

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

D32852
G/prt

_____AD3d_____

Submitted - October 25, 2011

REINALDO E. RIVERA, J.P.
DANIEL D. ANGIOLILLO
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2010-09219

DECISION & ORDER

Evans Gabriel, et al., plaintiffs, Kerline Goinet, etc., et al., plaintiffs-respondents, Sulta Marcellus, plaintiff-appellant, v Stephen Zwerin, et al., defendants-respondents, Peter Montour, et al., defendants-appellants, et al., defendant.

(Index No. 16831/08)

Dinkes & Schwitzer, P.C., New York, N.Y. (Matthew A. Windman of counsel), for plaintiff-appellant.

Picciano & Scahill, P.C., Westbury, N.Y. (Francis J. Scahill and Andrea E. Ferrucci of counsel), for defendants-appellants.

Goldberg Segalla, LLP, Mineola N.Y. (Marianne Arcieri of counsel), for defendant-respondent Paradise Tour & Travel, Inc.

In an action, inter alia, to recover damages for personal injuries, the plaintiff Sulta Marcellus appeals, as limited by her brief, from so much of an order of the Supreme Court, Nassau County (Cozzens, Jr., J.), entered July 19, 2010, as granted that branch of the motion of the defendant Paradise Tour & Travel, Inc., which was for summary judgment dismissing the complaint insofar as asserted against it by her, and the defendants Peter Montour and Jean A. Toussaint separately appeal, as limited by their brief, from so much of the same order as granted those branches of the motion of the defendant Paradise Tour & Travel, Inc., which were for summary judgment dismissing the complaint insofar as asserted against it and for summary judgment dismissing the cross claims insofar as asserted against it by them.

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ORDERED that the appeal by the defendants Peter Montour and Jean A. Toussaint from so much of the order as granted that branch of the motion of the defendant Paradise Tour & Travel, Inc., which was for summary judgment dismissing the complaint insofar as asserted against it is dismissed, as they are not aggrieved by that portion of the order (*see* CPLR 5511; *Mixon v TBV, Inc.*, 76 AD3d 144, 156-157); and it is further,

ORDERED that the order is affirmed insofar as appealed from by the plaintiff Sulta Marcellus and insofar as reviewed on the appeal by the defendants Peter Montour and Jean A. Toussaint; and it is further,

ORDERED that one bill of costs is awarded to the defendant-respondent Paradise Tour & Travel, Inc., payable by the appellants appearing separately and filing separate briefs.

On August 1, 2008, a bus operated by the defendant Stephen Zwerin and owned by the defendant Cramden Coach, LLC (hereinafter Cramden), collided with a van operated by the defendant Peter Montour and owned by the defendant Jean A. Toussaint, in which the plaintiff Sulta Marcellus was a passenger. On the date of the accident, the Long Island Rail Road (hereinafter the LIRR) was performing track work that disrupted service to some of its lines, and it had retained the defendant Paradise Tour & Travel, Inc. (hereinafter Paradise), to provide shuttle bus service for the passengers on the affected lines. Since Paradise did not have enough of its own buses to meet the demand, it retained Cramden, among others, to meet the needs of the LIRR. Shortly after joinder of issue, Paradise moved for summary judgment dismissing the complaint and all cross claims insofar as asserted against it, contending, *inter alia*, that Cramden was an independent contractor and, thus, Paradise could not be held vicariously liable for any negligence by Cramden.

Paradise submitted evidence demonstrating that Cramden was an independent contractor over which it only exercised incidental control. Thus, Paradise established, *prima facie*, that it could not be held vicariously liable for any negligence of Cramden or its employee, Zwerin (*see Kleeman v Rheingold*, 81 NY2d 270, 273; *Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668; *Chuchuca v Chuchuca*, 67 AD3d 948, 950). In opposition, the appellants failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *cf. Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 506). Further, the appellants failed to demonstrate that discovery was necessary to oppose the motion (*see* CPLR 3212[f]; *Zuckerman v City of New York*, 49 NY2d 557, 562). Accordingly, the Supreme Court properly granted those branches of Paradise's motion which were for summary judgment dismissing the complaint insofar as asserted against it by Marcellus and all cross claims insofar as asserted against it by Montour and Touissant.

RIVERA, J.P., ANGIOLILLO, BELEN and ROMAN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court