

Schick v Metropolitan Suburban Bus Auth.

2007 NY Slip Op 33610(U)

October 30, 2007

Supreme Court, Nassau County

Docket Number: 2125-06/

Judge: Ute W. Lally

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

mg,md

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 8
NASSAU COUNTY

JOHN SCHICK,

Plaintiff(s),

MOTION DATE:8/15/07

INDEX NO.:2125/06

-against-

SEQ. NO.1,2

CAL. NO. 2007H1747

METROPOLITAN SUBURBAN BUS AUTHORITY, MTA,
LONG ISLAND BUS and CHARLES KIM,

Defendant(s)

The following papers read on the motions for summary judgment:

Notice of Motion/ Order to Show Cause.....	1-4
Notice of Cross Motion.....	5-8
Answering Affidavits.....	9,10
Reply.....	11,12,13,14

Upon the foregoing papers, it is ordered that the motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor on the issue of liability only and directing an assessment of damages trial is granted, and cross motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing plaintiff's complaint is denied.

This is an action to recover money damages for personal injuries allegedly sustained by plaintiff when he was a passenger in a para transit bus owned by defendants Metropolitan Suburban Bus Authority, MTA, Long Island Bus (hereinafter "MTA") and driven by defendant Kim. On September 20, 2005 at approximately 8:30 p.m. the plaintiff was ejected from his wheelchair when the bus made a

sudden stop while operating in the northbound lane of Route 107 in Brookville, New York.

Plaintiff's attorney-in fact Margaret O'Kane commenced this action on his behalf. The defendants contend that the complaint should be dismissed on the basis of Ms. O'Kane's lack of legal authority to initiate this action on behalf of the plaintiff.

On October 26, 2000 the plaintiff executed a statutory short form power of attorney in accordance with the provisions set forth in New York General Obligations Law §5-1501. In this form the plaintiff gave Ms. O'Kane the authority to act on his behalf with respect to claims and litigation. Plaintiff's attorney stated in the reply affirmation that a copy of this power of attorney was annexed to the notice of claim which was served upon the defendants.

The language contained in a statutory short form power of attorney conferring general authority with respect to "claims and litigation" is to be construed as authorizing the attorney-in-fact to assert and to prosecute any cause of action or claim which the principal may have against any individual or corporation (NYGOL §5-1502H; see also Zaubler v Picone, 100 AD2d 620).

Therefore, Margaret O'Kane, as plaintiff's attorney-in-fact, possessed a legal authority to commence this action of behalf of the plaintiff.

Plaintiff claims he is entitled to summary judgment in his favor on the issue of liability as the defendants were negligent in the sudden stopping of the bus, and in improperly securing his shoulder strap.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material and triable issues of fact (JMD Holding corp. v congress Financial Corp., 4 NY3d 320, 373; see also Zuckerman v City of New York, 49 AD2d 557). In order to establish a *prima facie* case of

negligence against a common carrier for injuries sustained by a passenger when the vehicle comes to a stop, the plaintiff must establish by more than a mere characterization that the stop was unusual and violent (Urquhart v New York City Transit Authority, 85 AD2d 828; see also Golub v New York City Transit Authority, 40 AD3d 581).

The plaintiff submitted an affidavit stating that the bus made a violent and sudden stop without warning. He testified at an examination before trial that the bus driver jammed on his brakes. He further stated in his affidavit that the force of the stop propelled him forward out of his wheelchair despite the fact that he was wearing a lap seatbelt. At his EBT the plaintiff said that when he was ejected from his wheelchair he landed on his left arm, which caused it to fracture.

Based upon plaintiff's description of the stop and the resulting injury, this court finds that he has demonstrated that the stop was unusual and violent (see Urquhart v New York City Transit Authority, supra).

The plaintiff contends that his injuries were exacerbated by defendant Kim's failure to properly fasten plaintiff's shoulder strap. Defendants claim that there is no legal requirement that a patron's shoulder strap be securely fastened. The defendants allege that Kim owed no duty to the plaintiff to properly secure his shoulder strap.

In order to prove a *prima facie* case of negligence the plaintiff must establish the existence of a duty owed to the plaintiff by the defendant (Gordon v Muchnick, 180 AD2d 715). Initially, while there may be no duty owed to plaintiff, a defendant may voluntarily assume a duty (Gordon v Muchnick, supra; see also Wolf v City of New York, 39 NY2d 568). "Where a person voluntarily assumes the performance of a duty, he is required to perform it carefully, not omitting to do what an ordinary prudent person would do in accomplishing the task" (Wolf v City of New York, supra, 573; see also Paryi v City of Kingston, 41 NY2d 553).

At the examination before trial of Tracy Aquan, an employee of MTA, she testified that every driver of a para transit bus is given instructions on how to properly secure a wheelchair and fasten a passenger's safety straps. She further testified that it is the bus operator's responsibility to fasten the passenger's shoulder strap.

Plaintiff stated in an affidavit that he was a frequent passenger of MTA's para transit bus service. He further stated that the bus driver always fastened his shoulder strap as it was impossible for him to secure his own shoulder strap to the floor. He indicated that as a double above the knee amputee it is critical that his shoulder strap be properly secured as the lap belt may not sufficiently restrain him. Plaintiff stated that on the night of the accident at issue his shoulder strap was not properly attached by Kim and, therefore, his torso was not restrained when the bus suddenly stopped.

Accordingly, this court finds that Kim voluntarily assumed the duty of fastening the plaintiff's shoulder strap, and subsequently breached that duty by failing to exercise reasonable care in properly fastening the shoulder strap.

Plaintiff has made a *prima facie* showing of an entitlement to judgment as a matter of law, and the burden now shifts to the defendants to proffer evidence in admissible form demonstrating the existence of a material issue of fact requiring a trial (Alvarez v Prospect Hosp., 68 NY2d 320, 324; Friends of Animals, Inc. v. Associated Fur Mfrs., Inc., 46 NY2d 1065).

Defendants contend that the testimony of Tracy Aquan at an examination before trial is sufficient to raise material issues of fact. Ms. Aquan testified that Kim informed her that the plaintiff refused to wear the shoulder strap. She further testified that Kim told her he was forced to suddenly stop the bus when the car in front of him stopped without warning. Plaintiff claims that these statements amount to inadmissible hearsay.

"Hearsay is an out-of-court statement offered to prove the

