

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

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LUCIA G. VALDOVINOS, as Administratrix of the Estate
of SHAQUAN JACKSON, deceased,
Plaintiff,
-against-

DECISION & ORDER
Index No. 50093/2015
Seq. # 1

THE CITY OF NEW ROCHELLE, THE CITY OF NEW
ROCHELLE POLICE DEPARTMENT, JUAN BARRAGAN-
REYES and JUAN BARRAGAN-VALENCIA,

Defendant.

-----X
The following papers were read on the motion for summary judgment seeking to dismiss the complaint against The City of New Rochelle and the City of New Rochelle Police Department ("the City defendants"):

Notice of Motion/Affirmation in Support/Exhibits A-BB	1-30
Memorandum of Law in Support	31
Affirmation in Opposition/Exhibits A-D	32-36
Affirmation in Opposition/Exhibit 1	37-38
Affirmation in further support/Exhibits CC-DD	39-41
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Factual and Procedural Background

The plaintiff, Lucia G. Valdovinos, as Administratrix of the Estate of Shaquan Jackson, commenced this action on January 5, 2015, to recover monetary damages for injuries and the death of Shaquan Jackson ("Jackson"), who was a passenger in a vehicle

driven by the defendant, Juan Barragan-Reyes ("Barragan"), when that vehicle overturned after a 88 second pursuit by the New Rochelle police.

The City defendants now file the present motion for summary judgment seeking to dismiss the complaint as against them, arguing that New York's Vehicle and Traffic Law § 1104 immunizes from liability, authorized emergency vehicles engaged in emergency operations and a plaintiff may only recover by proving that the officer acted in reckless disregard for the safety of others. The City defendants assert that the plaintiff is required to meet the threshold of showing that the police intentionally performed 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 and that the police did so with conscious indifference to the outcome. The City defendants argue that the evidence falls below this threshold and therefore, the City defendants are entitled to summary judgment as a matter of law.

The City defendants argue that the notice of claim and bill of particulars are fatally defective, as they allege mere negligence, which is insufficient as a matter of law to overcome their immunity under VTL 1104. The City defendants contend that the New Rochelle Police Department does not have a legal identity separate and apart from the City of New Rochelle and therefore, cannot be sued. The City defendants further argue that Barragan's cross-claims must be dismissed, since there is no relationship between the City of New Rochelle and Barragan that would entitle him to indemnification and since Barragan participated in Jackson's death, he is not entitled to indemnification.

In opposition, the plaintiff, by an attorney, argues to adequately asserting claims against the City defendants to place them on notice of the claims against them and argues that the allegations provide adequate and substantive notice of the claims against the New Rochelle defendants. The plaintiff's attorney argues that the testimony of the defendant officers raises issues of fact precluding protection under VTL 1104(e); the New Rochelle Police Department pursuit policy raises questions of fact; and the expert affidavit of Christopher M. Calabrese raises questions of fact requiring denial of the motion. The plaintiff's attorney states that the plaintiff will stipulate to withdraw the action against The New Rochelle Police Department, provided that the City defendants bring their answer into consistency with their legal theories, since the answer denies that the Police Department initiated a motor vehicle pursuit and denies that the police personnel who authorized, continued and failed to terminate the pursuit, were agents, servants and/or employees and/or were under the direction or control of The City of New Rochelle.

Discussion

A party moving for summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986])). To demonstrate its entitlement to relief, the moving party must come forward with evidentiary proof that establishes the absence of any material issues of fact, (*see McDonald v Mauss*, 38 AD3d 727, 728 [2d Dept 2007])). Once the moving party has established its prima facie entitlement to summary judgment, the burden shifts

to the opposing party to submit evidentiary proof in admissible form to establish material issues of fact (see *Alvarez*, 68 NY2d at 324; *Winegrad*, 64 NY2d at 853).

“A police officer’s conduct in pursuing a suspected lawbreaker may not form the basis of civil liability to an injured third party unless the officer acted with reckless disregard for the safety of others” (*Nurse v City of New York*, 56 AD3d 442, 443 [2d Dept 2008]). “Vehicle and Traffic Law § 1104(a) states that the driver of an authorized emergency vehicle when involved in an emergency operation, may disregard certain traffic regulations” (*Starkman v City of Long Beach*, 106 AD3d 1076 [2d Dept 2013]). ‘However, pursuant to Vehicle and Traffic Law § 1104(e), “[t]he...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” (*Id.*). ‘This “reckless disregard” standard requires evidence that the officer must have “intentionally done 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 done so with conscious indifference to the outcome”’ (*Nurse v City of New York*, 56 AD3d @443).

Upon review of the evidence, the Court finds that the City defendants have established their prima facie entitlement to judgment as a matter of law. Officer Mario Arias (“Arias”) and Officer Robert Ferguson (“Ferguson”) were investigating a domestic violence call at approximately 11:30 to midnight on the night of October 6, 2013, made by Barragan’s girlfriend, Guadalupe Orozco (“Orozco”), in which she claimed that Barragan got intoxicated, hit her and choked her until she could not breathe. Arias and

Ferguson observed bruising and cuts on Orozco's face while interviewing her and were on the sidewalk in front of her residence conducting the interview, when Barragan drove by with Jackson in the car. Orozco pointed him out to the officers and exclaimed that he was going to "dip" them, which they understood as slang for trying to evade them. The officers testified that while driving past, Barragan pointed his finger at Orozco, which Ferguson believed Barragan intended to be threatening. Both officers then got into their cars and initiated a pursuit of Barragan, with Arias following on the same road, while Ferguson took another route. A minute and a few seconds into the pursuit, Barragan's car overturned and both Barragan and Jackson were thrown from the vehicle, resulting in Jackson's death. Barragan's blood tested positive for marijuana, valium and had 0.15% blood alcohol content.

Arias testified that he pursued Barragan for approximately 88 seconds. He activated his emergency lights, periodically used his siren and did not exceed 55 miles per hour. Arias slowed as he drove through intersections and testified that he lost sight of Barragan's vehicle for approximately 45 seconds before coming upon the overturned vehicle. Therefore, the pursuit itself was not reckless, nor did it show a reckless disregard for the safety of others.

The plaintiff's expert states that Arias violated his own standard that only individuals who have committed felonies were to be pursued. However, at the time Arias was pursuing Barragan, he believed that he had committed a felony. Additionally, Arias did not violate the New Rochelle Police Pursuit Policy, which clearly allowed for pursuit in misdemeanor cases.

None of the testimony or evidence shows that Arias did not drive with due regard for the safety of all persons, nor had a reckless disregard for the safety of others. Further, Arias had lost sight of Barragan's vehicle, constructively terminating the pursuit and the proximate cause of the accident was Barragan's independent recklessness, not the police officers' initiation of a pursuit of Barragan (*Nurse v City of New York*, 56 AD3d @443). Therefore, the City defendants have established that judgment as a matter of law and the plaintiff has failed to create any issues of fact in rebuttal.

With regard to Barragan's cross-claims, the Court also grants summary judgment in favor of the City defendants, since as stated in the motion papers, the City of New Rochelle had no contractual obligation to Barragan and his participation in Jackson's death precludes his indemnification claim.

Accordingly, based upon the foregoing, it is

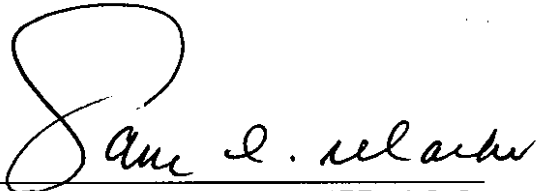
ORDERED that the motion for summary judgment is GRANTED; and it is

ORDERED that the action as against The City of New Rochelle and The City of New Rochelle Police Department, is dismissed; and it is further

ORDERED that the cross-claim against The City of New Rochelle and The City of New Rochelle Police Department, is dismissed.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
December 31, 2018


HON. SAM D. WALKER, J.S.C.