

Freedman v Dedicated Servs., Inc.

2009 NY Slip Op 33126(U)

December 23, 2009

Supreme Court, Queens County

Docket Number: 27342/07

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 22

LINDA FREEDMAN,

Plaintiff,

-against-

DEDICATED SERVICES, INC., et al.,
Defendants.

Index No. 27342/07

Motion
Date October 20, 2009

Motion
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Motion
Sequence No. 1

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Upon the foregoing papers it is ordered that plaintiff's motion for an order pursuant to CPLR 3212 granting partial summary judgment as against defendants on the issue of liability on the basis that there are no triable issues of fact and that as a matter of law, plaintiff is entitled to judgment on liability against said defendant is hereby granted.

This is an action to recover damages for personal injuries sustained on May 17, 2007 by the plaintiff, Linda Freedman, in the vicinity of the Grand Central Parkway Eastbound at or near Exit 13S-W in the County of Queens, State and City of New York. Plaintiff was a 41-year old, with cerebral palsy, who was wheelchair bound and a passenger in an Access-A-Ride van owned by defendant, Dedicated Services, Inc., operated by its employee, John M. Pacheco and provided on a contractual basis by the defendant, the New York City Transit Authority, Para Transit System Division.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a

triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradley's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

Plaintiff made a prima facie showing that there is an absence of any material issues of fact. To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of their injuries (see, *Gordon v. Muchnick*, 180 AD2d 715 [2d Dept 1992]). Absent a duty of care, there is no breach and no liability (*Id.*; see also, *Marasco v. C.D.R. Electronics Security & Surveillance Systems Co., et.al.*, 1 AD3d 578 [2d Dept 2003]). Plaintiff established that at the time of the accident, plaintiff was seated in her wheelchair with the wheelchair's brake engaged inside an Access-A-Ride van. Plaintiff also established that she and her wheelchair were not properly secured to the Access-A-Ride van by way of the proper lap and shoulder belt that should have been engaged and secured by the driver, John M. Pacheco. In support of the motion, plaintiff submitted, inter alia, plaintiff's own examination before trial transcript testimony, the examination before trial transcript testimony of defendant John M. Pacheco, and a copy of defendant Pacheco's MV 104 and Paratransit Division accident and incident reports marked at defendant's deposition. Plaintiff established that because her wheelchair and she were not properly secured to the Access-A-Ride van by the driver, when the driver was caused to stop short due to traffic conditions, plaintiff was caused to be violently precipitated out of her wheelchair, fly

through the cabin of the van and strike the front dashboard and railings of the van. In his examination before trial transcript testimony, defendant driver admits to not securing plaintiff with a lap belt and shoulder belt that was included with the van. He also admits that it was his responsibility to secure her with the lap belt and the shoulder belt.

Defendants failed to present sufficient evidentiary proof in admissible form to establish a triable issue of fact. Defendant does not deny that there was a duty, that it breached the duty, and that the breach of its duty was the proximate cause of plaintiff's injuries. Despite defendants' contentions, there are no triable issues of fact in connection with whether plaintiff is contributorily negligent, as contributory negligence is irrelevant on a motion for partial summary judgment on liability (see, CPLR 1411; *Maidman v. Stagg*, 82 AD2d 299 [2d Dept 1981]). Defendant driver has admitted to not securing plaintiff with a lap belt and shoulder belt that was included with the van, and that it was his responsibility to do such. As there is no triable issues of fact, summary judgment is warranted and the case may be disposed of summarily.

That branch of plaintiff's motion finding that plaintiff has met the requirements of serious injury threshold under Insurance Law § 5102 is hereby denied as it is premature, since the defendants have yet to conduct the plaintiff's independent medical examination.

This constitutes the decision and order of the court.

Dated: December 23, 2009

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Howard G. Lane, J.S.C.

