SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

SHARON JACKSON and LARRY JACKSON,

Plaintiffs,

v.

NEW YORK CITY TRANSIT AUTHORITY and MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY,

Defendants.

Index No. 118269/2002

3

ROBERT LIPPMANN, J.:

Plaintiffs move, pursuant to CPLR 2221, for leave to renew or reargue the prior decision of this court, dated December 10, 2004, which granted defendants' motion to preclude certain expert testimony at trial. Plaintiffs also move to amend their notice of claim.

This action arises out of injuries allegedly sustained by plaintiff Sharon Jackson while a passenger on a New York City Transit Authority bus. Ms. Jackson left her seat while the bus was in motion and fell when the bus made a sudden stop.

By motion originally returnable November 18, 2004, defendants moved to preclude plaintiffs' expert, Ned B. Einstein, from testifying that the bus upon which Ms. Jackson was a passenger was not properly designed and did not adequately protect passengers, who were standing or walking while the bus was in motion, from injury.

Defendants argued that the qualified immunity granted to municipal corporations for planning decisions, which was first espoused in Weiss v Fote (7 NY2d 579 [1960]), bars

plaintiffs from recovering on this theory. In addition, defendants argued that since plaintiffs failed to mention the design defect theory in their notice of claim, they cannot interpose this theory at trial.

In opposition, plaintiffs conceded that defendants are public benefit corporations eligible for partial immunity for planning decisions. However, partial immunity is not applicable here because it is only available where the public corporation, in making its planning decision, entertained and passed on the very same question of risk that plaintiff now wishes to put before the court. Plaintiffs claimed that defendants have not shown that they ever passed on the very same question of risk.

Plaintiffs also pointed out that even where a party enjoys qualified immunity, it can be lost when that party determined to remedy a potentially dangerous condition and unreasonably delays in correcting it. Plaintiffs rely on a "staff summary sheet" provided in discovery to claim that, a year before the accident, defendants decided to correct such a condition by adding hand holds to the backs of the seats on the bus. Plaintiffs also claimed that their notice of claim is sufficient for allowing them to proceed on this theory at trial. Moreover, since defendants raised this issue for the first time in its reply papers, this issue is not properly before the court and should not be considered.

By order dated December 10, 2004, this court granted defendants' motion finding that defendants are protected by qualified immunity with respect to the design of the bus. In addition, the court found that plaintiffs did not specify any design defect in their notice of claim and, as such, cannot introduce this theory now.

In moving to reargue, all plaintiffs have done is reiterate the same arguments that they made in opposition to the original motion. The court considered these arguments previously and has now reviewed them and stands by its prior decision.

With respect to the issue of whether defendants ever passed on the same question of risk, the court notes that defendants required the manufacturer to comply with all Federal Motor Vehicle Safety Standards (FMVSS) and the Bureau of Motor Carrier Safety (BMCS). Plaintiffs cannot have Ned B. Einstein testify so that his judgment can be substituted for the FMVSS and BMCS. The court also notes that plaintiffs have never claimed that the buses, as designed, did not meet the FMVSS and BMCS standards.

Nor does the "staff summary sheet" state, as plaintiffs contend, that defendants had decided to remedy a potentially dangerous condition. Nothing in the "staff summary sheet" indicates that the defendants were concerned that the seat back headrest and the rail attached to the overhead parcel racks were insufficient for safety purposes. Rather, the "staff summary sheet" reveals an apparent concern for the excessive wear on the material of the back headrest caused by passengers constantly grabbing on to the head rests. It recommended adding hand holds to the back of the seats in order to protect the seats' material from excessive wear.

Since plaintiffs have not demonstrated that the court overlooked or misapprehended any relevant facts or misapplied any controlling principal of law, the original decision is adhered to.

The motion to amend the notice of claim is also denied.

Plaintiffs wish to amend the notice of claim to include the claim that Ms. Jackson injuries were caused by the improper design of the bus. However, because this theory of claim is barred by qualified immunity, there is no reason to amend the notice of claim.

Finally, plaintiffs maintain in their reply that, based on recently disclosed evidence, the accident can be attributed to the actions of the bus driver and, accordingly, Ned B. Eienstein should be allowed to testify. While it is not clear to the court what testimony Ned B. Einstein can offer with respect to the actions of the bus driver, the court's prior order only precludes Mr. Einstein from testifying concerning the design of the bus. It does not bar him from testifying about any other matter.

For the forgoing reasons, it is ordered, that the motion to reargue is granted, and upon reargument, the original decision is adhered to.

Dated: 4/18/05

APR 18 2005

J.S.C.

HON. ROBERT D. LIPPMANN
J.S.C.

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