

Silverman v City of N.Y.

2011 NY Slip Op 33441(U)

December 19, 2011

Sup Ct, NY County

Docket Number: 110968/08

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE
J.S.C.
Jaffe
Justice

PART 5

Index Number : 110968/2008
JOHNSON, MARVIN LEE
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT
CAL #52

INDEX NO. 110968/08
MOTION DATE 9/27/11
MOTION SEQ. NO. 003
MOTION CAL. NO. 52

this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
1
2
3

FILED

Cross-Motion: Yes No

DEC 21 2011

Upon the foregoing papers, it is ordered that this motion

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION**

Dated: 12/19/11
DEC 19 2011 DEC 19 2011
BARBARA JAFFE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : PART 5

-----X
 KENNETH P. SILVERMAN, ESQ., AS TRUSTEE OF THE
 ESTATE OF MARVIN LEE JOHNSON,

Index No. 110968/08

Plaintiff,

Argued: 9/27/11

Motion Seq. No.: 003

Motion Cal. No.: 52

-against-

DECISION AND ORDER

THE CITY OF NEW YORK and CONTE SEGUINOT,

Defendants.

For plaintiff:

Robert Ackerman, Esq.
 Law Office of Robert M. Weiss, Esq.
 11 Broadway, Suite 1055
 New York, NY 10004
 212-233-0800

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For defendants:

Lynn M. Leopold, ACC
 Michael A. Cardozo
 Corporation Counsel
 100 Church Street
 New York, NY 10007
 212-442-6851

By notice of motion dated May 30, 2011, plaintiff moves pursuant to CPLR 3212 for an order granting him summary judgment on the issue of liability. Defendants oppose.

I. BACKGROUND

On June 11, 2007, at approximately 11:45 pm, plaintiff, who was driving his vehicle east on 125th Street in Manhattan, was stopped at its intersection with Third Avenue when he was struck by a police car driven by defendant New York City Police Officer Conte Seguinot.

(Affirmation of Robert Ackerman, Esq., dated May 30, 2011 [Ackerman Aff.], Exh. A).

On or about July 19, 2007, plaintiff served defendants with a notice of claim (Affirmation of Lynn M. Leopold, ACC, in Opposition, dated July 14, 2011 [Leopold Opp. Aff.], Exh. A), and on or about August 7, 2008, he commenced the instant action with the filing of a summons and complaint, asserting claims for negligence arising from the accident (Ackerman Aff., Exh. A).

Sometime thereafter, defendants joined issue with service of their answer. (*Id.*).

At an examination before trial (EBT) held on June 8, 2009, plaintiff testified that before the accident, he and the four cars in front of him stopped at the intersection even though the light was green in order to permit a police officer to drive through the intersection. The officer then lost control of his vehicle as he turned left onto East 125th Street, crossing over the double yellow line and hitting the driver's side of plaintiff's vehicle. (*Id.*, Exh. B).

At an EBT held the same day, Seguinot testified that he was responding to an officer's call for help when the accident occurred, and that he was unable to recall how fast he was driving before reaching the intersection but was not traveling faster than 40 miles per hour, and was unable to recall how fast he was driving once he reached the intersection but that he slowed down and waited for the traffic along East 125th Street to stop, as he had a red light. (*Id.*, Exh. C). Although he estimated that he was driving at approximately five miles per hour when he made the turn and the vehicle "fishtailed," he also testified that he was unable to recall whether he was traveling more than 10 miles per hour in doing so, that he never looked at his speedometer, and that he was unable to estimate his speed at the time of impact. (*Id.*). When asked whether the vehicle fishtailed during the turn or thereafter, he could not recall, and although he testified that he does not know what caused it to do so, he noted that it was raining and that the pavement was wet. (*Id.*).

At an EBT held on October 23, 2009, New York City Police Sergeant Cassandra Whitaker testified that she was in Seguinot's vehicle when the accident occurred, that the highest speed at which Seguinot was driving as they approached the intersection was 40 miles per hour, that she cannot estimate the speed at which they were traveling as Seguinot made the turn, and that the vehicle started fishtailing as Seguinot made the turn but that the accident occurred

beyond the intersection. (Leopold Opp. Aff., Exh. E).

II. CONTENTIONS

Plaintiff denies that Seguinot was engaged in any of the conduct set forth in Vehicle and Traffic Law (VTL) § 1104(b), and thus asserts that his conduct is not privileged, and as he crossed over the double yellow line in violation of VTL § 1126(a), that he was negligent as a matter of law regardless of whether the pavement was wet. (Ackerman Aff.).

In opposition, defendants assert that Seguinot's conduct was privileged because he ran a red light before the accident occurred, and even if it was not privileged, that triable issues of fact exist as to whether he was negligent, given the wet pavement. (Leopold Opp. Aff.). In any event, they claim that plaintiff's failure to demonstrate that he sustained a serious physical injury precludes summary judgment in his favor. (*Id.*).

In reply, plaintiff maintains that as the accident was not caused by Seguinot running a red light but by him losing control of his vehicle, that the wet pavement was foreseeable and does not excuse the violation of VTL § 1126(a), and that he need not demonstrate that he sustained a serious physical injury in order to be entitled to summary judgment on the issue of liability. (Affirmation of Robert Ackerman, Esq., in Reply, dated July 25, 2011).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*,

49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]).

Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

A. VTL § 1104

Pursuant to VTL § 1104(a) and (b), the driver of an authorized emergency vehicle engaged in an emergency operation is privileged in performing the following acts, as relevant here:

2. Proceed past a steady red signal . . . , but only after slowing down as may be necessary for safe operation;
3. Exceed the maximum speed limits so long as he does not endanger life or property;
4. Disregard regulations governing directions of movement or turning in specified directions.

If such conduct causes injury, the driver may only be held liable for it if he failed to “drive with due regard for the safety of all persons . . . [, or] reckless disregard for the safety of others.” (VTL § 1104[e]). If such driver engages in any other injury-causing conduct not specifically enumerated in section 1104(b), he may be held liable pursuant to ordinary negligence principles. (*Kabir v County of Monroe*, 16 NY3d 217 [2011]; *Tatishev v City of New York*, 84 AD3d 656 [1st Dept 2011]).

Here, there is no dispute that Seguinot was driving an authorized emergency vehicle and was engaged in an emergency operation when the accident occurred. Although he ran a red light and crossed over the double yellow line just before the accident, the parties dispute whether the accident was proximately caused by his conduct or by his subsequent loss of control of the vehicle. Consequently, triable issues of fact exist as to whether his conduct was privileged

pursuant to VTL § 1104(b)(2) and/or (4). Moreover, absent any evidence as to the speed limit in effect at the accident location, and as the testimony offered is inconsistent as to the speed at which Seguinot was driving before and during the turn and whether his vehicle fishtailed during or after the turn, triable issues of fact also exist as to whether his conduct was privileged pursuant to VTL § 1104(b)(3).

B. Serious physical injury

In light of the above determination, the parties' contentions as to plaintiff's demonstration of a serious physical injury need not be considered at this point in the action.

IV. CONCLUSION

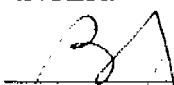
Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment on the issue of liability is denied.

FILED

ENTER:

DEC 21 2011



Barbara Jaffe, JSC
BARBARA JAFFE

NEW YORK
COUNTY CLERK'S OFFICE

DATED: December 19, 2011
New York, New York

DEC 19 2011