

Crane v New York City Tr. Auth.

2008 NY Slip Op 30944(U)

March 4, 2008

Supreme Court, New York County

Docket Number: 0117565/2004

Judge: Donna Marie Mills

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

PRESENT : DONNA M. MILLS

PART 21

Justice

CRANE, SANDRA

INDEX No. 117565/04

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 002

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

MOTION CAL No. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits 2

Replying Affidavits 3

CROSS-MOTION: _____ YES NO

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: 3-4-08

Check one: _____ FINAL DISPOSITION

FILED *[Signature]*
J.S.C.
MAR 4 2008
NON-FINAL DISPOSITION
NEW YORK
COUNTY CLERK'S OFFICE

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

-----X
SANDRA CRANE,

Plaintiff,

-against-

Index No.

NEW YORK CITY TRANSIT AUTHORITY,
MANHATTAN AND BRONX SURFACE TRANSIT
OPERATING AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY and "JOHN DOE"
bus operator last name Dorsey,

117565/04

Defendants.
-----X

FILED
MAR 14 2008
NEW YORK
COUNTY CLERK'S OFFICE

DONNA MILLS, J.

Plaintiff seeks summary judgment on the issue of liability in this personal injury action.

In her complaint, plaintiff asserts that on December 19, 2003, while riding on a Q 32 bus, she suffered serious injuries as a result of the bus making a sudden and unusual stop near 34th Street and Fifth Avenue in New York City. She moves for summary judgment on liability, claiming that defendants cannot raise an issue of fact as to their responsibility for the accident. She also seeks an order setting the case down for an assessment of damages.

Plaintiff submits part of her deposition testimony in which she describes the bus' sudden stop and her accident. She also submits her affidavit, in which she states that as a result of the stop she lost contact with the pole she was grasping, fell into another pole in front of her and fell into the stairwell of the bus. Plaintiff claims that her deposition testimony is corroborated by the deposition testimony of a Kathleen McGrath, who was a passenger on the bus at the time of the accident. Part of McGrath's testimony is submitted. McGrath describes the stop and plaintiff's subsequent collapse.

Plaintiff states that Bus Operator Dorsey (Dorsey), who is an employee of defendants, is responsible for making the bus stop abruptly. Defendants' defense for her conduct is that prior to the accident, another passenger was pushing the back doors of the bus, which caused the interlocking brakes to operate, resulting in an abrupt stop. Plaintiff states that defendants were ordered by this court to produce Dorsey for a deposition but that Dorsey did not appear. A copy of the Order, dated August 9, 2007, is submitted.

Plaintiff asserts that defendants' failure to produce Dorsey for deposition precludes her testimony from being used by defendants. Plaintiff claims that such evidence would include any statements Dorsey made on accident reports. According to plaintiff, since Dorsey 's testimony cannot be used to the advantage of defendants, defendants have no defense to counter the assertions of plaintiff and Mc Grath.

~~In opposition, defendants state that several attempts were made to locate Dorsey at her~~
home, but she was unable to attend a deposition because she was scheduled for surgery. Ultimately, she left defendants' employ. Defendants contend that they have another witness whom they have attempted to produce for a deposition. He is an expert witness, Steven Lu, who is a Superintendent of Technical Services, Department of Buses. He allegedly has the qualifications to testify as to the function and operation of the rear door interlock mechanism, including the speed at which the interlock would be activated. Defendants argue that his deposition was Court-ordered and is crucial for their defense. They respectfully request an additional 90 days in which to produce him for a deposition.

In addition to the above, defendants submit part of McGrath's testimony, in which she testified that there was a man standing in the rear stairway of the bus, pushing on the rear doors.

She further testified that immediately after the accident, Dorsey informed the passengers that when someone attempts to open the rear doors when a bus is moving, the bus stops automatically.

Defendants argue that plaintiff's testimony is inconsistent with her affidavit as to the speed of the bus when it came to a stop. They claim that she could not estimate the speed of the bus at the deposition, but subsequently she states in her affidavit that the bus was traveling in excess of two miles per hour. Plaintiff's papers indicate that, based on the bus manual from the Department of Buses, the interlocking brakes will only engage when the bus is moving less than two miles an hour. Defendants contend that the speed of the bus at the time of the accident is an issue of fact that precludes summary judgment.

In reply, plaintiff again argues that the defendants' failure to produce Dorsey for a deposition excludes all of her testimony from this case. Plaintiff contends that Dorsey's hearsay statement conveyed by McGrath in her deposition is excluded. Plaintiff states that in opposing this motion, defendants failed to submit affidavits from anyone with knowledge and information about the facts surrounding the accident.

Plaintiff argues that she has no obligation to take Steven Lu's deposition. She states that there is no issue of the interlocking brakes in this case as all testimony regarding the brakes comes from Dorsey's precluded statements whether directly or indirectly; that defendants cannot argue in an attorney's affirmation what probative value the expert would have; that defendants could have drafted an affidavit and had Lu sign it in opposition to the motion; and that no expert exchange has been made for him.

“[T]he 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 issues of fact.” Ayotte v Gervasio, 81 NY2d 1062, 1063 (1993), quoting Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986); see also Winegrad v New York University Medical Center, 64 NY2d 851 (1985); Kesselman v Lever House Restaurant, 29 AD2d 302, 303 (1st Dept 2006). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion’s opponent to offer evidentiary facts sufficient to raise a triable issue of fact. See Alvarez v Prospect Hotel, 68NY2d 320, supra; Kesselman, supra.

In this case, plaintiff has presented evidence showing that the bus at bar stopped suddenly, causing her to fall and sustain injuries. She has met her summary judgment standard, placing the burden on defendants to submit competent, admissible evidence establishing an issue of fact. Defendants have failed to submit said evidence. It is not enough for defendants’ counsel to say that Lu, if deposed, would explain the function of the brake mechanism. This is hearsay. It would have been more appropriate to submit a sworn affidavit from Lu in opposition to the motion.

Based on the evidence submitted, defendants have not met their burden to preclude summary judgment. Therefore, plaintiff is entitled to summary judgment on the issue of liability.

Accordingly, it is

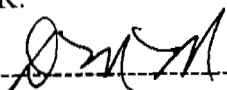
ORDERED that plaintiff’s motion for partial summary judgment is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants; and it is further

ORDERED that an assessment of damages against defendants is directed; and it is further

ORDERED that, within 60 days from the date hereof, plaintiff shall serve a copy of this order with notice of entry, a note of issue and a statement of readiness upon the Clerk of the Trial Support Office (Room 158), and shall pay the proper fees, if any, and said Clerk shall thereupon place this action on the appropriate trial calendar for the assessment hereinabove directed.

DATED:

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

FILED
MAR 14 2008
NEW YORK
COUNTY CLERK'S OFFICE