

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32674
H/prt

_____AD3d_____

Argued - October 7, 2011

REINALDO E. RIVERA, J.P.
ANITA R. FLORIO
THOMAS A. DICKERSON
PLUMMER E. LOTT, JJ.

2010-06955

DECISION & ORDER

Bernadette Williams, et al., plaintiffs-respondents, v
City of New York, defendant-respondent, Metropolitan
Transit Authority, et al., appellants.

(Index No. 37648/07)

Morris Duffy Alonso & Faley, New York, N.Y. (Iryna S. Krauchanka and Andrea M. Alonso of counsel), for appellants.

Paul B. Weitz & Associates, P.C. (Pollack, Pollack, Isaac & De Cicco, New York, N.Y. [Brian J. Isaac and Jillian Rosen], of counsel), for plaintiffs-respondents.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Pamela Seider Dolgow and Alyse Fiori of counsel), for defendant-respondent.

In an action to recover damages for personal injuries, etc., the defendants Metropolitan Transit Authority and MTA Bus Company appeal from an order of the Supreme Court, Kings County (Sherman, J.), dated May 26, 2010, which denied their motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

ORDERED that the order is affirmed, with one bill of costs payable to the respondents appearing separately and filing separate briefs.

The plaintiff Bernadette Williams allegedly was injured when the bus in which she was a passenger drove over a dip or sink hole in the left lane of the roadway, raising her into the air, then back down to her seat. The defendants Metropolitan Transit Authority and MTA Bus Company

October 25, 2011

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(hereinafter together the MTA) moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it. The Supreme Court denied the motion and the MTA appeals. We affirm.

“Under the emergency doctrine, ‘when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context’” (*Miloscia v New York City Bd. of Educ.*, 70 AD3d 904, 905, quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327). “This is not to say that an emergency automatically absolves one from liability for his [or her] conduct. The standard then still remains that of a reasonable [person] under the given circumstances, except that the circumstances have changed” (*Ferrer v Harris*, 55 NY2d 285, 293; see *Pawlukiewicz v Boisson*, 275 AD2d 446, 447). Both the existence of an emergency and the reasonableness of a party’s response thereto will ordinarily present questions of fact (see *Crawford-Dunk v MV Transp., Inc.*, 83 AD3d 764).

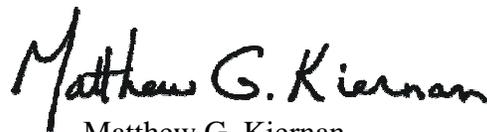
Here, the MTA failed to establish its prima facie entitlement to judgment as a matter of law. The evidence submitted reveals the existence of triable issues of fact as to whether the driver’s action in moving into the left lane was in response to an emergency situation, and whether his actions were reasonable and prudent under the circumstances (see *Crawford-Dunk v MV Transp., Inc.*, 83 AD3d 764; *Schlanger v Doe*, 53 AD3d 827; *Ortiz v Globe Ground N. Am.*, 36 AD3d 872; *Rabassa v Caldas*, 306 AD2d 137; *Pawlukiewicz v Boisson*, 275 AD2d 446). Moreover, the evidence failed to eliminate all triable issues of fact as to whether any negligence on the part of the driver was a proximate cause of the accident (see generally *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315).

The MTA’s remaining contention is without merit.

Accordingly, the MTA’s motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it was properly denied (see generally *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

RIVERA, J.P., FLORIO, DICKERSON and LOTT, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court