

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

D33614
O/kmb

_____AD3d_____

Submitted - December 13, 2011

ANITA R. FLORIO, J.P.
ARIEL E. BELEN
SHERI S. ROMAN
SANDRA L. SGROI, JJ.

2010-05312
2010-10405

DECISION & ORDER

Rachel Abrams, etc., et al., appellants, v Excellent
Bus Service, Inc., et al., respondents.

(Index No. 950/08)

Lester B. Herzog, Brooklyn, N.Y., for appellants.

Ryan & Conlon, LLP, New York, N.Y. (William F. Ryan of counsel), for
respondents.

In an action to recover damages for personal injuries, the plaintiffs appeal (1), as limited by their brief, from so much of an order of the Supreme Court, Kings County (Bunyan, J.), entered March 26, 2010, as denied their cross motion for a unified trial, and (2) from a judgment of the same court (Saitta, J.), entered September 22, 2010, which, upon a jury verdict on the issue of liability, finding that the defendants were not negligent in the operation of a bus, is in favor of the defendants and against them, in effect, dismissing the complaint.

ORDERED that the appeal from the order is dismissed; and it is further,

ORDERED that the judgment is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the defendants.

The appeal from the intermediate order must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on the appeal from the order are brought up for review and have been

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considered on the appeal from the judgment (*see* CPLR 5501[a][1]).

On February 11, 2007, the plaintiff Rachel Abrams (hereinafter the injured plaintiff), then 15 years old, allegedly injured her right knee when she fell while returning to her seat from the bathroom on a moving coach bus. She alleged that the bus swerved, causing her to fall. The injured plaintiff, and her mother derivatively, commenced this negligence action against the defendants, Excellent Bus Service, Inc., the owner of the bus, and the individual who was driving the bus at the time of the incident. The defendants moved for summary judgment on the issue of liability and the plaintiffs cross-moved for a unified trial. In an order entered March 26, 2010, the Supreme Court denied both motions.

Following a trial on the issue of liability, the jury found that the defendants were not negligent in the operation of the bus. Thereafter, the Supreme Court entered a judgment, in effect, dismissing the complaint.

Courts are encouraged to conduct bifurcated trials in personal injury actions (*see* 22 NYCRR 202.42[a]; *Bertelle v New York City Tr. Auth.*, 19 AD3d 343, 344). Unified trials should only be held “where the nature of the injuries has an important bearing on the issue of liability” (*Berman v County of Suffolk*, 26 AD3d 307, 308). The decision whether to conduct a bifurcated trial rests within the discretion of the trial court, and should not be disturbed absent an improvident exercise of discretion (*see* CPLR 603; *Wright v New York City Hous. Auth.*, 273 AD2d 378, 378; *Lind v City of New York*, 270 AD2d 315, 316; *McIver v Canning*, 204 AD2d 698, 699). Here, the Supreme Court providently exercised its discretion in conducting a bifurcated trial, since the injured plaintiff’s injuries did not have a bearing on the issue of liability.

Further, the Supreme Court properly denied the plaintiffs’ request for a *res ipsa loquitur* charge. Such a charge is warranted only where a plaintiff establishes that (1) the type of accident at issue ordinarily does not occur in the absence of negligence, (2) the instrumentality causing the accident was in the defendant’s exclusive control, and (3) the accident was not due to any voluntary action or contribution by the plaintiff (*see* *Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226; *Di Santo v County of Westchester*, 210 AD2d 628, 629). A fall on a moving bus is not the kind of event that ordinarily does not occur in the absence of negligence.

The plaintiffs’ remaining contentions are without merit.

FLORIO, J.P., BELEN, ROMAN and SGROI, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court