

Ng v New York CityTr. Auth.

2009 NY Slip Op 31786(U)

August 3, 2009

Supreme Court, New York County

Docket Number: 400534/2007

Judge: Harold B. Beeler

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

HAROLD BEELER

PRESENT: _____ J.S.C.

PART 21

Index Number : 400534/2007 *Incline*

NG, EMILY

vs

TRANSIT AUTHORITY

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered _____, in support of this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED
AUG 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/03/09

[Signature]
HAROLD BEELER, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

At IAS Part 21 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 71 Thomas Street, New York, New York on the 3rd of August, 2009.

PRESENT: HON. HAROLD B. BEELER,
Justice

EMILY NG and JOSEPH WU,
Plaintiffs,

-against-

NEW YORK CITY TRANSIT AUTHORITY,
MARK E. STALLBOHM, ACADEMY BUS
LINES, INC., ACADEMY EXPRESS, INC.,
ACADEMY EXPRESS, L.L.C., SHIRLEY A.
PINKNEY, EXTREME LEASING CORP. and
JOHN CAMPBELL,

Defendants.

INDEX NUMBER 400534/2007
Motion Sequence 002
DECISION & ORDER

FILED
AUG 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

Defendants Extreme Leasing Corp. and John Campbell (~~Extreme Leasing~~) move for summary judgment in their favor dismissing the complaint and all cross-claims against them. Defendants Academy Express, L.L.C. (also sued here as Academy Bus Lines, Inc. and Academy Express, Inc.) and Shirley A. Pinkney (Academy) cross-move for summary judgment in their favor dismissing the complaint and all cross-claims against them. Defendants Transit Authority and Mark E. Stallbohm (Transit Authority) cross-move for summary judgment in their favor dismissing the complaint and all cross-claims against them. Plaintiffs oppose all defendants' motions and cross-move for partial summary judgment in their favor on liability.

On July 26, 2005, close to eight in the morning, plaintiff Ng was allegedly injured while a passenger on a Transit Authority express bus driven by Stallbohm which collided with an

Academy bus driven by Pinkney and a tractor-trailer owned by Extreme Leasing and operated by Campbell on the New Jersey Turnpike between Exits 13 and 14. The Transit Authority express bus was going to Manhattan from Staten Island where Ng boarded.

All defendants argue that Ng did not suffer serious injury within the meaning of Insurance Law § 5102(d). Her claimed injuries were numbness in both hands and arms, disc bulges at C4-C5 and C6-C7, radiculopathy at C5-C6, neck pain, and acute myofascial strain. According to her bill of particulars, she was incapacitated for 53 days, July 26-September 16, 2005, after which she returned to work as an accountant. Beginning two weeks after the accident, she made 75 visits to members of a Staten Island chiropractic group for "spinal manipulation" often with "hot/cold packs" until November 2006 when she moved to Maryland. There, she visited Mark Alexander, DC, a local chiropractor, an undetermined number of times for "Passive Physiotherapy modalities." She continues to complain of steady pain in her neck and intermittent numbness of her hands.

Ng was examined, at defendants' request, by orthopedist Barbara Freeman, MD, on July 13, 2007, orthopedist Maurice C. Carter, MD, on January 28, 2008, and neurologist Robert S. April, MD, on January 28, 2008. Additionally, on or about November 27, 2007, radiologist Jane Ebin Tuvia, MD, read Ng's X-rays taken on July 26, 2005 (the day of the accident) and MRI film taken on August 3, 2005. Dr. Freeman quantified limitations in Ng's range of motion, but stated they are "limited by the claimant's subjective control." She found "no objective evidence for continued treatment." Dr. Carter concluded that Ng "has been and remains neurologically intact." He also opined that if she wanted to recover from sprain or strain to her neck, she would have physical therapy not chiropractic treatments. Dr. April reported that he found Ng's range of

motion for her lumbar spine and upper limbs to be normal. He concluded that “the accident of record did not produce a neurological diagnosis, disability or limitation and that she is not disabled for work activity.” With this medical evidence, defendants initially make a prima facie showing that plaintiff’s alleged injuries do not satisfy the Insurance Law’s serious injury threshold.

Ng meets the burden to present objective medical proof of a serious injury causally related to the accident by submitting reports from Denny A. Julewicz, DC, a member of the Staten Island chiropractic group, and Dr. Alexander, as well as a report by Daniel W. Wilen, MD, an orthopedic surgeon who examined her on August 1, 2005 and found “internal derangement of the cervical and thoracic spine” and range of motion deficits. Therefore, all applications to dismiss the action for failing to meet the serious injury threshold of Insurance Law § 5102(d) are denied. A jury will have to decide between the contrasting medical opinions of Ng’s condition.

Plaintiff Ng offers little information about the accident. She testified that she was resting in her seat, listening to music through headphones with her eyes closed when she felt an impact. She has no evidence about the conduct of any defendant leading up to the accident. She saw none of the other vehicles allegedly involved.

Pinkney testified that she was driving her bus straight ahead in the HOV lane, the furthest left of four lanes, with an unobstructed view when she first glimpsed the Transit Authority angling into the HOV lane from the adjacent lane on her right without room to spare. She stated she applied her brakes, but could not avoid a collision of the front, passenger-side corner of her bus with the rear, driver-side corner of the Transit Authority bus.

Campbell testified he was driving his tractor-trailer in the lane next to the HOV lane. He

saw a bus in the HOV lane on his left and another bus coming from his right, crossing his lane and attempting to move to the far left into the HOV lane. When the collision occurred, he stated that the bus on the right (Transit Authority's bus) was half in HOV lane and half in his lane. After the buses hit each other, Campbell slowed down, but hit the back of Transit Authority's bus.

Stallbohm testified that he was on the New Jersey Turnpike for about 5 minutes before the accident. He passed Extreme Leasing's truck in the lane to his left (third lane) and pulled ahead of the truck into the third lane, the lane next to the HOV lane. He testified that he never saw the Academy bus until after the accident took place. He claimed a passenger car came from the HOV lane and cut in front of him in the third lane setting off the chain of events. He stated that the accident occurred when his bus was in the third of four lanes, but he did not recall if he was changing lanes when it happened. Stallbohm felt two impacts, one with the Academy bus and the other with Extreme Leasing's truck, but he did not remember which came first although it was only a matter of seconds between them. Stallbohm was cited for an illegal lane change and paid \$433 for a fine and costs.

No evidence is offered by plaintiff or Transit Authority that in any ways questions the behavior of Pinkney or Campbell. The accounts by each of these drivers are consistent in describing the circumstances of the accident. Pinkney's assertion that she was driving straight ahead in the HOV lane and only saw the Transit Authority bus immediately prior to contact is confirmed by Campbell's testimony that the Transit Authority bus aggressively moved from the lane to his right, across his lane and into the HOV lane where the first impact occurred. Stallbohm's driving created an emergency situation for Pinkney and Campbell which removes

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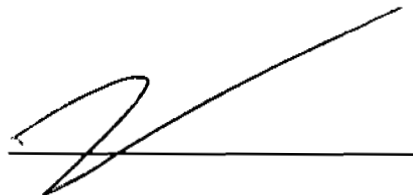
any issue of liability for them and their respective employers. *Rahimi v Manhattan & Bronx Surface Tr. Operating Auth.*, 2007 NY Slip Op 7065, 2 (1st Dept 2007) (“Summary judgment was properly granted to the Transit Authority as the evidence established as a matter of law that the bus driver acted reasonably in an emergency not of his own making”).

Accordingly, the summary judgment motion by defendants Extreme Leasing Corp. and John Campbell is granted and the complaint and all cross-claims against them are dismissed. Additionally, the cross-motion for summary judgment by defendants Academy Express, L.L.C. and Shirley A. Pinkney is granted and the complaint and all cross-claims against them are dismissed. All applications to dismiss the complaint for failure to meet the threshold of serious injury are denied, as discussed above. Plaintiffs’ cross-motion for partial summary judgment on liability is denied. A jury will have to decide if the accident and the resulting injures to Ng were the result of negligence by Transit Authority and/or its driver Stallbohm. The Clerk shall enter judgment accordingly.

This constitutes the decision and order of the Court. Any other requested relief not expressly granted is denied.

DATE: August 3, 2009

ENTER:



HAROLD B. BEELER, J.S.C.

FILED
AUG 10 2009
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J.S.C.

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