

Blackmon v The Port Auth. of N.Y. & N.J.

2007 NY Slip Op 32841(U)

September 10, 2007

Supreme Court, New York County

Docket Number: 0115221/2005

Judge: Carol R. Edmead

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

PRESENT: CAROL EDMEAD J.S.C.

PART 35

Index Number : 115221/2005

BLACKMON, RUTH

vs

PORT AUTHORITY

Sequence Number : 002

DISMISS COMPLAINT

INDEX NO. 115221/05

MOTION DATE 9/6/07

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of defendants Greyhound Lines, Inc. and "John Doe" employee bus driver (identified as Mikhail Dynin) for an order, pursuant to CPLR 3212, dismissing the complaint of plaintiff Ruth Blackmon and all cross claims of co-defendant The Port Authority of New York and New Jersey, as against the Greyhound defendants is denied. It is further

ORDERED that the cross motion of defendant The Port Authority of New York and New Jersey for an order pursuant to 3212 dismissing the plaintiff's complaint and all cross claims against Port Authority, is granted. And the Clerk of the Court is directed to enter judgment dismissing the complaint as against defendant The Port Authority of New York and New Jersey and any cross claims as against said defendant. It is further

ORDERED that counsel for defendant The Port Authority of New York and New Jersey shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

Dated: 9/10/07

CAROL EDMEAD
J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
SEP 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

PAPERS NUMBERED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

RUTH BLACKMON,

x

Plaintiff,

Index No. 115221/05

-against-

DECISION/ORDER

THE PORT AUTHORITY OF NEW AND
NEW JERSEY, GREYHOUND LINES, INC., and
"JOHN DOE," employee bus driver,

Defendants.

x

EDMEAD, J.S.C.

FILED
SEP 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

Defendants Greyhound Lines, Inc. ("Greyhound") and "John Doe" employee bus driver (identified as Mikhail Dynin) ("Dynin") (collectively the "Greyhound defendants"), move for an order, pursuant to CPLR 3212, dismissing the complaint of plaintiff Ruth Blackmon ("plaintiff") and all cross claims of co-defendant The Port Authority of New York and New Jersey (the "Port Authority"), as against the Greyhound defendants.

Port Authority cross moves for an order pursuant to 3212 dismissing the plaintiff's complaint and all cross claims against Port Authority.

This case arises out of an alleged slip and fall on March 14, 2005 at 5:50 p.m. in the Port Authority of New York and New Jersey at Gate 81 (the "accident site"). Plaintiff alleges in her Verified Bill of Particulars that defendants were negligent in creating and allowing there to exit a defective missing platform and step where the passengers disembarked from the bus, thereby creating a hazardous and deep step between the bus and the ground, and a hazardous and dangerous condition in allowing the area to be poorly lit. As a result of this incident, plaintiff

allegedly suffered personal injuries.

Plaintiff's Deposition Testimony

Passengers were waiting for the bus, the bus was late arriving. They loaded the handicapped individual onto the bus, then they loaded everyone else on the bus, and she took her seat. The bus driver got on the bus, he turned the bus on and then he turned the bus off and got off the bus. He got on the bus again, and then the bus began to back out. Then, the bus driver stopped the bus again. The bus driver pulled over and he said that there was a technical problem with the bus and that we would have to exit the bus and take another bus. Then the bus driver got off the bus and left (p. 18-22). At this point, the bus may not have been in the regular bus parking area (p. 22).

When the bus driver left the bus, she and the other passengers started to get up and make their way to the exit. As plaintiff started to go down the steps, she had her hand on the rail on the right hand side. People were still grumbling and in general complaining because of the way the situation was turning out. Someone made a loud noise, and plaintiff looked back momentarily, and then she turned back around and continued to exit from the bus. As she was going down, she had her hand on the rail and then she let the rail go at what she thought was the last step. When she stepped down, there was nothing there. She was expecting another step or maybe the ramp. At that time, she was looking down. She tried to catch herself but she fell (pp. 24-26). When plaintiff heard the commotion and turned around, she was "maybe" on the second step. There were three or four steps in total. She fell as she turned back forward and stepped from the second step ((pp. 48-49).

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When plaintiff got to the front of the bus, she could see that it wasn't well lit there. It looked "gloomy." But, she did not notice any lights out. There was a bus nearby whose lights were shining at plaintiff (pp. 49-50).

When plaintiff got on the bus, she walked on a "ramp" that was not connected to the bus. It led up to the steps of the bus (pp. 45-46).

Deposition Testimony of Mikhail Dynin

Sometimes, the bus driver will use a "step" to assist passengers getting on and off the bus. If someone wants to use the step, he has to go find it. The step's dimensions are like a suitcase. It is made of steel and wood with a non-slip top. The step may be near his gate or he might have to go look for it (p. 19). He does not know to whom the steps belong (p. 20). The ramps he is familiar with are sloping about six inches high and separate levels in the terminal. They are stationary. Buses enter between these ramps. He is not familiar with any movable ramp (pp. 23-24).

No one from Port Authority assists him when he uses the step to assist passengers onto the bus (p. 41).

Dynin first loaded the wheelchair passenger into the bus. Then he started to board the regular passengers. He was trying to leave and he felt that something was wrong with the bus. He circled and returned to the gate area. He told passengers to remain seated and that he would return. He couldn't close the door; he cannot close the door when he is not inside (p. 32). He went to dispatch to report a problem with the bus. When he returned half the passengers were standing outside of the bus instead of sitting inside (pp. 25-29). He does not recall if there was a step or ramp for anything used to step off of the bus (p. 29). The lighting was "regular" (p. 30).

He left the bus running with the air conditioning on (p. 32).

Dynin told the passengers to remain on the bus because he was afraid that somebody might fall down (p. 33). The departure building does not have a ramp for stepping off of the bus; the arrival building has a ramp for stepping off of the bus (p. 33)

The Greyhound Defendants' Contentions

Clearly, because Dynin advised the passengers, including the plaintiff, not to exit the bus, and the plaintiff took it upon herself to do so, there is no foundation for a claim of negligence against Greyhound or Dynin. Greyhound provided a reasonable means for which the passengers could alight the bus. As Dynin advised the passengers that he would be back and to remain on the bus, Greyhound had no way of knowing that the plaintiff would exit the bus and therefore such behavior could not have been reasonably foreseen. Plaintiff failed to establish that there was a defect as she stated that she stepped down expecting another step causing her to fall.

Port Authority's Contentions

Plaintiff stated that the her fall occurred because she thought there was another step, not because there was any defect in the pavement, sidewalk, curb or any other facet of the superstructure of the Port Authority Bus Terminal. Hence, the plaintiff has failed to establish that any defect was the cause of her accident. Rather, by her own testimony, it was her reliance on her own perception of the bus' steps which led to her alleged fall. Therefore, it is clear that plaintiff has failed to establish that the Port Authority of New York and New Jersey was in any way liable for her alleged injuries.

Plaintiff's Opposition to the Motion and Cross Motion

Plaintiff has always represented that the bus driver told her she could leave the bus.

Thus, a question of fact exists on this issue. Both plaintiff and the bus driver testified that the lighting conditions within the terminal were poor, and according to plaintiff, the gloominess of the terminal building contributed to her fall. Therefore, once again, there is a clear question of fact.

According to Port Authority witness and employee Ernest Peart, Port Authority and Greyhound are jointly responsible for the safety of the passengers as they are getting on buses. Plaintiff fell onto Port Authority property, due to a missing step kept with the Port Authority building, and she fell under poor Port Authority lighting. There are clear issues of fact which need to be resolved in front of a jury as to the role of Port Authority.

Further, Dynin testified that the extra step used by plaintiff which acts to reduce the amount of space between the bus and the ground is a steel and wood device which is kept on the property of the Port Authority building.

The Greyhound Defendants' Reply

The plaintiff has not demonstrated that a dangerous condition existed. There is no evidence of any defect in the steps of the bus, nor would it be accurate to describe the path as "treacherous" using even the most generous definition. In this case, plaintiff created the danger by failing to exercise reasonable care. If she had been looking where she was stepping, she would not have been "expecting another step or maybe the ramp," because she would have seen that she was on the final step. If the plaintiff had exercised reasonable care, she would have clearly recognized that she was stepping off the bus onto the ground and would not have let go of the handrail.

Plaintiff's affirmation in opposition states that contrary to the deposition testimony of the

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bus driver, plaintiff was never told by the bus driver to remain on the bus and that this disputed description of events creates an issue of fact. However, assuming *arguendo* that plaintiff was not told to remain on the bus, it is a non-issue and entirely irrelevant given the failure of plaintiff to provide any evidence of a hazardous condition or a treacherous path, and given the plaintiff's carelessness in descending without looking and without holding the handrail.

Port Authority's Reply

There is not one shred of evidence to support the fact that a "step" which plaintiff claims she missed was the property of the Port Authority. There is no evidence whatsoever that the Port Authority ever provided, stored or maintained such an item. Hence, plaintiff's argument that the phantom step somehow belongs to the Port Authority is without merit. It is the Port Authority's position that the plaintiff had not left the bus when she had her accident. She was on the steps of the bus when her attention was distracted to a noise behind her after which she began to exit the bus and fell. There is no evidence that the lighting in the bus terminal had anything to do with plaintiff's accident. She was in the vestibule of the bus when she claims that she fell. The quality of the lighting in the bus terminal is a non issue.

Analysis

Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the “cause of action . . . has no merit” (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*r, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show

facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, *supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, *supra* at 562). Opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

In this case, the Greyhound defendants argue that the passengers were explicitly told by the driver that they were to remain on the bus. The plaintiff testified that after the bus driver pulled over, he announced that there was a technical problem with the bus. He never made an announcement for passengers to exit the bus. After the bus driver had exited the bus and the passengers were still on the bus, the passengers decided to walk off the bus. Mr. Dynin’s testimony is in congruence with the plaintiff’s testimony. When faced with conflicting testimonial evidence, it is for the jury to decide which of the accounts are credible.

Further, an issue of fact exists as to whether the Greyhound defendants could have reasonably foreseen that passengers would exit the bus when Dynin left the bus.

And, the plaintiff's carelessness in descending without looking and without holding the handrail, is for the jury to weigh on the issue of comparative negligence/fault. Her actions are not a basis to grant the Greyhound defendants summary judgment.

Defendant the Port Authority of New York and New Jersey has established entitlement to summary judgment dismissing the complaint and any cross claims as against Port Authority. As defendant Port Authority points out, plaintiff stated that the her fall occurred because she thought there was another step, not because there was any defect in the pavement, sidewalk, curb or any other facet of the superstructure of the Port Authority Bus Terminal. Hence, the plaintiff has failed to establish that any defect attributable to Port Authority was the cause of her accident.

And, based on plaintiff's deposition testimony, she fell because the step she anticipated was not there. There is no evidence that the lighting in the bus terminal had anything to do with plaintiff's accident. She was in the vestibule of the bus when she claims that she fell. The quality of the lighting in the bus terminal is a feigned issue.

Further, the court agrees with the Port Authority that there is not one shred of evidence to support the fact that a "step" which plaintiff claims she missed was the property of the Port Authority. There is no evidence whatsoever that the Port Authority ever provided, stored or maintained such an item. Hence, plaintiff's argument that the phantom step somehow belongs to the Port Authority is without merit.

Conclusion

Based on the foregoing, it is hereby

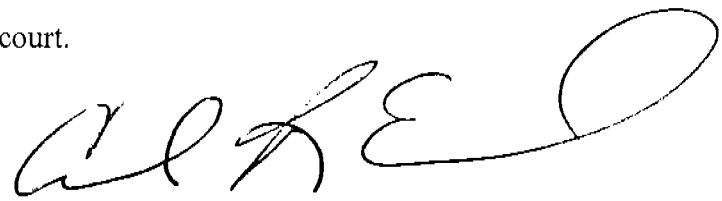
ORDERED that the motion of defendants Greyhound Lines, Inc. and "John Doe" employee bus driver (identified as Mikhail Dynin) for an order, pursuant to CPLR 3212, dismissing the complaint of plaintiff Ruth Blackmon and all cross claims of co-defendant The Port Authority of New York and New Jersey, as against the Greyhound defendants is denied. It is further

ORDERED that the cross motion of defendant The Port Authority of New York and New Jersey for an order pursuant to 3212 dismissing the plaintiff's complaint and all cross claims against Port Authority, is granted. And the Clerk of the Court is directed to enter judgment dismissing the complaint as against defendant The Port Authority of New York and New Jersey and any cross claims as against said defendant. It is further

ORDERED that counsel for defendant The Port Authority of New York and New Jersey shall serve a copy of this order with notice of entry within twenty days of entry on counsel for all parties.

This constitutes the decision and order of this court.

Dated: September 10, 2007



Carol Robinson Edmead, J.S.C.

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