

Kusznier v New York City Tr. Auth.

2007 NY Slip Op 33671(U)

November 5, 2007

Supreme Court, Richmond County

Docket Number: 0011305/2001

Judge: Joseph J. Maltese

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CECYLIA KUSZNIER,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**THE NEW YORK CITY TRANSIT AUTHORITY,
 WALTER ROBINSON, FITZROY V. MATTHIE
 AND MAYRA L. LAUREANO**

Defendants

The following items were considered in the review of this motion to dismiss

<u>Papers</u>	<u>Numbered</u>
Notice of Petition and Affidavits Annexed	1
Affirmation in Opposition	2
Answering Affidavits	3
Replying Papers	4
Exhibits	Attached to Papers
Memorandum of Law	5

Upon the foregoing cited papers, the Decision and Order on this Summary Judgment Motion is as follows:

The defendant moves for an order pursuant to CPLR §3211 and §3212 for dismissal of the complaint and any cross claims and counter claims against the defendant, New York City Transit Authority (“Authority”), and summary judgment claiming there are no triable issues of fact and that the Authority was not the proximate cause of plaintiff’s accident or injuries. The plaintiff opposes this motion claiming that the Authority has not offered any admissible evidence in support of its motion for summary judgment.

Facts

This is a personal injury action involving the events that occurred on the morning January 22, 2000 at the intersection of Fingerboard Road and Narrows Road in Staten Island. Plaintiff stepped off the bus on Fingerboard Road near the intersection of Narrows Road. She stepped off at the normal bus stop at that location and walked onto the sidewalk. Plaintiff claims that after seeing the green light, she took about fifteen steps to cross Narrows Road when she was struck by a vehicle. The New York City

Transit Authority bus was operated by Walter Robinson and the car was owned by Fitzroy Matthie and operated by Mayra Laureano.

Discussion

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact.”¹ 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.”² 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.³

In support of their motion for summary judgment, the Authority offers the police accident report and internal reports prepared by the Authority’s employees. Plaintiff argues that all the documents are hearsay and thus, cannot be the basis for granting summary judgment.

Plaintiff is correct that the police report does not constitute competent evidence: “A police accident report made by a police officer who was not an eyewitness containing hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident in question.”⁴ However, reports prepared by the Authority’s employees may be admitted pursuant to the business record exception in CPLR § 4518.⁵

¹CPLR §3212[b].

²*Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [App Div 2nd Dept 1990].

³*American Home Assur. Co., v. Amerford Intl. Corp.*, 200 AD2d 472 [App Div 1st Dept 1994].

⁴*Figueroa v Luna*, 721 NYS2d 635 [1st Dept 2001], citing *Kajoshaj v Greenspan*, 450 NYS2d 311 [App Div 1st Dept 1982], *Murray v. Donlan*, 433 NYS2d 184 [App Div 2d Dept 1980].

⁵*See, Sing by Singh v NY City Transit Auth.*, 533 NYS2d 603, 604 [App Div 2nd Dept 1988], citing CPLR 4518; *Bromberg v City of NY*, 270 NYS2d 425 [App Div 2nd Dept 1966].

Even assuming in plaintiff's favor that the internal documents prepared by the Authority's employees are inadmissible, the court is still left to evaluate two items: Mayra Laureano's affidavit and the plaintiff's deposition. First, defendant Authority objects to the introduction of Laureano's affidavit as she is a defendant in this litigation and has never appeared in this action. She has also never appeared for a deposition by the Authority and has defaulted in this action, as well as another action brought by plaintiff. Since no reasonable excuse has been given for defendant Laureano's default in this action, plaintiff cannot now use her affidavit in an attempt to create an issue of fact.⁶ Therefore, the court is left to evaluate solely the plaintiff's deposition.

The only act of negligence on the part of the Authority asserted by plaintiff is that the bus driver may have stopped the bus in the intersection. Upon review of the facts, it cannot be concluded that such conduct proximately caused the accident. Plaintiff, in her deposition, admits that she was discharged at the regular bus stop. No evidence exists that the bus was discharged in an unsafe or unauthorized location. Plaintiff further testified that the bus had been proceeding in the same direction as plaintiff, that she stepped onto the sidewalk, walked about 10 to 15 steps to the crosswalk and decided to cross the street after she received the green light. While she was crossing the street, she was hit by a car. There is no evidence that the Authority was negligent. Rather, like the facts in *Brooks v. Manhattan and Bronx Surface Transit Operating Authority*,⁷ plaintiff chose her own path and was struck by another vehicle. These were intervening acts which preclude a finding that the action of the bus driver was a proximate cause of the accident.⁸ Accordingly, we hold that there was neither negligence by the Authority, nor was the conduct alleged the proximate cause by the Authority, and grant defendant's motion for dismissal of the complaint and any cross claims and counter claims against the Authority.

⁶*See, Recht v Teuscher*, 575 NYS2d 513, 514 [App Div 2nd Dept 1991].

⁷462 NYS2d 217 [App Div 2nd Dept 1983].

⁸*Id.* See also, *Rodriguez v. Manhattan & Bronx Surface Transit Operating Auth.*, 498 NYS2d 826 [App Div 1st Dept 1986].

Accordingly, it is hereby:

ORDERED that the defendant's motion pursuant CPLR §3211 and §3212 for dismissal of the complaint along with any cross claims and counter claims against The New York City Transit Authority and summary judgment in favor of said defendant is granted.

ENTER,

DATED: November 5, 2007

Joseph J. Maltese
Justice of the Supreme Court