

Sosin v New York City Tr. Auth.

2008 NY Slip Op 30362(U)

January 29, 2008

Supreme Court, New York County

Docket Number: 0104141/2005

Judge: Donna Marie Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 21

SOSIN, DIANA

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY, et al.
Defendant.

INDEX NO. 104141/05

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL NO. _____

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

PAPERS NUMBERED

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

1

Answering Affidavits- Exhibits _____

2

Replying Affidavits _____

3

CROSS-MOTION: YES NO

FILED
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Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM

DECISION.

Dated: 1/29/08

Donna M. Mills
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X
DIANA SOSIN,

Plaintiff,

-against-

Index No. 104141/05

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY,
and THE CITY OF NEW YORK,

Defendant.

-----X

DONNA MILLS, J.:

The defendant New York City Transit Authority (NYCTA) moves, pursuant to Insurance Law 5102 (d) and CPLR 3211 and 3212, for an order dismissing the complaint.

This is an action to recover damages for personal injuries suffered by the plaintiff Diana Sosin (Sosin) while seated on a NYCTA bus, when a newly boarded passenger in a motorized wheelchair, after freeing himself from a pole, crashed into Sosin. It is alleged that the bus driver failed to assist the wheelchair passenger, and failed to secure the wheelchair.

In support of its motion to dismiss, the NYCTA argues that it is not responsible for the acts of the passenger in the wheelchair, and that Sosin has not suffered a serious injury as defined by Insurance Law § 5102 (d).

In opposition, Sosin argues that, by NYCTA rule, the bus driver had a duty to assist the wheelchair passenger and secure the wheelchair, and that Article 51 of the Insurance Law is not applicable when the plaintiff is injured by an instrumentality other than the vehicle.

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 eliminate any material issue of fact from the case (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 [2005]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]). It is uncommon to grant summary judgment in a negligence action, even where the facts are uncontradicted (Ugarriza v Schmieder, 46 NY2d 471 [1979]).

To establish a prima facie case against the NYCTA, the plaintiff Sosin must establish (1) the existence of a duty on its part to the plaintiff, (2) a breach of that duty, (3) that such breach was a substantial cause of the resulting injury (Merino v New York City Tr. Auth., 218 AD2d 451 [1st dept] affd 89 NY2d 824 [1996]). However, as the movant, the NYCTA has the initial burden of establishing entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact (Ayotte v Gervasio, 81 NY2d 1062 [1993]).

In the case at bar, the NYCTA fails to establish as a matter of law that it did not operate the bus with negligent disregard for the safety of the plaintiff Sosin. Contrary to the NYCTA's assertion, it owed a duty to the plaintiff Sosin to provide a reasonably safe bus ride. Triable issues of fact are presented including (1) whether there was a violation of the NYCTA regulation requiring a bus driver to secure a wheelchair, (2) whether the violation was a proximate cause of accident, (3)

whether the bus driver exercised reasonable care to prevent the motorized wheelchair from crashing into a seated 80-year-old woman, (4) whether the failure to secure the wheelchair presented a foreseeable risk of injury to a seated passenger, and (5) whether the bus driver breached a common-law duty by failing to secure the wheelchair before moving the bus.

Questions concerning what is foreseeable are generally for the fact finder to resolve (Deridian v Felix Constr. Corp., 51 NY2d 308 [1980]). An intervening act will be deemed a superceding cause and will serve to relieve the defendant of liability when the act is of such an extraordinary nature or so attenuates the defendants's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant (Kush v City of Buffalo, 59 NY2d 26 [1983]). This case is not one where the question of proximate cause may be decided as a matter of law, as the actions of the passenger in the motorized wheelchair were not intervening acts which operated upon but did not flow from the original negligence (Pommells v Perez, 4 NY3d 566 [2005]). On the contrary, there are issues of fact as to whether it was foreseeable that unsecured motorized wheelchairs would crash into seated elderly passengers, and, if so whether the NYCTA took reasonable precautionary measures to prevent injury (Scurti v City of New York, 40 NY2d 433 [1976]).

In addition, assuming that the bus driver, did not comply with the NYCTA regulation requiring that he secure the wheelchair, a violation of a rule of an administrative agency or ordinance of a local government is some evidence of negligence (Long v Forest-Fehlhaber, 55 NY2d 154 rearg denied 56 NY2d 805 [1982]; Permuy v City of New York, 156 AD2d 174 [1st Dept 1989]).

Moreover, the NYCTA bus driver Javier Lugo, exhibited extremely poor judgment at his examination by declaring that, since he knew what the questions were going to be, he intended to answer all questions that he did not recall; and then proceeding to so do (Lugo examination, at 24).

It is unfortunate that Mr. Lugo's professed ability to divine the future, was not working on the day of the accident. In any event, it is impossible to grant summary judgment to a party when their witness's stated purpose is to answer questions dishonestly.

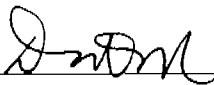
Finally, turning to Insurance Law Article 51, the "no-fault law" limits the right to recover in common-law negligence actions only, inter alia, if the injury is incurred through the "use or operation" of a covered vehicle (Insurance Law § 5103 [a] [1]). Contrary to the NYCTA's assertion, where a person's injuries are produced by an instrumentality other than the vehicle itself, such as unloading a truck, no-fault first-party benefits are not available (Walton v Lumbermens Mut. Cas. Co., 88 NY2d 211 [1996]). More specifically, personal injuries sustained by passengers while riding in a bus, that do not arise out of the use or operation of the bus, are also not covered by the no fault law (Matter of Manhattan & Bronx Surface Tr. Operating Auth. [Gholson], 98 Misc 2d 657 [Sup Ct, Kings County], affd 71 AD2d 1004 [2d Dept 1979]; Tickner v Rochester-Genesee Regional Transp. Auth., 87 Misc 2d 703 [Sup Ct, Monroe County 1976]). In this case, the plaintiff Sosin's injuries were produced by the motorized wheelchair, an instrumentality other than the bus itself. Therefore, the no fault-law is not a defense to this action.

Accordingly, it is

ORDERED that the motion is denied.

Dated: 1/29/08

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

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