

Sabella v City of New York

2007 NY Slip Op 33261(U)

October 10, 2007

Supreme Court, Richmond County

Docket Number: 0011874/2002

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3**

**Index No.: 11874/2002
Motion No.: 4 & 5**

LISA SABELLA,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY and LUIS GONZALEZ and “JOHN DOE”
GONZALEZ,**

Defendants

NEW YORK CITY TRANSIT AUTHORITY,

Third-Party Plaintiff

against

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UNITED PARCEL SERVICE,

Third-Party Defendant

NEW YORK CITY TRANSIT AUTHORITY,

Second Third-Party Plaintiff

against

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UNITED PARCEL SERVICE,

Second Third-Party Defendant

The following items were considered in the review of this motion for summary judgment.

In motion number 4, the third-party and second third-party defendant, United Parcel Service, moves this court for an order pursuant to CPLR § 3212 granting summary judgment and dismissing

the New York City Transit Authority's Third-party and Second Third-Party complaint as a matter of law. The Transit Authority opposes this motion. In motion number 5, the New York City Transit Authority moves this court for an order pursuant to CPLR § 3211(a)(7) as well as § 3212 dismissing this action against the Transit Authority because the plaintiff failed to state a cause of action against the Transit Authority.

This action arises from an incident that occurred on April 23, 2001 when the plaintiff, Lisa Sabella alleges to have sustained personal injuries as she fell from the front steps of New York City Transit Authority's Bus Number 6273 while she attempted to descend the bus. Specifically, the complaint alleges that the Transit Authority was negligent in failing to lower or kneel the front exit door stairway of the bus. Amplifying the complaint, the Bill of Particulars alleges that the Transit Authority "permitted and allowed plaintiff to exit in an unsafe manner."

After the action was commenced, the Transit Authority impleaded United Parcel Service alleging that a UPS delivery truck was parked at the curb in the bus stop area, thereby forcing the bus operator, defendant Luis Gonzalez, to discharge the plaintiff on the grassy area of the sidewalk.

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990]). The court's role upon a motion for summary judgment is one of issue finding rather than issue determination. (*McKinney v. Setteducatti*, 183 AD2d 879 [2d Dept 1992]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable (*American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994]).

Here, there is a triable issue of fact with respect to the transit authority's duty and customary practice in kneeling their buses. Specifically, defendant bus operator Luis Gonzalez testified at his deposition that a bus operator kneels a bus "when you are far away from the curb or when you are double parked, if somebody is parked in the bus stop, the customer asks or requests and it is safe to do so." In reviewing the reports generated by the Transit Authority in response to this accident, Luis Gonzalez stated that the "bus was parallel and 3 inches away from right curb" at the time of the incident. The report of the supervisor (pass number 269180) stated that "bus 6273 at R/S/ curb passed bus stop 6" from curb + parallel." As there is a question of fact as to the distance from the curb, whether it was 3 inches or 6 inches, summary judgment is not appropriate and the Transit Authority's motion for summary judgment is denied.

Third-party defendant, United Parcel Service, argues that 1) it is not illegal for a UPS delivery vehicle to double park in the city or state of New York, while in the course of making a delivery; and, 2) the positioning of the UPS vehicle, whether or not it was parked at the bus stop, was not the proximate cause of the accident.

The defendant UPS was deposed through its driver, Anthony Mazzola, who testified that he had occasion to park at bus stops while performing his deliveries, however, the UPS truck was shorter than a NYCTA bus, and did not occupy the entire length of the bus stop. UPS, however, asserts the argument that as a courier engaged in the business of loading and unloading merchandise, they are lawfully entitled to double-park or let their delivery vehicle "stand" for their delivery purposes in the City of New York. Specifically, Title 34, Section 4.08(a)(4) of the New York City Rules and Regulations states "when parking is prohibited by signs or rules, no person shall stop a vehicle attended or unattended except temporarily for the purposes of and while expeditiously receiving or discharging passengers or loading or unloading property to or from the curb." The Appellate Division, Second Department has held that the temporary blocking of a sidewalk for the purpose of making a truck delivery is neither illegal, nor a nuisance, nor negligence. (*Labriola v. Langone* 34 AD2d 809 [2d Dept 1970]).

Moreover, the plaintiff in this action testified that the cause of her fall was due to the Transit Authority Bus Driver's failure to kneel the bus and lower the steps as she was exiting the bus. While the position of the UPS vehicle within the designated bus stop may have furnished the condition of the occurrence, it was not the proximate cause of the plaintiff's accident. Although parked in a designated bus stop, the UPS vehicle was temporarily there making a delivery and was permitted to do so. Additionally, the courts have held that doing so does not constitute negligence. Accordingly, the third party defendant is entitled to summary judgment as a matter of law.

Accordingly, it is hereby:

ORDERED, that the motion of third-party and second third-party defendant, United Parcel Service, for summary judgment (motion number 4) is granted and the third-party complaints are dismissed; and it is further

ORDERED, that the motion of defendant, New York City Transit Authority, for summary judgment (motion number 5) is denied; and it is further

ORDERED, that all parties return to DCM 3 at 9:30AM on **November 1, 2007** for a pre-trial conference.

ENTER,

DATED: October 10, 2007

Joseph J. Maltese
Justice of the Supreme Court