or a right turn and continued on with traffic. Instead, he chose to enter the exit ramp and proceed south in the northbound lanes. Even if the YPD officer followed him onto the exit ramp and proceeded 1 or 200 feet beyond where they testified they ended the pursuit, the non-party driver still had options. He could have stopped his vehicle prior to entering the Major Deegan Expressway in the wrong direction against traffic. He could have pulled over to the shoulder immediately after entering the highway. Perhaps he could have turned at the base of the exit ramp and proceeded with traffic as opposed to against it. As such, this Court finds that because YPD officers ended their pursuit either before or somewhere on the exit ramp, their conduct is not the proximate cause of the head on collision between plaintiff, Gregory Jean, and the Buick driver. The Buick driver's independent reckless behavior was the proximate cause of this accident.

This matter is similar to *Fuchs v. City of New York*, 186 A.D.3d 459, 2nd Dept. 2020. In *Fuchs*, the plaintiff was injured when the vehicle she was operating was struck by another vehicle which was being pursued by NYPD police officers. The pursued vehicle turned the wrong way onto a one-way street and struck plaintiff. The Court found that the municipal defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the NYPD officers were involved in a pursuit which exceeded the speed limit and disregarded the direction of movement or turning in specified directions and did not act with reckless disregard for the safety of others. Further, the Court found that the proximate cause of the accident was the independent recklessness of the driver of the vehicle that was being pursued, not the police officers' conduct in initiating the pursuit. Such is the case here.

As this Court finds that the YPD officers conduct in pursuing the non-party Buick driver was privileged pursuant to VTL §1104(b), there is no evidence that the YPD officers acted

recklessly as a matter of law, and that the pursuit was not the proximate cause or a concurrent cause of this incident, the plaintiff's complaint as against defendants, Yonkers and YPD is dismissed. The moving defendants are ordered to serve a copy of this order, with Notice of Entry on the parties within 30 days.

The above constitutes the decision and order of the Court.

Dated: 12/9/21
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.