

Gomez v Vanessa Express Co., Inc.
2009 NY Slip Op 30916(U)
April 10, 2009
Supreme Court, New York County
Docket Number: 100775/07
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Marilyn Shafer
Justice

PART 8

Andrea Gomez

INDEX NO. 700775/07

- v -

MOTION DATE _____

Vanessa Express Co et al

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accord

with the annexed ~~affidavits~~

memorandums.

FILED

APR 22 2009

COUNTY CLERK'S OFFICE
NEW YORK

MARILYN SHAFER

Dated: 4/10/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 8

-----x
ANDREA GOMEZ,

Plaintiff,

- against -

VANESSA EXPRESS CO, INC. and
"JOHN DOE", (name being fictitious),

Defendants.
-----x

Index No. 100775/07

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HON. MARILYN SHAFER, J.:

Defendants, Vanessa Express Co., Inc. ("Vanessa") moves
pursuant to CPLR 3212, for summary judgment dismissing the
Complaint in this personal injury action.

Background

Plaintiff, Andrea Gomez, commenced this action seeking to
recover damages for personal injuries she allegedly sustained on
November 1, 2006, when she fell while riding on a mini bus owned
by Vanessa and operated by defendant "John Doe" (name being
fictitious), a driver for Vanessa whose identity is unknown to
plaintiff. Plaintiff claims that she fell while returning to her
seat after going to the front of the moving mini bus to retrieve
change from the \$10 she had paid toward the \$1 bus fare.
Plaintiff states that her foot slipped as she attempted to pass a
woman seated in the aisle seat next to her.

The Complaint essentially alleges the driver was negligent
in operating the bus while making change and while plaintiff was
standing. The Bill of Particulars contains similar allegations,
and lists the injuries allegedly sustained by plaintiff as a

result of the fall, including, *inter alia*, a left lateral tibial plateau fracture.

Vanessa answered, generally denying the allegations in the Complaint and asserting numerous affirmative defenses. Vanessa now seeks summary judgment dismissing the Complaint.

Discussion

It is well established that a party seeking summary judgment must make a prima facie showing of its cause of action or defense sufficiently to warrant the court as a matter of law directing judgment in its favor, and must do so by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see* CPLR 3212[b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, 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 (*Zuckerman v City of New York, supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, plaintiff alleges a negligence claim against defendants. Negligence consists of a duty of care owed to another, and the breach of that duty proximately causing injury (*see Pulka v Edelman*, 40 NY2d 781, 782 [1976], citing *Palsgraf v*

Long Is. R.R. Co., 249 NY 339 [1928]). Furthermore, "a common carrier is subject to the same duty of care as any other potential tortfeasor-reasonable care under all of the circumstances of the particular case" (*Bethel v New York City Tr. Auth.*, 92 NY2d 348, 356 [1998]).

Vanessa contends that it is entitled to summary judgment dismissing the Complaint since plaintiff cannot establish that her injuries resulted from the breach of a duty owed to her by defendants. Vanessa further contends that even if plaintiff can establish that defendants' breached a duty of care owed to her, the intervening act of the passenger seated next to her, and not defendants' acts, caused her injuries.

To support its position, Vanessa relies primarily on the transcripts of the examination before trial ("EBT") of the parties. At an EBT held on September 28, 2007, plaintiff testified, in part, that she boarded defendants' mini bus to travel to work; that she gave the driver \$10 because she did not have change for the \$1 fare; and that the driver instructed her to sit down (Transcript of Plaintiff's EBT, Not of Mot, Exh E, pp. 16-17). Plaintiff also stated that she sat in the third row behind the driver, in a seat next to a window, and that a lady was seated in the aisle seat next to her (*id.*, p. 38). Plaintiff further testified:

Within a minute [the driver] told me, here's the change for the ten dollars. I stood up, I picked it up, since the bus was moving next to me there was this lady I told her excuse

me, she did not want to stand up since the bus was moving, I wanted to sit, so that's when I slipped, my foot turned around

(*id.*, p. 17). Plaintiff further stated:

When he said change for ten dollars, the driver, since I saw nobody, you know, I stood up, because that's all I had He passed on to this gentleman, somebody grabbed it, so then I had to stand up since it was mine so then I came out, I picked it up and I return, went to the lady, said excuse me again. She did not stand up. I am fat so you know So when I went to enter there again, that's when my foot went, slipped

(*id.*, p. 39).

In addition, at an EBT held on November 26, 2007, Ever Escobar testified, in part, that he and his wife own Vanessa; that Vanessa usually maintains records of incidents involving its buses; and that there is no evidence in Vanessa's records of the alleged incident (Transcript of Escobar EBT, Not of Mot, Exh G, pp. 33-34). Ever Escobar also testified that he has instructional meetings with drivers every three months (*id.*, p. 27), and that during those meetings, he specifically instructs the drivers not to operate the buses while making change or while passengers are standing (*id.*, pp. 26, 28, 36).

On review of the submissions, the Court concludes that Vanessa fails to establish entitlement to judgment in its favor as a matter of law. The submissions raise triable issues of fact as whether defendants breached the duty of reasonable care owed to plaintiff by operating the bus while making change and while

plaintiff was standing. Material issues of fact also exist as to whether the alleged conduct of the passenger seated next to plaintiff was an unforeseeable, superceding act which broke the chain of causation regarding plaintiff's injuries (see *Marenghi v New York City Tr. Auth.*, 151 AD2d 272, 273-274 [1st Dept 1989]). Thus, the motion for summary judgment must be denied.

Accordingly, it is

ORDERED, that the motion for summary judgment is denied.

Dated:

4/12/09

ENTER: **MARILYN SHAFER**
J. S. C.

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