

Smith v Greyhound Lines, Inc.
2009 NY Slip Op 31502(U)
June 22, 2009
Supreme Court, New York County
Docket Number: 110725/07
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER, JSC

PART 8

Index Number : 110725/2007

SMITH, DAISY

vs

GREYHOUND LINES

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

002 + 3 are consolidated

Upon the foregoing papers, It is ordered that this motion

is decided in accord

with the annexed memorandum.

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

FILED
JUN 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

MARILYN SHAFER
[Signature]

Dated: 6/22/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
DAISY SMITH,

Plaintiff,

-against-

GREYHOUND LINES, INC.,

Defendant.

-----X
MARILYN SHAFER, J.:

Index No. 110725/07
FILED
JUN 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

Motion sequence numbers 002 and 003 are consolidated for disposition. In motion sequence number 002, defendant Greyhound Lines, Inc. (Greyhound) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint. In motion sequence number 003, Greyhound moves, pursuant to CPLR 3108, for an order granting an open commission permitting it to issue a subpoena duces tecum to an out-of-state non-party witness, Bally's Atlantic City (Bally's), for the production of documents and potentially to depose one or more employees of Bally's.

In this personal injury action, plaintiff Daisy Smith (Smith) alleges that on May 4, 2007, she was injured when she was riding to Atlantic City, on a Greyhound bus. According to Smith, while she was in the restroom, the bus, which was traveling at an excessive rate of speed, jolted and jerked and caused her to spin around and hit her knee on the toilet. Smith contends that the bus driver, Thaddeus Hargrove was driving so fast that other passengers called for him to slow down. Smith further contends

that when she was exiting the bus in Atlantic City, Hargrove failed to assist her, and that she fell again, further injuring her knee.

Greyhound moves for summary judgment, contending that Smith has failed to establish a prima facie case of negligence and, therefore, that the complaint must be dismissed. Greyhound cites the testimony of Hargrove stating that, during the trip to Atlantic City, he did not exceed the speed limit. Hargrove testified that when he reached the 98-mile marker on the Garden State Parkway the speed limit was 65 miles per hour (mph) and that he was not exceeding the limit. He further testified that he was aware that in the area of mile 50, the road was bumpy for approximately $\frac{1}{2}$ mile, and that although the speed limit is 65 mph, he slowed down approximately $\frac{1}{4}$ of a mile before the area to approximately 50 to 55 mph, because he knew the road was bumpy. Hargrove testified that no passengers yelled for him to slow down, though at some point two passengers yelled that someone had fallen or gotten hurt.

Greyhound contests Smith's deposition testimony that Hargrove was driving at between 70 and 80 mph, noting that she, herself, does not even drive. Greyhound challenges Smith's testimony that passengers called for Hargrove to slow down, noting that Smith was not able to identify any of the passengers who allegedly called for Hargrove to slow down, not even her

sister, or even indicate whether those passengers were sitting in front of, or behind, her.

Greyhound contends, based upon Hargrove's testimony, that Smith's second fall occurred, not as she was exiting the bus, but after she had exited, and was walking past Hargrove, and that, therefore, Greyhound had no duty of care for her at that point. Furthermore, according to Hargrove, as Smith was exiting, he asked her if she needed his assistance, but she declined his offer, saying that her sister was with her.

In opposition to Greyhound's motion, Smith submits the affidavit of her sister, Dorothy Hamilton, who was traveling with her. According to Hamilton, who does drive, the bus was traveling at more than 70-80 mph during the trip, and she states that both she and other passengers had called out to the bus driver to slow down. Hamilton further states that the bus was swerving back and forth and jolting, causing her and other passengers to be thrown around in their seats.

Hamilton states that when they arrived at Atlantic City, she and her sister were the last passengers to leave the bus and that when she was descending the steps in front of her sister, she asked the bus driver to help Smith, but that he was talking on his cell phone and failed to respond. According to Hamilton, Smith fell while attempting to negotiate the steps, not after she had exited the bus.

Greyhound contends that Davis has failed to make a prima facie case of negligence and, therefore, summary judgment must be granted dismissing the complaint. Citing *Urquhart v New York City Tr. Auth.* (85 NY2d 828, 830 [1995]), Greyhound argues that the plaintiff's proof that the movement of the bus was "unusual and violent" must be more than "mere characterization" of the movement, and must be based on "objective evidence." See also *Banfield v New York City Tr. Auth.* (36 AD3d 732 [2d Dept 2007]). Greyhound also cites *Taylor v Westchester St. Transp. Co.* (276 App Div 874, 874 [2d Dept 1949]), in which the Appellate Division concluded that testimony of the plaintiff that the bus "'lurched forward' or 'snatched forward' without other tangible proof that the bus was propelled forward with unusual or unnecessary force, and without other evidence of acts or of physical facts to warrant such a finding, was insufficient to establish negligence" by the defendant.

However, in none of these cases was the defendant seeking summary judgment before trial. In both *Urquhart* and *Taylor*, the courts were reviewing a verdict after trial, and in *Banfield* the plaintiff was seeking summary judgment in her favor, placing a higher burden of proof on the plaintiff than on one who is opposing summary judgment, as here.

On a motion for summary judgment by defendant, it is not the plaintiff that has the burden of proof of making a prima facie

case. Rather, the defendant, as the proponent of the motion for summary judgment has the burden of making a prima facie showing that it is entitled to judgment as a matter of law, giving sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557 (1980).

Because a motion for summary judgment is a drastic remedy, the motion should not be granted if there are any triable issues of fact. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

In *Harris v Manhattan & Bronx Surface Tr. Operating Auth.* (138 AD2d 56, 61 [1st Dept 1988]), as here, the defendant moved for summary judgment, contending that the plaintiff had failed to make a prima facie case of negligence. The Appellate Division, First Department ruled that defendant's motion for summary judgment should have been denied, stating that "[s]ummary judgment should properly be granted in negligence cases only in rare instances, since ... the very question of negligence is itself a question for jury determination." *Id.* at 57 (internal quotation marks and citation omitted). Reviewing *Taylor* and several other cases involving injuries to bus-riders, the Court noted that "[t]hese cases should not be interpreted to require plaintiff to produce other witnesses to the accident, which would be unnecessary and unreasonable burden in establishing a prima facie case." *Id.* at 61. The Court further stated:

plaintiff here has done more than to merely characterize the stopping of the bus as sudden and unexpected. She stated in her affidavit that the vehicle was traveling at a very high rate of speed when it came to a sudden, unusual and violent stop. She further alleged that a crowd of people standing behind her was thrown against her by the sudden stop. ... The force of the propulsion of plaintiff into the railing ... was apparently great enough to crush plaintiff's ribs.

Id.

Here, Smith testified that before she went to use the rest room, the bus was driving too fast - 70 or 80 miles an hour, and that other passengers were yelling for the bus driver to slow down. Testimony of Daisy Smith, at 107-108. According to Smith, while she was in the restroom

[t]he bus started making a very sudden unusual jerking and jolting back and forth, and I was trying to hold on and it was just jerking back and forth crazily and it spun me around so strong and it spun me around and my right knee hit the commode, which is a metal commode.

Id. at 82. Smith further testified that when she went to the hospital in Atlantic City the physician told her that she had broken her kneecap. *Id.* at 57.

Like the plaintiff in *Harris*, here Smith has done more than merely characterize the operation of the bus as sudden and unexpected. See *Harris v Manhattan & Bronx Surface Tr. Operating Auth.*, 138 AD2d at 61.

Although Greyhound challenges Smith's ability to estimate the speed at which the bus was traveling in light of the fact that she does not, herself, have a driver's license, questions of

the credibility of witnesses must be determined by the trier of fact, and not by the court on a motion for summary judgment.

Smith's characterization of the excessive speed and jolting and swerving of the bus is supported by the affidavit of her sister, Dorothy Hamilton, who was traveling with her to Atlantic City. Hamilton described the bus as "jolting back and forth, and going so fast and swerving that it gave us the feeling that we were on a 'rollercoaster'." Affidavit of Dorothy Hamilton ¶ 4. Hamilton also stated that both she and other passengers were being tossed about in their seats and that both she and other passengers yelled for the driver to slow down.

Furthermore, Hamilton directly contradicts Hargrove's testimony concerning Smith's second fall after the bus reached Atlantic City.

Greyhound contends that Hamilton's affidavit is tailored to defeat Greyhound's motion and is, therefore, unreliable and, therefore, should not be considered by the court, but here again, Hamilton's credibility is a matter to be determined by the trier of fact, and not the court.

The court concludes that there are sufficient questions of fact concerning the operation of the bus, where Smith incurred her second alleged injury, and whether she requested the driver's assistance while exiting the bus, to preclude summary judgment.

Smith opposes Greyhound's motion for an order granting an

open commission permitting defendant to issue subpoenas to an out-of-state non-party, arguing that the note of issue was filed in the end of November 2008, and the time for discovery has long passed. As Greyhound argues, however, in response to Greyhound's motion for summary judgment, Smith has submitted the affidavit of Hamilton which contradicts Hargrove's testimony and asserts new facts concerning Smith's fall after she arrived in Atlantic City, and the alleged lack of assistance by the bus driver. Under these circumstances, Greyhound should be permitted to conduct discovery of Bally's to obtain documents which relate to Smith's second fall and to take depositions of any employees of Bally's who witnessed the fall. However, defendant should be aware that if it fails to obtain timely discovery through the New Jersey courts, it will not be permitted to unduly delay this action.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment, in motion sequence number 002, is denied; and it is further

ORDERED that defendant's motion, in motion sequence number 003, for an order granting an open commission, is granted, as indicated above.

Dated:

6/22/09

FILED
 JUN 29 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

ENTER:

[Signature]
MARILYN SHAFER
 J.S.C.