

Foster v Suffolk County Police Dept.

2014 NY Slip Op 30217(U)

January 6, 2014

Sup Ct, Suffolk County

Docket Number: 09-4989

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY**COPY****PRESENT:**Hon. PETER H. MAYER
Justice of the Supreme CourtMOTION DATE 6-20-13
ADJ. DATE 9-24-13
Mot. Seq. # 005 -MD-----X
MAUREEN FOSTER, as Executrix of the Estate
of SCOTT FOSTER, deceased and MAUREEN
FOSTER, Individually,

Plaintiff,

- against -

THE SUFFOLK COUNTY POLICE
DEPARTMENT, THE COUNTY OF SUFFOLK
and JOHN LICAUSI,Defendants.
-----XIRA COOPER, ESQ.
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants Suffolk County Police Department and County of Suffolk, dated May 15, 2103, and supporting papers (including Memorandum of Law dated May 15, 2013); (2) Affirmation in Opposition by the Plaintiff, dated August 7, 2013, and supporting papers; Affirmation in Opposition by the defendant John Licausi, dated September 12, 2013; (3) Reply Affirmation by the defendants Suffolk County Police Department and County of Suffolk, dated September 23, 2013, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendants, Suffolk County Police Department ("Police Department") and Suffolk County ("County"), for summary judgment dismissing the complaint and all cross claims asserted against them is denied.

This action stems from an automobile accident that occurred on May 8, 2008, on Old Medford Avenue at its intersection with Horseblock Road in the Village of Farmingville, Town of Brookhaven which resulted in the death of the decedent, Scott Foster. Plaintiff seeks damages based upon the alleged recklessness, negligence and carelessness of the defendants herein.

Defendants Suffolk County Police Department and County of Suffolk now move for summary judgment dismissing the complaint, and all cross claims. In support of the motion, they submit, *inter alia*, their attorney's affirmation and memorandum of law, the transcript of deposition of Police Officer Michael Bogliole as witness for the moving defendants, the transcript of deposition of co-defendant John Licausi, and copies of the pleadings. In opposition to this motion, the plaintiff submits, *inter alia*, her attorney's affirmation, and a copy of the Suffolk County General Regulations regarding vehicular pursuits. In opposition, defendant John Licausi submits, *inter alia*, his attorney's affirmation, a copy of the Suffolk County General Regulations regarding vehicular pursuits, and the affidavit of Kevin T. Wehrle, sworn to on September 11, 2013.

Defendant John Licausi testified that on May 8, 2008, he was on the corner of Mount McKinley Road and Granny Road, Farmingville, at approximately 11:30 a.m. He was trying to sell some landscaping equipment to a Mr. Keith Carr, a landscaper. Licausi alleged that he had bought the equipment earlier in the morning from an unknown individual. Mr. Carr asked him to wait while he called his wife. While defendant Licausi waited, a Suffolk County Police Officer, Michael Bogliole, arrived at the scene. Mr. Carr told Licausi that he had called the police, rather than his wife, because someone had stolen equipment from him some weeks earlier and that the person looked like Licausi.

Licausi testified that Officer Bogliole asked him for his license, registration and insurance, and that he complied with the request. Officer Bogliole then asked Licausi to get out of his vehicle and put his hands on the police vehicle while he went into his car to use his radio. Licausi testified that he and Mr. Carr then began arguing, and that Officer Bogliole used profanity while telling Licausi to shut up. Licausi testified that his argument with Mr. Carr was going to escalate into an altercation. He walked over to his vehicle, which was still running. Officer Bogliole asked him where he was going and he gave his mother's address in Riverhead. Licausi entered his vehicle and Officer Bogliole came over to the vehicle and told him to get out. Officer Bogliole had his hand on the lip of the door as Licausi drove away. He testified that there was no physical contact between himself and Officer Bogliole. He testified that he intended to go to his mother's house but just drove in a circle. He traveled north on Mt. McKinley and made a left on Mt. Rainier. There was no stop sign at that corner. He was driving at 30 miles per hour. He traveled a few hundred feet before turning right onto Mt. Marcy, before making a right turn back onto Mt. McKinley. There was a stop sign on Mt. Marcy, but he did not come to a full stop. He testified that he then made a left on Granny Road and then a right on Old Medford Avenue. Although he heard Officer Bogliole's siren, he did not actually see him until he turned onto Old Medford Avenue. Because he was angry and used "poor judgment," he ignored the officer. He testified that he was driving at approximately 40 miles per hour when first saw Officer Bogliole and that his highest rate of speed was past 50 miles per hour.

He testified that he traveled a half-mile on Old Medford Avenue, driving through two stop signs without stopping. Officer Bogliole was 250 to 300 feet behind him at the first stop sign and 100 to 150 feet behind him at the second. Both were traveling 45 to 50 miles per hour at the time. He wanted to stop prior

to entering the intersection with Horseblock Road, but Officer Bogliole “came speeding up” behind him. He testified that as he approached the intersection with Horseblock Road he tapped his brakes a couple of times to tell Officer Bogliole that he wanted to stop. He could not stop because Officer Bogliole was “too close” to him. At the intersection with Horseblock Road, there was a black vehicle stopped in the southbound through lane on Old Medford Avenue. He testified that he had planned to go around the black car on the right, but thought that if he stopped Officer Bogliole would hit his vehicle. Instead, he attempted to go around the stopped black vehicle. At this point, Officer Bogliole was 75 feet behind him. He testified that he was traveling at 40 to 50 miles per hour. As he entered the intersection, he observed the decedent, Scott Foster’s vehicle. He tried to turn left to avoid him, but the accident occurred.

Officer Bogliole testified that on May 8, 2008, he was working a seven a.m. to three p.m. shift. At approximately 11:43 a.m., he received a radio transmission with regard to a suspect attempting to sell stolen landscaping equipment. When Officer Bogliole arrived at the scene, he received a second radio transmission advising him that the owner of the vehicle had an outstanding warrant. When Officer Bogliole arrived at the scene, he observed the suspect’s green Mountaineer, and pulled behind it. The landscaper who called 911, Keith Carr, told Officer Bogliole that the defendant Licausi was trying to sell him stolen landscaping equipment. At this point, Licausi was still in his vehicle. Officer Bogliole walked over to Licausi’s vehicle and asked him to roll down his window. He instructed Licausi to turn off his vehicle and requested his driver’s license. Licausi was argumentative and Officer Bogliole had to repeat his instructions, but he eventually complied. The keys remained in Licausi’s ignition. Officer Bogliole asked Licausi to step out of the car because he observed that his hands were shaking and his eyes were glassy. Officer Bogliole then asked Licausi to walk over to the front of the police vehicle. He wanted to access his computer to compare the information on Licausi’s license with the information he had received with regard to an outstanding warrant against the owner of the vehicle. As Licausi walked, he did not notice anything about his gait. There was no smell of alcohol. While Officer Bogliole was on his computer, he heard Licausi and Carr talking loudly and arguing with each other. Officer Bogliole was concerned about a physical altercation. At some point Officer Bogliole became concerned that Licausi was going to flee, so he got out of his vehicle and told Licausi not to move. He had not had time to verify any of the information. He testified that he was concerned that Licausi was driving while intoxicated. When Officer Bogliole got out of his vehicle, Licausi started to run. When Officer Bogliole attempted to grab Licausi, he pushed his hands off and ran to his vehicle. Officer Bogliole attempted to pull Licausi out of his vehicle, and as they struggled, Licausi put the vehicle into gear, revved up the engine and pulled away. As he drove away, Officer Bogliole’s right arm was behind Licausi’s back. Officer Bogliole was able to extricate his arm, but his body rolled down the side of the vehicle. Licausi’s driver’s side door was open as he drove away. Officer Bogliole ran back to his vehicle, engaged his lights and siren and advised his dispatcher as to what had occurred. He advised dispatch as to his intention to pursue Licausi.

He testified that Licausi proceeded northbound on Mt. McKinley to Mt. Rainier. Licausi’s driver’s side door was still open. There was no traffic on the road at the time. When Officer Bogliole made a left turn, Licausi was about 100 feet in front of him and traveling no more than 40 miles an hour. He testified that he observed Licausi go around a bend at 30 to 40 miles an hour. It looked like his vehicle was going to “roll”, and was being driven erratically. Licausi was accelerating on Mt. Rainier to just over 40 miles an hour. Licausi drove through the stop sign at the intersection with Mt. Macy Avenue. Officer Bogliole testified that when he got to the stop sign he slowed down and checked traffic. He then observed Licausi

make a right turn onto Pleasant Place and go through the stop sign there without stopping. At this point Officer Bogliole was about 100 feet behind Licausi. The next intersection was South Bicycle Path, where Licausi slowed down to make a right turn onto it, traveling in excess of 40 miles an hour.

Once on South Bicycle Path, the next intersection was Granny Road, which was controlled by a traffic signal. Officer Bogliole observed that the traffic light was red. Licausi accelerated as he went through the red light. Officer Bogliole observed that traffic on Granny Road come to a complete stop and swerve in an attempt to avoid Licausi. Officer Bogliole testified that Licausi accelerated through the intersection and was going in excess of 70 miles an hour at one point after the intersection. He testified that he slowed down to less than 10 miles an hour at the intersection to ensure that no vehicle was coming. After the Granny Road intersection, South Bicycle Path turns into Old Medford Road. He testified that Licausi was driving erratically and passed through two further stop signs.

The next intersection was that of Old Medford Road and Horseblock Road, where the accident occurred. Officer Bogliole observed that the traffic signal was red for traffic traveling southbound on Old Medford Road. As Licausi was approaching the intersection, he was accelerating and the distance between Officer Bogliole and Licausi was increasing. He testified that traffic was congested on Horseblock Road which is an east/west roadway. Licausi entered the intersection against the red light and the accident with Foster's vehicle occurred. He testified that he was less than 1000 feet from the intersection when the accident occurred. When asked why he continued his pursuit of the defendant Licausi, he stated that "he had to be stopped."

The Suffolk County Police Department Directive issued on January 18, 2008 specifies the conduct of police officers during vehicular pursuits. Chapter 2, Section 7(II) sets forth the Department's policy

A. When a member of the Service initiates a vehicular pursuit his/her primary concern shall be to insure the safety of the public and the police officer(s) involved.

B. New York State Vehicle and Traffic Law exempts authorized emergency vehicles involved in emergency operations from some restrictions of the Vehicle and Traffic Law. This exemption, however, 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 (Vehicle and Traffic Law 1104-4e).

C. During a vehicular pursuit, members of the Service shall drive with due regard for the safety of all persons. Members shall avoid engaging in or shall terminate any vehicular pursuit when conditions indicate that the safety of the officer and/or the public is in jeopardy or as instructed by his/her supervisor. The officer must continually evaluate the risks involved in initiating or continuing the pursuit.

Chapter 2, Section 7 (VI)(A) sets forth the Department's policy on initiation of pursuit, in effect at the time of the accident:

It is the primary responsibility of a police officer initiating a pursuit to ensure the safety of the public and the police officers involved. A pursuit shall only be initiated when a law violator:

a. Clearly exhibits the intention of avoiding arrest,

or

b. Presents a clear and present threat to the safety of other motorists.

or

c. Has committed or is in the course of committing a violent felony, or attempting to commit a violent felony

or

d. Has committed an offense less than a violent felony but the necessity of immediate apprehension outweighs the risk or danger created by the vehicular pursuit as in the case of a person operating a vehicle in an intoxicating condition.

In order to lessen the violator's temptation to attempt evasion, officers intending to effect vehicular stops shall endeavor to be in close proximity to the violator's vehicle before activating emergency equipment.

The General Order also specifies the considerations for discontinuing vehicular pursuits initiated by police officers. Chapter 2 Section 7 (VI) (R) (1), in effect at the time of the accident, states, in relevant part:

A pursuit shall be discontinued when there is an exceptional danger to the pursuing officers or the public and this danger outweighs the necessity for immediate apprehension.

The pursuing officers must consider present danger, seriousness of the crime, length of pursuit and the possibility of identifying the suspect at a later time when determining whether or not to continue the pursuit. The element of personal challenge shall not enter into the officer's decision whether or not to pursue or terminate the pursuit.

The 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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Vehicle & Traffic Law 1104 (“Authorized Emergency Vehicles”) states, in relevant part:

(a) The driver of an authorized emergency vehicle, when involved in an emergency

operation, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(b) The driver of an authorized emergency vehicle may:

1. Stop, stand or park irrespective of the provisions of this title;
2. Proceed past a steady red signal, a flashing red signal or a stop sign, 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.

c. Except for an authorized emergency vehicle operated as a police vehicle or bicycle, the exemptions herein granted to an authorized emergency vehicle shall apply only when audible signals are sounded from any 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.

(d) An authorized emergency vehicle operated as a police, sheriff or deputy sheriff vehicle may exceed the maximum speed limits for the purpose of calibrating such vehicles' speedometer. Notwithstanding any other law, rule or regulation to the contrary, a police, sheriff or deputy sheriff bicycle operated as an authorized emergency vehicle shall not be prohibited from using any sidewalk, highway,

street or roadway during an emergency operation.

(e) The 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.

Drivers of emergency vehicles have a primary obligation to respond quickly to preserve life and property and to enforce criminal laws; in recognition of drivers's special needs, the legislature enacted provision of Vehicle and Traffic Law which qualifiedly exempts drivers of emergency vehicles from certain traffic laws when involved in emergency operation. (*Saarinen v Kerr*, 84 NY2d 494, 602 NYS2d 297 [1994]. “ Thus, while the Legislature shields municipalities from simple negligence and mere errors in judgment, it also protects innocent victims and the general public by expressly not relieving emergency operators and their municipal employers of all reasonable care.” (*Campbell v City of Elmira*, 84 NY2d 505, 513, 620 NYS2d 302, 306 [1994]). Under this statute, the manner in which a police officer operates his or her vehicle in an emergency situation may not form the basis for civil liability to an injured third party unless the officer acted in reckless disregard for the safety of others (*Rincon v A.C. Dusenberry*, 106 AD3d 974, 965 NYS2d 366 [2d Dept 2013]; *see, also, Saarinen v Kerr, supra; Quintana v Wallace*, 95 AD3d 1287, 945 NYS2d 366 [2d Dept 2012]). It is noted that the moving defendants’ argument that they are entitled to “governmental immunity” outside of the qualified immunity granted by Vehicle & Traffic Law 1104 is without basis in the prior case law with regard to this statute.

The reckless disregard standard requires proof that the driver intentionally committed an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow (*Ferrara v Village of Chester*, 57 AD3d 719, 869 NYS2d 600 [2d Dept 2008]; *see also Campbell v City of Elmira, supra; Saarinen v Kerr, supra*). “We are in total agreement that parties may be found to have acted in violation of the statutory formulation when they consciously-and thus, with general intentionality, not necessarily with intent to cause particular injury-disregard known serious risks of harm. The decision to ignore a grave risk, which is likely to result in harm to others, may satisfy the intentional aspect sufficient to impose liability.” (*Campbell v City of Elmira, supra*, at pp. 510-11 of 84 NY2d 505, p. 305 of 620 NYS2d).

The moving defendants have failed to establish prima facie entitlement to judgment as a matter of law, as the evidence submitted raises numerous issues of both fact and credibility which preclude such a finding. Some examples are set forth below.

First is the claim that Officer Bogliole was concerned that Licausi was driving while intoxicated. This is based upon his claim that Licausi’s hands were shaking and his eyes were glassy. However, Officer Bogliole smelled no alcohol, observed no slurred speech, testified that Licausi’s gait was normal and, most importantly, did not explain why he failed to immediately administer a field sobriety test. This creates an

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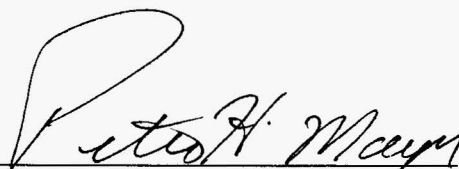
issue of fact as to whether, under the Department's guidelines in effect at the time of the accident, Officer Bogliole properly initiated the pursuit of the defendant Licausi. It also raises issues as to the credibility of his testimony.

Secondly is the discrepancy between the testimony of Officer Bogliole and that of defendant John Licausi. Officer Bogliole alleges that there was a physical altercation between himself and Licausi as he tried to prevent Licausi from driving away from the scene. Defendant Licausi denies that such an altercation occurred. Officer Bogliole alleges that Licausi drove away from the scene with his driver's side door open and that his body rolled down the side of the vehicle. Defendant Licausi denies that this occurred and states that he drove away, with his door closed, at 30 miles per hour (although he admits not coming to a full stop at the first stop sign he encountered). Again, this raises issues of credibility as to whether Officer Bogliole properly initiated the pursuit of the defendant Licausi. Another discrepancy involves the testimony of Licausi and Officer Bogliole as to what transpired as the vehicles approached the intersection of Old Medford Road and Horseblock Road, where the accident occurred. Officer Bogliole testified that as Licausi was approaching the intersection, he was accelerating and the distance between Officer Bogliole and Licausi was increasing. He further testified that he was less than 1000 feet from the intersection when the accident occurred. Defendant Licausi testified that as they entered this intersection Officer Bogliole was 75 feet behind him. He "tapped" his brakes a couple of times to tell Officer Bogliole that he wanted to stop. He could not stop because Officer Bogliole was "too close" to him and he feared that if he stopped there would have been a collision with Officer Bogliole's vehicle. Again, this raises issues of credibility and whether Officer Bogliole properly continued the pursuit of the defendant Licausi. Finally, there is an issue of fact as to whether, under the totality of circumstances, including Officer Bogliole's observation of the near collision of Licausi's vehicle with other vehicles at the red light at the intersection of South Bicycle Path and Granny Road, Officer Bogliole should have terminated his pursuit and, if so, whether his failure to do so constituted a reckless disregard for the safety of others sufficient to impose liability on the moving defendants herein.

In light of the foregoing, the motion by defendants, Suffolk County Police Department and Suffolk County, for summary judgment dismissing the complaint and all cross claims asserted against them is denied.

Dated: _____

1/6/14



PETER H. MAYER, J.S.C.