

Crum v Metropolitan Transp. Auth.

2009 NY Slip Op 30994(U)

April 29, 2009

Supreme Court, Nassau County

Docket Number: 013980/08

Judge: Daniel Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----X

TRIAL TERM PART: 47

HADIYAH CRUM,

Plaintiff,

-against-

INDEX NO.: 013980/08

**MOTION DATE: 12-16-08
SUBMIT DATE: 4-28-09
SEQ. NUMBER - 001**

**METROPOLITAN TRANSPORTATION AUTHORITY
MTA LONG ISLAND BUS and 'JOHN DOE' or
'JANE DOE', a Fictitious Name of the Operator
of Bus #438 Whose True Name is Currently
unknown.,**

**MOTION DATE: 2-10-09
SUBMIT DATE: 4-28-09
SEQ. NUMBER - 002**

Defendants.

-----X

The following papers have been read on this motion:

- Notice of Motion, dated 11-19-08.....1**
- Notice of Cross Motion, dated 1-20-09.....2**
- Affirmation in Opposition and in Reply, 4-2-09.....3**
- Defendant's Reply Affirmation, dated 4-27-09.....4**

Plaintiff's motion for summary judgment is denied and defendant's cross motion for summary judgment is granted CPLR §3212. The action is dismissed.

Plaintiff, a passenger on defendant's public bus, alleges in her complaint that she was injured when she "was caused to be forcibly struck while lawfully a passenger ...". There is no bill of particulars, however, in her affidavit in support of her motion she claims that "the operator of the bus, while driving approximately 25-35 miles per hour, failed to slow down

at the [Atlantic Beach] toll booth, causing the rear of the bus to bounce hard, throwing me from my seat.” She also states that no other motor vehicles were involved. In her testimony at a hearing held pursuant to §1276(4) of the Public Authorities Law, she testified in response to a query “No, I didn’t fall out of my seat”. Plaintiff in reply states that the bus failed to slow down “just prior to the Toll Booth”. Plaintiff’s counsel, in his supporting affirmation, states that the defendant lost control of the motor vehicle and struck a support pole, but since he does not claim to have personal knowledge and does not refer to any evidence in support of this view of the facts, it is of no probative value. It is well settled that an attorney’s affirmation that is not based on personal knowledge or supported by documentary evidence is of no probative value. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 152 (2d Dept. 2006); *Sampson v. Delaney*, 34 AD3d 349 (1st Dept. 2006); *cf Davey v. Dolan*, 46 AD3d 854 (2d Dept. 2007). Here, plaintiff’s attorney does not profess to possess personal knowledge of any facts asserted and has not employed his affirmation as a vehicle to refer to other competent evidence. *Feratovic v. Lun Wah, Inc.*, 284 AD2d 368 (3d Dept. 2001). In her opposition/reply, plaintiff makes no mention of striking the support pole. Moreover, plaintiff never states that the bus made any sudden or change of movement but submits, without explanation, that the failure to slow down caused the rear of the bus to bounce hard in such a way as to cause her to be thrown from her seat. If the contention is failure to stop and absence of contact with any object, there is no connection between the speed and the bouncing of the bus. Plaintiff does not submit any evidence as to the condition of the roadway.

In opposition to the plaintiff's motion and in support of its cross motion, defendant has submitted an affidavit of a person who states that he was the driver of the bus, that there is a gate at the toll booth which required his bus to come to a stop, that there is a toll operator who records the bus information and who then raises the gate. He further states that he came to a complete stop on the date of the accident, that he did not speed through the tolls at 25 - 35 miles per hour, there was no hard bounce, no passenger was thrown from her seat and no report to him that any one was hurt.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept. 1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's

affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton*, 29 AD3d 975 (2d Dept. 2006); *Ciccione v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. See *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006). When an affidavit submitted on a motion for summary judgment contradicts earlier sworn testimony, it is insufficient to create an issue of fact. *Addolorato v. Waldbaum's*, 57 AD3d 592 (2d Dept. 2008). By extension such an affidavit is insufficient to make a *prima facie* showing of entitlement to the requested relief. Cf. *Strange v. Colgate Design Corp.*, 6 AD3d 422 (2d Dept. 2004).

It is now settled law that a common carrier no longer has a duty of extraordinary care to a passenger, but rather is subject to the same duty of reasonable care as any other potential tortfeasor - reasonable care under all of the circumstances of the particular case. *Bethel v. New York City Transit Authority*, 92 NY2d 348, 356 (1998).

It has been held that a question of fact exists upon evidence from eye witnesses that a bus bounced up when it rode over a pot hole at a high rate of speed causing a jolt, a loud boom and lifted passengers up off their seats. *Thompson v. New York Bus Service*, 2 Misc3d 133A (App. Term N.Y. County 2004).

A mere characterization by a plaintiff that the movement of a vehicle was unusually violent is too general and indefinite in the absence of any other supporting evidence to satisfy the requirement that there must be proof of a violent movement by the vehicle which goes beyond the jerking and jolting that is normally associated with bus travel. *Harris v. Manhattan and Bronx Surface Transit Operating Authority*, 138 AD2d 56 (1st Dept. 1988); *see also Rountree v. Manhattan and Bronx Surface Transit Operating Authority*, 261 AD2d 324 (1st Dept. 1999). Where there is objective evidence of a movement or event which is likely to have caused injury, summary judgment should be denied. *Grant v. New York City Transit Authority*, 2009 WL 910737 (1st Dept. 2009).

Plaintiff has failed to establish a *prima facie* case for summary judgment. The bare conclusory statements of plaintiff even allowing for the descriptions contained in her affidavits are insufficient both to satisfy the requisites for a *prima facie* showing of negligence on the part of defendant or to defeat defendant's *prima facie* showing.

The defendant has made a *prima facie* showing of entitlement to summary judgment in its favor by submission of an affidavit from the bus driver giving his version of the events thereby requiring plaintiff to proffer evidence of a triable factual issue. Plaintiff's evidence does not create any triable factual issues.

In order to raise a triable issue sufficient to defeat defendant's motion, a plaintiff must establish that the movement of a bus was extraordinary and violent and of a different class than the jerks and jolts commonly experienced in bus travel. *Jenkins v. Westchester County*, 278 AD2d 370 (2d Dept. 2000).

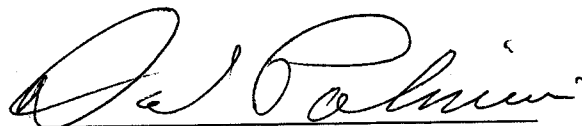
When a plaintiff undisputedly falls from her seat, it must be shown that the movement which caused the fall consisted of a jerk or lurch that was unusual and violent. *Golub v. New York City Transit Authority*, 40 AD3d 581 (2d Dept. 2007); *see also Martin v. New York City Transit Authority*, 48 AD3d 522 (2d Dept. 2008). Moreover, as it has recently been held, there must be objective support to demonstrate that the movement of the bus was unusual or violent and of a different class from usual jerks and jolts. *Rayford v. County of Westchester*, 59 AD3d 508 (2d Dept. 2009). Plaintiff's evidence falls short of establishing any factual issue that the movement of the bus was unusual or unanticipated and thus there are no factual issues to be resolved.

Based on the above, the plaintiff's motion is denied, the defendant's motion is granted and the action is dismissed.

This shall constitute the Decision and Order of this Court.

DATED: April 29, 2009

ENTER



HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED
APR 30 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

TO: Taller & Wizman, P.C.
Attorneys for Plaintiff
118-35 Queens Boulevard, 17th Fl.
Forest Hills, NY 11375

Sciretta & Venterina, LLP
Attorneys for Defendants
77 Tompkins Circle
Staten Island, NY 10301