

Wade v New York City Tr. Auth.

2002 NY Slip Op 30162(U)

August 6, 2002

Supreme Court, Kings County

Docket Number: 200/98

Judge: Joseph F. Bruno

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At a City Trial Part of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of August, 2002

P R E S E N T:

HON. JOSEPH F. BRUNO,

Justice.

-X

JAMES W. WADE, 11, an infant by his father and natural guardian, JAMES WADE, SR., and JAMES WADE, SR.,

Plaintiffs,

- against -

Index No. 200/98

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

-X

The following papers numbered 1 to 6 read on this motion:

| | <u>Papers Numbered</u> |
|---|------------------------|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____ | 1 - 2 |
| Opposing Affidavits (Affirmations) _____ | 3 - 5 |
| Reply Affidavits (Affirmations) _____ | 6 |
| _____ Affidavit (Affirmation) _____ | |
| Other Papers _____ | |
| _____ | |

Upon the foregoing papers in this action to recover damages for personal injuries allegedly sustained by the infant plaintiff James W. Wade, II (“plaintiff”), defendant New York City Transit Authority (“NYCTA”) moves for an order, pursuant to CPLR 2004,

extending the time for it to file a summary judgment motion, and, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint as against it.

At 8:00 P M on October 8, 1986, plaintiff, who was then 13 years of age, along with two of his friends, hitched a ride on the side of a B-49 bus while it was stopped at a red light on Ocean Avenue at the intersection with Farragut Road, in Brooklyn, New York. Plaintiff was positioned on the passenger side by the rear door and placed his foot and hand inside the rubber around the door. The bus then made a turn onto Farragut Road and, after the bus driver completed the turn, the bus accelerated, causing plaintiff to lose his balance and fall off the bus. Consequently, plaintiff sustained injuries.

On April 24, 1987, plaintiff, by his father and natural guardian, James Wade, Sr., and James Wade, Sr., individually, commenced this action against the NYCTA, alleging that the bus driver was negligent in operating the bus at an excessive rate of speed and in a hazardous manner, and seeking recovery for plaintiff's injuries. James Wade, Sr. has asserted a claim for loss of plaintiff's services.

In addressing the NYCTA's motion insofar as it seeks an order, pursuant to CPLR 2004, extending the time for it to file a summary judgment motion, the court notes that CPLR 3212 (a) provides that "the court may set a date after which no [summary judgment] motion may be made," and that no summary judgment motion shall be made more than 120 days after the filing of a note of issue, "except with leave of court on good cause shown." The local rule enacted by the Second Judicial District, i.e., Kings County Supreme Court Uniform

Civil Term Rule 13 provides that “[n]o motion for summary judgment may be made more than 60 days after filing a Note of Issue, except with leave of the Court on good cause shown.” Under both CPLR 3212(a) and this local rule, the NYCTA’s motion for summary judgment is untimely.

CPLR 3212 (a) and Kings County Supreme Court Uniform Civil Term Rule 13, however, do “not provide a safe haven for frivolous or meritless lawsuits and ‘[f]oreclosing the opportunity for a summary judgment motion in a sense punishes the whole court system by keeping a case alive when an earlier arrangement for a decent funeral is possible’” (*Rossi v Arnot Ogden Med. Ctr.*, 252 AD2d 778, 779, quoting Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, **Book 7B**, CPLR C3212:12, 1998 Pocket Part, at 62-63). The Supreme Court, therefore, is afforded wide latitude with respect to determining whether “good cause” exists to exercise its discretion to entertain a belated but meritorious motion for summary judgment (*Luciano v Apple Maintenance & Servs.*, 289 AD2d 90, 90; *Samuel v A.T.P. Dev. Corp.*, 276 AD2d 685, 686-687; *Cibener v City of New York*, 268 AD2d 334, 334), even on the eve of trial (*Quinlan v Kaufman*, 258 AD2d 453, 453), in the interest of judicial economy and particularly where there has been no prejudice to the opposing party resulting from the delay (*Medina ex rel Giglio v Barbaro*, 279 AD2d 615, 615-616; *Goodman v Gudi*, 264 AD2d 758, 758; *Rossi*, 252 AD2d at 779-780). Thus, good cause to entertain a late summary judgment motion may be established by showing arguable merit, a reasonable excuse for the delay, and the absence of prejudice (*Slate v State of New York*,

284 AD2d 767,769; *La Duke v Albany Motel Enters.*, 282 AD2d 974,974; *McKay v Ciani*, 280 AD2d 808, 809; *Rossi*, 252 AD2d at 779-780).

In support of its motion insofar as it seeks leave to file a late summary judgment motion, the NYCTA has submitted evidentiary proof establishing the meritorious nature of its motion. It has asserted, as an excuse for its untimeliness, the fact that it handles a voluminous amount of cases on a daily basis, and that it, therefore, overlooked the time frame within which to file the instant motion due to law office failure. In opposition, plaintiff merely argues that the NYCTA's motion has not been timely made and that the court should reject its explanation for its delay. Plaintiff does not allege that he will be prejudiced in any way by the NYCTA's delay. Thus, in view of the meritorious nature of the NYCTA's motion, the NYCTA's excuse for the delay, the absence of any prejudice to plaintiff from the delay, and the interests of judicial economy, the court finds that an order permitting the NYCTA to file a late summary judgment motion herein is warranted (*see McKay*, 280 AD2d at 809; *Rossi*, 252 AD2d at 779-730).

The court now turns to the merits of the NYCTA's motion for summary judgment. In support of its motion, the NYCTA contends that plaintiff assumed the risk of injury when he voluntarily engaged in hitching a ride on a bus and that the sole proximate cause of the accident was plaintiff's own conduct. It argues that plaintiff's assumption of the risk bars his recovery in this action.

It is well established that a plaintiff may not recover damages for injuries in an action alleging a defendant's negligence, where the plaintiff expressly assumed and consented to the risks which proximately caused his or her injuries (*see Arbegast v Board of Educ.*, 65 NY2d 161, 171). Such doctrine of assumption of the risk requires both knowledge of the danger involved as well as an appreciation of the risk (*see Turcotte v Fell*, 68 NY2d 432, 439; *Barker v Kallash*, 63 NY2d 19, 27).

In the case at bar, plaintiff does not claim that he was ignorant of the fact that his conduct was wrongful or that he was unaware of the great and obvious risks and the potential danger such conduct posed to himself (*see Barker*, 63 NY2d at 27; *Matter of McMillan v New York City Hous. Auth.*, 266 AD2d 153, 153; *de Pena v New York City Tr. Auth.*, 236 AD2d 209, 210). Indeed, plaintiff admitted at his deposition that prior to the date of the accident, he had hitched rides on the outside of buses more than 10 times, and that he had also engaged in this activity two previous times on the very day of the accident. He further testified that when he engaged in this activity, he was aware that he could have fallen and gotten hurt, and that he knew, at the time of the accident, that if he slipped and fell, he would be "dead." Thus, the risk was open and obvious, and understood and fully assessed by plaintiff (*see Barker*, 63 NY2d at 27).

Furthermore, where the proximate cause of a plaintiff's injuries "was his own willful behavior in engaging in hazardous and illegal conduct . . . compensation should not be granted in such circumstances" (*Tillmon v New York City Hous. Auth.*, 203 AD2d 19, 20;

see also Matter of McMillan, 266 AD2d at 153-154; *Rice v New York City Hous. Auth.*, 239 AD2d 400,400; *de Pena*, 236 AD2d at 210; *Porter v New York City Hous. Auth.*, 150 Misc 2d 67, 70). Riding on the outside of a moving bus is an activity so obviously fraught with danger that, by its very nature, it evinces a wanton disregard by the rider for his or her own personal safety or well-being (*see generally Olsen v Town of Richfield*, 81 NY2d 1024,1026; *Tillmon*, 203 AD2d at 20). It is undisputed that plaintiff willfully engaged in this hazardous and illegal conduct, causing his injuries (*see Matter of McMillan*, 266 AD2d at 153-154; *Rice*, 239 AD2d at 347; *de Pena*, 236 AD2d at 210; *Tillmon*, 203 AD2d at 20; *Porter*, 150 Misc 2d at 70).

Plaintiff argues, however, that the bus driver intentionally or recklessly operated the bus at an excessive rate of speed, with notice and knowledge of his presence on the bus, in order to dislodge him and his friends and was negligent. Specifically, plaintiff asserts that he was seen by the bus driver through the driver's side view mirror and that the driver increased the speed of the bus when he saw him clinging to the ledge of the bus. He contends that my assumption of the risk would, therefore, not bar his claims because a duty arose on the part of the bus driver to act reasonably towards him (regardless of whether he was acting improperly or not). Plaintiff further contends once the driver became aware that he had placed himself in danger, the issue becomes one of comparative negligence, requiring a jury to assess the relative fault of the NYCTA and to determine whether it breached the duty to act reasonably towards him.

“Whether a duty exists presents a question of law to be determined by the court based upon the facts and circumstances of the case” (*Vogel v West Mtn. Corp.*, 97 AD2d 46, 48). “[A] duty [is] found to exist only where a defendant [has] sufficient control over the event to be in a position to prevent the negligence” (*Piccirillo v Beltrone-Turner*, 284 AD2d 854-855, quoting *Vogel*, 97 AD2d at 49).

Since the bus driver was never identified and was never deposed, plaintiffs claim that the bus driver saw him and intentionally accelerated the bus to dislodge him is based solely upon inferential or circumstantial evidence. While circumstantial evidence may properly be considered by the court in the determination of the NYCTA’s motion, such circumstantial evidence must be sufficient to raise a question of fact and to support its submission to the trier of fact.

Where, as here, the plaintiffs case is “based wholly upon circumstantial evidence,” the plaintiff, in order to demonstrate the existence of a triable issue of fact in opposition to a motion for summary judgment, is required to make “a showing of sufficient facts from which the negligence of the defendant and the causation of the accident by that negligence can be reasonably inferred” (*Babino v City of New York*, 234 AD2d 241, 241-242; *see also Thomas v New York City Tr. Auth.*, 194 AD2d 663, 664). The trier of fact must be able “to reach a conclusion based upon the logical inferences to be drawn from the evidence, and not upon speculation” (*Babino*, 234 AD2d at 242).

In the case at bar, plaintiff relies upon his own self-serving statements in his January 10, 1994 deposition testimony and his recent affidavit that he believed the bus driver made eye contact with him through the side view mirror, and his speculation therein that the bus driver deliberately speeded up the bus in order to throw him off. It is noted, however, that at plaintiff's prior April 20, 1987 General Municipal Law § 50-h hearing, plaintiff, in his response to the NYCTA's inquiry as to "what happened at the time of the accident," only testified that he "was hanging on the side of the bus" and "[he] fell," and that he "d[idn]t know" if "the bus [was] moving along, when [he] fell." Plaintiff also relies upon the recent affidavit of one of his companions who had hitched a ride with him on that bus, Caultroyn Beaton, who similarly states that he believed the bus driver looked back at them through the side view mirror.

Additionally, plaintiff has submitted the deposition testimony of Edward Blanco, a witness who was stopped at the traffic light behind the subject bus at the intersection of Farragut Road and Ocean Avenue, who observed plaintiff and his friends jump on the outside of the bus and the accident that followed. Edward Blanco testified that he **blew his horn** because he was afraid that he might hit plaintiff if he fell off the bus. There is, however, no evidence that the bus driver was aware of the reason that Edward Blanco blew his horn. Furthermore, while Edward Blanco stated that the bus started to accelerate from the time that it turned onto Farragut Road until the happening of the accident, he did not have any personal

knowledge that the reason the bus driver started to accelerate was in any way related to plaintiffs presence on the exterior of the bus.

Under these circumstances, the court finds that there is insufficient circumstantial evidence to raise a triable issue of fact as to whether the bus driver was aware of or had notice of plaintiffs presence on the side of the bus at the time of the accident or that he intentionally accelerated the bus. Rather, any fact finder considering this case would be required to improperly speculate as to the bus driver's notice and awareness of plaintiffs presence and as to how the accident occurred (*see Gomes v Courtesy Bus Co.*, 251 AD2d 625,627).

Plaintiff's reliance upon *Dominguez v Manhattan and Bronx Surface Transit Operating Authority* (46 NY2d 528) is misplaced. In *Dominguez* (46 NY2d at 534), the Court of Appeals ruled that a jury could, solely on the basis of circumstantial evidence, conclude that a defendant had knowledge of a plaintiff's danger for purposes of application of the doctrine of last clear chance, under which a contributorily negligent party, who cannot extricate himself or herself from a perilous situation in time to avoid injury, may recover from a negligent party who becomes aware of the plaintiffs danger in time to avert the accident, but fails to use reasonable care to do so. The Court of Appeals, in *Dominguez* (46 NY2d, at 534), in making its ruling, expressly noted that the question of whether circumstantial evidence raises a triable issue of fact "will . . . depend on the unique factual circumstances of each accident."

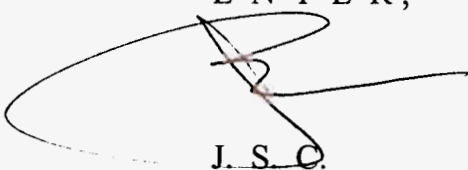
The factual circumstances of *Dominguez* (46 NY2d, at 534-535) significantly differ and are distinguishable from those in the instant case. In *Dominguez* (46 NY2d at 534), the bus driver was identified and testified at the trial and, thus, the jury could assess his credibility as compared to that of the plaintiff therein. Moreover, in addition to the testimony of the plaintiff in that case that he could see the bus driver looking at him through the broad inside rear view mirror, an impartial witness, a woman passenger on the bus, who was seated inside the bus adjacent to that plaintiff's position on its exterior, testified that "the youths on the outside were making a great deal of noise, yelling and banging on the bus." The woman passenger also corroborated the testimony of the plaintiff therein that the bus driver actually saw him by her testimony that she "was sure the [bus driver] had noticed [the youths] as she several times observed his eyes watching them in the mirror." The Court of Appeals, in *Dominguez* (46 NY2d at 535), therefore, found that "[t]here was sufficient evidence for the jury to find that the bus driver did know of [that plaintiff's] presence, based on the testimony as to the noise made by the youths and the various observations of the driver's use of the mirror."

Here, as discussed above, the circumstantial evidence to support the unidentified bus driver's awareness or notice of plaintiff's presence on the bus is solely based on the conclusory and speculative assertions of plaintiff and one of his cohorts (*see generally Baly v Chrysler Credit Corp.*, 94 AD2d 781, 782), and Edward Blanco's testimony is insufficient to support these assertions. Thus, inasmuch as the NYCTA has established its entitlement

to summary judgment, and plaintiff has failed to demonstrate the existence of a factual issue, summary judgment dismissing the complaint as against the NYCTA must be granted (*see* CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562; *Babino*, 234 AD2d at 241).

Accordingly, the NYCTA's motion for an order extending the time for it to file a summary judgment motion and granting it summary judgment dismissing the complaint as against it, is granted.

This constitutes the decision and order of the court. The clerk may enter judgment accordingly.

ENTER,

J. S. C.