Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 22**
Justice

SUN WHAN LEE, Plaintiff,	Index No. 15329/05
-against-	Motion Date July 17, 2007
"JOHN DOE" (a fictitious name to be used until actual name is known) and NEW YORK CITY TRANSIT AUTHORITY, Defendants.	Motion Cal. No. 9
	Motion Sequence No. E003

The following papers numbered 1 to 5 read on this motion by plaintiff for leave to reargue/renew this Court's order dated April 13, 2007.

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits....	1-3
Affirmation in Opposition.....	4-5

Upon the foregoing papers it is ordered that plaintiff's motion seeking leave to reargue/renew this Court's Order dated April 13, 2007, which Order granted defendants' motion for summary judgment, and upon renewal, denying defendants' motion for summary judgment is granted.

A motion to reargue is addressed to the sound discretion of the court and is designed to afford a party an opportunity to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (*see*, *Schneider v. Solowey*, 141 AD2d 813; *Rodney v. New York Pyrotechnic Products, Inc.*, 112 AD2d 410). Plaintiff fails to set forth any relevant facts that this Court overlooked or misapprehended, or any controlling principles of law that this Court misapplied. Therefore, to the extent that plaintiff seeks leave to reargue, plaintiff's motion is denied.

A motion to renew must be based upon new facts that were not offered in the prior motion, and the party must set forth a reasonable justification for the failure to present such facts in

the prior motion (*see*, CPLR 2221[e]; *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc*., 271 AD2d 636, 638). Plaintiff proffers as its newly discovered material facts, a sworn affidavit of Ms. Min Kim, an independent witness to the accident, and the sworn affidavit of plaintiff herself, Sun Whan Lee. Plaintiff has set forth justification for its failure to present such facts in the original motion (*McNeill v. Sandiford*, 270 AD2d 467 [2d Dept 2000]; *Shapiro v. State*, 259 AD2d 753 [2d Dept 1999]). Regarding the newly submitted affidavit of Ms. Kim, said justification consists of the fact that: while counsel for defendant diligently attempted to obtain a sworn version of the independent witness, they were only recently able to "re-connect" with the independent witness. Plaintiff maintains that prior to the opposition on the underlying summary judgment motion, plaintiff's counsel spoke with the independent witness, reduced her version to writing and mailed it to her to review and execute. Plaintiff's counsel further maintains that the firm was only able to retrieve the executed affidavit in May 2007 after approximately ten telephone calls and approximately five "in-person" attempts. Said date was after plaintiff's opposition papers were submitted on the underlying motion. Additionally, regarding plaintiff, Sun Whan Lee, said justification consists of the assertion that plaintiff has a host of medical issues, and as such, plaintiff's counsel was unable to make contact with her in time to obtain her affidavit in opposition to the defendant's summary judgment motion, and May 9, 2007 was the earliest opportunity for plaintiff to provide an affidavit (s*ee, Ralat v. New York City Housing Authority*, 265 AD2d 185 [1st Dept 1999])(holding that renewal was proper where plaintiff's counsel stated that despite diligent efforts, he was unable to obtain sworn affidavits from plaintiff's two witnesses until after the court's initial determination). Accordingly, plaintiff's motion to renew/reargue is granted.

Upon renewal, defendants' underlying motion for summary judgment is denied. Defendants bring the underlying motion for summary judgment, dismissing the plaintiff's Complaint on the grounds of liability. In this action, plaintiff seeks to recover damages from defendants for personal injuries arising from an alleged fall, which occurred on June 1, 2004 while plaintiff was a passenger on the Q16 bus that was traveling at or near Union Street and 32nd Avenue, Queens County, State of New York. Plaintiff alleges negligence, claiming that the bus came to a sudden stop causing her to fall to the floor of the bus and to sustain serious injuries.

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce

competent evidence in admissible form to establish the existence of a triable issue of fact *(see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2nd Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2nd Dept 1987]).

It is well-settled law that: "[t]o establish a prima facie case of negligence against a common carrier for injuries sustained by a passenger when the vehicle comes to a halt, the plaintiff must establish that the stop caused a jerk or lurch that was 'unusual and violent.'" (*Urquhart v. New York City Trans. Auth.*, 85 NY2d 828 [NY 1995]). In order for plaintiff to raise a triable issue of fact in opposition to a motion for summary judgment, the plaintiff must assert that the operation of the bus was "extraordinary and violent, of a different class than the jerks and jolts commonly experienced in city bus travel." (*McLeod v. County of Westchester*, 2007 NY Slip Op 2087 [2d Dept 2007], citing *Urquhart*, *supra*); *see also, Jenkins v. Westchester County*, 278 AD2d 370 [2d Dept 2000]). "Proof that the stop was unusual or violent must consist of more than a mere characterization of the stop in those terms by the plaintiff." (*See, Urquart, supra* at 830).

Defendants have presented a *prima facie* case that there are no triable issues of fact with regard to defendants' negligence. *Inter alia*, defendants submit the sworn deposition testimony of bus driver, Thomas J. Maley, who testified that he did not come to any sudden stops along his route at the time plaintiff was a passenger. Accordingly, defendants have established a *prima facie* case that they acted with reasonable care.

The evidence in the record before me, including a sworn affidavit of an independent witness, Ms. Min Kim, (in which Ms. Kim asserts "the bus driver made a sudden, violent stop, ... [which] caused the [plaintiff] to fall to the ground and land on her back") and a sworn affidavit of plaintiff herself (in which plaintiff states that the bus made a sudden and violent stop, which threw her to the floor with great impact, and resulted in permanent injuries to her back and body) demonstrates that there are controverted issues of fact in connection with, *inter alia*, whether the bus driver made a "sudden, violent stop;" whether said stop caused plaintiff to fall to the floor of the bus; and whether there was a breech of any legal duty owed to plaintiff. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, defendants' motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: July 19, 2007

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Howard G. Lane, J.S.C.