Brown v Port Auth. of N.Y. & N.J.

2010 NY Slip Op 33670(U)

December 20, 2010

Sup Ct, New York County

Docket Number: 114364/05

Judge: Judith J. Gische

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SCANNED ON 12/21/2010

[* 1]

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

HON. JUDITH J. GISCHE J.S.C.

PART 10

Index Number : 114364/2005

BROWN, THELMA

VS.

PORT AUTHORITY OF NEW YORK

SEQUENCE NUMBER : 005

SUMMARY JUDGEMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

his motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

FILED

DEC 21 2010

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

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

Dated: 12/20/10

HON. JUDITH J. GISCHE J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

----------x

THELMA BROWN and ARTHUR BROWN,

Plaintiffs,

-against-

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, HUDSON TRANSIT CORPORATION, SHORT LINE TERMINAL AGENCY, INC. A/K/A SHORT LINE BUS CO., HUDSON TRANSIT LINES, INC., and COACH USA, INC.,

Defendants.

----------x

DECISION/ ORDER
Index No.: 114364/05
Seq. No.: 005

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED
DEC 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Hudson/Short Line/Coach's n/m (§ 3212) w/MRR affirm, SVH affid, exhs	1
Port Authority's x/m (§ 3212) w/CA affirm, SIR, JR affids	2
Pltf's opp w/KSW affirm, TB affid, exhs	3
Hudson/Short Line/Coach's opp w/MRR affirm	4
Hudson/Short Line/Coach's reply w/MRR affirm	5
Port Authority's reply w/CA affirm, exh	6

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff, Thelma Brown ("Brown"), to recover monetary damages for the personal injuries she allegedly sustained as a result of defendants' negligence. Defendant, the Port Authority of New York and New Jersey ("Port Authority"), is owner of the property on which the accident occurred. Defendants, Hudson Transit Corporation ("Hudson Corp."), Short Line Terminal Agency, Inc. a/k/a Short Line Bus Co. ("Short Line"), Hudson Transit Lines, Inc. ("Hudson Lines"); and

Coach USA, Inc. ("Coach") (collectively "the Hudson defendants") who are all jointly represented, are carriers who use the Port Authority as a depot. The Hudson defendants now move, and Port Authority cross-moves, pursuant to CPLR § 3212, for summary judgment dismissing the complaint.

Issue has been joined by each moving defendant and discovery is complete. The Note of Issue was filed April 14, 2010. These motions were brought timely (within 120 days of the note of issue being filed), therefore they will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2d Dept. 2004). The court's decision and order is as follows:

Arguments

Plaintiff claims that on November 23, 2004 at 10 a.m., she sustained injuries when she slipped and fell off the edge of the curb at the Port Authority Bus Terminal, located at 8th Avenue and West 41st Street, NY, NY, at Gate 314 (the "Gate"). Plaintiff claims that she fell off the curb while attempting to load her luggage into the rear compartment of a Coach bus (the "Bus").

Plaintiff asserts two causes of action against defendants in her verified complaint for negligence and loss of consortium for her husband, Arthur Brown. Plaintiff alleges that the Hudson defendants were negligent by failing to park the Bus so that it was parallel with the sidewalk; by failing to park the Bus within a safe distance from the sidewalk; and for parking the Bus in a manner that allowed the luggage compartments to extend past the sidewalk. Plaintiff further alleges that the bus driver refused to help plaintiff load her baggage onto the Bus, despite her asking for assistance two or three different times. Plaintiff alleges that the Port Authority failed to provide sufficient lighting

at the Gate and that the sidewalk was too short in length for the safe boarding of passengers.

The Hudson defendants contend that they did not breach any duty of care owed to plaintiff, as they were only required to provide plaintiff with a "clear, direct and safe path" to board the Bus, and the fact that plaintiff fell while loading her luggage does not mean they were negligent. According to the Hudson defendants, their actions were not the proximate cause of plaintiff's injuries. Alternatively, the Hudson defendants argue that summary judgment should be granted as to Coach. The Hudson defendants provide the affidavit of Stephan Van Horn, Risk Manager for Coach, who states that Coach is merely a holding company that owns numerous subsidiary companies, but it does not own or operate any buses.

The Port Authority contends that plaintiff cannot establish her *prima facie* case of negligence because there is no evidence establishing that the Port Authority created or had notice of the dangerous condition alleged. According to the Port Authority, the lighting conditions at the Gate were adequate and, nevertheless, the lighting condition was not a proximate cause of plaintiff's accident. The Port Authority further argues that neither plaintiff nor other passengers/employees, complained about the lighting or the length of the sidewalk, prior to the time of the accident.

The Port Authority argues that if its motion for summary judgment dismissing plaintiff's complaint is denied, it is entitled to an order directing the Hudson defendants to indemnify and defend the Port Authority pursuant to the License Agreement, based on the Port Authority's License Agreement with the Hudson defendants. The Port Authority contends that the Hudson defendants have a contractual obligation to

indemnify and defend it for liability to third-parties in personal injury actions where the injuries were caused by the Hudson defendants, and to procure insurance naming the Port Authority as an additional insured.

Discovery has been completed. Plaintiff served a Verified Bill of Particulars dated June 8, 2007. Plaintiff; Guerino Saint-Pierre ("Saint-Pierre"), Bus Operator for Hudson Lines; Donna Young ("Young"), Safety Manager for Hudson Lines; and Earnest Peart ("Peart"), Maintenance Unit Supervisor for the Port Authority; were each deposed.

Plaintiff, currently 78 years old, testified at her deposition that for more than 20 years she has taken a Short Line bus out of Port Authority's bus terminal to visit her daughter in Corning, New York. Plaintiff stated that she would take the bus to visit her daughter approximately 4 or 5 times per year and she has made over a total of 80 trips to Corning, always leaving out of Gate 314. Plaintiff testified that on the date of the accident she was with her husband and she was wheeling a suitcase. She stated that she told her husband to wait on the Bus so that she could wait for the suitcase to be placed in the luggage compartment. Plaintiff described the suitcase as having four wheels and a retractable handle, measuring approximately two feet wide and five feet tall, and weighing over 20 pounds.

Plaintiff stated that she observed that the Bus had three luggage compartments which were all open. Plaintiff stated that the front of the Bus was parallel to and almost touching the sidewalk, but the back of the Bus was farther away from the curb than the front, by approximately two feet. Plaintiff also stated that the "lighting condition was good . . . in the front." When asked, "do you know if those lights had been exposed

light bulbs," plaintiff responded, "no." When asked, "do you know if there was a light at the back of the bus," plaintiff responded, "no. I didn't see it. No." Plaintiff also testified that in the past, she never noticed how the Bus was positioned because the drivers always helped her place her luggage into the luggage compartment.

Plaintiff testified that she asked the bus driver to help her with her suitcase and he refused, stating, "You have to put it in yourself." Plaintiff then put the suitcase in the luggage compartment in the front of the Bus. After the driver saw plaintiff place her luggage in the first compartment, plaintiff testified that "he looked. And he saw me place it there. And he said, ma'am, put it in there – the last compartment because you're going to Corning." Plaintiff testified that, by this point, she was tired so she asked the driver if she could leave the suitcase in the first compartment and then have him relocate it to the last compartment when he was finished collecting the tickets. She testified that the driver responded by stating, "can't you see that I'm busy, look at the people at the crowd." Plaintiff stated that she then removed the luggage and walked towards the back of the Bus and again asked if she could leave it there, to which the driver responded "no, put it in." Plaintiff testified, "my body was facing the bus to put my suitcase in the bus and there was a drop-off right there." Plaintiff stated that she was bending down and leaning forward while facing the compartment. She stated that the suitcase was in her hands and she was trying to put it in the third compartment. Plaintiff testified, "I got it halfway in and then I pull in the back of it to push it in and I fell off the curb."

Saint-Pierre testified at his deposition that at the time of the accident, he was a bus operator employed by Hudson Lines, also known as Short Line or Coach, and had

been employed there for about six years prior to the accident. Saint-Pierre stated that the Bus was a "45-footer" and displayed the words "Coach USA" on the outside. When asked, "If there's a 45-foot bus parked in Gate 313 and you have to pass by it and kind of round that corner and go into 314, does that make it difficult to pull up exactly parallel to the platform?" Saint-Pierre responded, "no. No. You've got enough room . . . [y]ou have enough room to do that." Saint-Pierre then testified that on the date of the incident, the Bus was "parallel" to the platform and was "about two to four inches" away from the curb. When asked whether there was a greater distance between the back of the Bus and the front of the Bus from the curb, Saint-Pierre answered, "I think it was even to my recollection because I believe if there was any gap I would have to redo it again." Saint-Pierre also stated that "the bus is longer than the platform" but he does not remember whether any portion of the third luggage compartment extended past the end of the platform.

Saint-Pierre testified that he would "take the ticket from the passenger, and . . . find out where the passenger is going" and then he would tell the passenger "where to leave their luggage . . . it if's on the first, compartment, second, or third compartment." Saint-Pierre stated that "the ones that have carry-on go straight on the bus. The ones that don't have carry-on. Some of them, the young ones, especially those going to college or school . . . I will tell them, okay, put your luggage on the front entrance of the bay or to the second and so on." Saint-Pierre stated that passengers were prohibited from putting the luggage in compartments, so he would tell them to put the luggage in front of the compartment that he wanted the luggage to be in, which was based on where they were going. Saint-Pierre testified that it was the company's policy that the

driver should load the luggage onto the bus for its passengers and that sometimes co-workers would be there to assist him. Saint-Pierre does not recall whether anyone assisted him on the date of the accident, but stated that if it was a crowded day, he would be permitted to request help from another employee.

When asked about the lighting conditions on the date of the accident, Saint-Pierre responded, ". . . it was good. And also remember the bus has got [sic] two other lights by the luggage compartment that light up when you open up the luggage compartment to the platform."

Saint-Pierre further testified that upon taking plaintiff's ticket, he asked her "do you need help, ma'am?" and "there was a man with her, and the man said we're okay. Something similar to that." Saint-Pierre testified that, "after the man said we're okay, I said put it on the second luggage compartment – I think I said at that time because I believe my third luggage compartment was for Ithaca." Saint-Pierre stated that he asked her if she needed assistance because "there was a policy [for] senior citizen[s] – or who appear to be senior citizen[s], people with disability, pregnant women, and children, you know, we have to volunteer for them, and that's why I did that." Saint-Pierre testified that he did not ask her if she needed assistance after taking her ticket and that she never asked for help, or otherwise spoke to him. Saint-Pierre stated that after he collected plaintiff's ticket and walked through the Port Authority door, he did not see her again until after the accident.

Young testified at her deposition that she is Safety Manager for Hudson Lines. Young testified that all buses that were on the route heading to Corning were owned by Hudson Lines. When asked whether Hudson Lines required its drivers to load luggage

into the luggage compartments of the bus, Young responded, "yes." Young also stated that on the date of the accident, there was a manual in effect that applied to all of Hudson Line's drivers, including Saint-Pierre, which set forth these rules and regulatons. When asked whether it would "be improper for a driver to pull into that platform at an angle?" Young responded, "yes." Young also stated that "the tires are supposed to hit the curb. There is an overhang of the bus."

Peart testified at his deposition that he is Maintenance Unit Supervisor for the Port Authority and his duties entail overseeing the electricians and electrical maintenance. Peart stated that the type of lighting at Gate 314 was a "pendulum mount fixture with a base and a glass at the bottom with the bulb on the inside, enclosed." Peart stated that the bulbs are 175 watts and "the fixture lights up the entire area on the side of the bus where the passenger gets off." Peart further testified that there was no routine or established procedure regarding the inspection, maintenance, or replacement of lighting at the Port Authority in general or at Gate 314 that he was aware of, but that if a light was dim, flickering, or went out, it could be reported to him by any number of people, usually by word of mouth. Peart also testified that he does not recall any complaints regarding the lighting conditions at Gate 314, and if there were any complaints, it would be repaired "within a day."

The Port Authority has also provided the affidavit of Stephen I. Rosen, PhD ("Rosen"), who identifies himself as being an expert witness in slip/trip and fall accidents. Rosen opines that, "the curb heights . . . are within the normal range" and "the illumination of . . . the platform was 10.0 foot-candles. This is an excellent level of illumination which exceeds all established and advisory illumination standards."

Discussion

Summary Judgment – Burden of Proof

The movant on a summary judgment motion has the initial burden of proving entitlement to summary judgment, by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1st Dept. 1980); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1st Dept. 1985). It is only when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment does the burden then shift to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman, *supra* at 562. Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or debatable. International Customs Assoc., Inc. v. Bristol-Meyers Squibb Co., 233 A.D.2d 161, 162 (1st Dept. 1996). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993). Moreover, the court cannot resolve issues of credibility, as it is for the jury to weigh the evidence and draw legitimate inferences therefrom. S.J. Capelin Assocs. v Globe Mfg. Corp., 34 N.Y.2d 338 (1st Dept. 1974).

On this motion for summary judgment, defendants have the burden of proving their defenses. Thus, defendants must prove there was no dangerous condition, or if there was one, that they did not create it, nor did they have a sufficient opportunity,

within the exercise of reasonable care, to remedy the situation. *See* Mercer v. City of New York, 223 A.D.2d 688, 689 (1996) *aff'd* 88 N.Y.2d 955 (1996); Gordon v. American Mus. of Nat. Hist., 67 N.Y.2d 836 (1986); Lewis v. Metropolitan Transp. Auth., 99 A.D.2d 246 (1984) *aff'd* 64 N.Y.2d 670 (1984).

I. Port Authority's Cross-Motion for Summary Judgment

Port Authority is the owner of the Property where plaintiff fell. A landowner is under a non-delegable duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party. Perez v. Bronx Park South, 285 A.D.2d 402 (1st Dept. 2001). This common law duty is tempered by a requirement that a plaintiff seeking recovery must establish that the landlord created or had actual or constructive notice of the hazardous condition which precipitated the injury. Pappalardo v. Health & Racquet Club, 279 A.D.2d 134 (1st Dept. 2000). To constitute constructive notice, a defect must be visible and apparent, and it must have existed for a sufficient length of time prior to the accident for the owner to have discovered the defect and remedied it. Pappalardo, *supra*. A party injured by the owner's failure to fulfill it may recover from the owner even though the responsibility for maintenance has been transferred to another. Mas v. Two Bridges Associates by Nat. Kinney Corp., 75 N.Y.2d 680, 687 (1st Dept. 1990); Ortiz v. Fifth Ave. Bldg. Assocs., 251 A.D.2d 200 (1st Dept. 1998).

At trial, in order to set forth a *prima facie* case of negligence, the plaintiff's evidence must establish (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury. Akins v. Glens Falls City School Dist., 53 N.Y.2d 325, 333; Solomon v

City of New York, 66 N.Y.2d 1026, 1027.

A. Lighting Condition

The Port Authority has established that the lighting at Gate 314 was adequate. Saint-Pierre testified that the lighting condition was "good" and that the luggage compartment shed additional light on the area. Peart testified that Gate 314 had 175 watt bulbs and that the lighting fixtures lit up the area. Peart also stated that there were no complaints regarding the lighting at Gate 314. Port Authority's expert, Rosen, opined that illumination of the platform was 10.0 foot-candles, which is an "excellent" level of illumination that "exceeds all established and advisory illumination standards."

In opposition, plaintiff has not come forward with any triable issue of fact that the Port Authority breached its duty of reasonable care in maintaining sufficient lighting at Gate 314. Plaintiff has not provided any evidence that the platform lights at Gate 314 did not meet the applicable standards; that the lighting condition was inadequate at the time of the accident; or that the additional lights from the Bus' luggage compartment failed to meet current standards. *See* Merino v. New York City Transit Authority, 218 A.D.2d 451 (1st Dept. 1996). Plaintiff only surmises that she might have fallen because the area was not well lit. This is based upon her noticing, after she fell, that a light bulb was out. She only noticed this, however, after she was on the floor laying on her back. This testimony is, however, contradicted by her deposition testimony that she did not notice a light at the back of the bus, and is insufficient to create an issue of fact to defeat summary judgment. Madtes v. Bovis Len Lease LMB, Inc., 54 A.D.3d 630 (1st Dept. 2008).

Plaintiff has, therefore, failed to establish that there is any triable issue of fact

that the Port Authority breached its duty of reasonable care in maintaining sufficient lighting at Gate 314.

B. Negligent Design

The Port Authority has also established that this particular platform has been in continuous use for many years without any incidents. Plaintiff has not come forward with any material issues of fact that the Port Authority breached its duty of reasonable care in maintaining the platform at Gate 314. It is, in fact, unrefuted that, as plaintiff submits in her moving papers, "the boarding platform at Gate 314 has been in its current configuration for a substantial period of time" and that "buses pull in and out of Gate 314 all day long, everyday." The mere fact of the happening of an accident is not sufficient to cast responsibility for faulty construction upon the owner and the happening of an accident cannot of itself be evidence of faulty construction. De Salvo v. Stanley-Mark-Strand Corporation, 281 N.Y. 333, 338 (1939). Continued use for a long period of time without any accident is evidence that there is no faulty construction. De Salvo v. Stanley-Mark-Strand Corporation, *supra* at 338. While most structures can probably be made safer, as a general rule, "when an appliance, or machine, or structure not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe, and convenient, its use may be continued without the imputation of culpable imprudence or carelessness." De Salvo v. Stanley-Mark-Strand Corporation, *supra* at 340.

Port Authority has, therefore, proved that the boarding platform was not negligently designed and plaintiff has not raised material issues of fact that it was unsafe.

C. Notice

On its motion for summary judgment, Port Authority has the burden of proving its defenses. Thus, Port Authority must prove that it did not have a sufficient opportunity, within the exercise of reasonable care, to remedy the situation (*see* Gordon v. American Mus. of Nat. Hist., 67 N.Y.2d 836 [1986]; Lewis v. Metropolitan Transp. Auth., 99 A.D.2d 246 [1984] *aff'd* 64 N.Y.2d 670 [1984]; *see*, Mercer v. City of New York, 223 A.D.2d 688, 689 [1996] *aff'd* 88 N.Y.2d 955 [1996]). Here, there is no evidence that any complaints were made concerning Gate 314 on or prior to the date of the accident. Plaintiff herself never complained of the lighting conditions or the curb length on the date of the accident or during any of her numerous prior trips leaving from Gate 314. There is no evidence that the Port Authority was notified of or had constructive notice of a blown-out light above the rear of the Bus. The Port Authority has, therefore, established lack of notice.

Plaintiff has failed to show that a defect was visible and apparent and existed for a sufficient length of time prior to the accident for the owner to have discovered the defect and remedied it. Pappalardo, *supra*.

Accordingly, Port Authority's cross-motion for summary judgment dismissing the complaint as to them is granted.

II. The Hudson Defendants' Motion for Summary Judgment

The Hudson defendants contend that they did not breach any duty owed to plaintiff, as they were only required to provide plaintiff with a "clear, direct and safe path" to board the bus. Although plaintiff fell while loading her luggage onto the bus,

the Hudson defendants contend that, this alone, does not impose any liability on the Hudson defendants.

A common carrier is under a duty to provide "a reasonably safe passage onto the bus which does not invite or dictate that the passenger board the bus via a treacherous path." Blye v. Manhattan and Bronx Surface Transit Operating Authority, 124 A.D.2d 106 (1st Dept. 1987). However, once the passenger is provided with a safe place to step on or off the bus, the operator's duty is completed, the duty of care owed that passenger has been fulfilled, and liability will not extend to the passenger's act of stepping into a structurally defective or perilous spot. Blye v. Manhattan and Bronx Surface Transit Operating Authority, *supra*; *see also* Fagan v. Atlantic Coast Line R. Co., 220 N.Y. 301 (1917). In situations where the passenger, of his/her own choice, opted to take an indirect and treacherous path onto a vehicle, despite the obvious presence of a clear, direct and safe path from which to board, liability cannot be imposed upon the carrier. Blye v. Manhattan and Bronx Surface Transit Operating Authority, *supra* at 112, *citing* Fagan v. Atlantic Coast Line R. Co., 220 N.Y. 301 (1917).

Here, plaintiff fell prior to boarding the Bus, while loading her suitcase onto the luggage compartment beneath the Bus. The issue of what duty is owed to a passenger is for the court to decide in the first instance. Bombero v. NAB Construction Corp., 10 A.D.3d 170 (1st Dept. 2004). The court holds that the driver had a duty of care in assisting the passengers to load luggage into the Bus. This is apparent from the Hudson defendants' own operating procedures.

Coach and Short Line's "Operator's Rules and Regulations" (the "Manual") states, as follows:

> **48. Passenger's Luggage**. Each operator is responsible for the safe and proper loading of all baggage on his coach. . . . It is the Operator's duty to load and unload all luggage from the baggage compartments of the bus and passengers should never be directed to perform this function.

Saint-Pierre admitted in his EBT that passengers were prohibited from putting luggage into the compartments, and that it was the company's policy that the driver should load the luggage onto the bus. Young similarly stated during her EBT that drivers were required to load all luggage into the luggage compartment. Therefore, there are facts from which a trier of fact could conclude that Saint-Pierre did not properly fulfill his duties by allowing plaintiff to load her own suitcase underneath the Bus.

Also, there is the factual issue of whether Saint-Pierre breached a duty owed to plaintiff by parking the Bus at an angle, leaving too large a space between the back of the Bus and the curb. Saint-Pierre admitted at his own EBT that if the Bus was not parallel, he would have had to re-park it. Young similarly testified that it would be improper to park the bus at an angle, and that the tires are supposed to hit the curb.

Furthermore, there are triable issues of fact regarding what actually happened on the date of the accident. Plaintiff testified that she asked Saint-Pierre to help her load her luggage onto the Bus on at least two different occasions, whereas, Saint-Pierre testified that when he offered to help plaintiff, she ignored him and her husband responded, "we're okay." Plaintiff also testified that the back of the Bus was further

from the curb than the front of the Bus, whereas, Saint-Pierre testified that it was parallel.

Here, not only have the Hudson defendants failed to met their burden of proof, but there are triable issues of fact requiring the denial of their motion (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]; Rotuba Extrudes v. Ceppos, 46 N.Y.2d 223 [1978]). The determination of whether the Hudson defendants were negligent is for the trier of fact to decide (Ugarriza v. Schmieder, *supra*).

Coach

The Hudson defendants argue that, in the alternative, summary judgment should be granted as to Coach. The Hudson defendants provide the affidavit of Stephan Van Horn, Risk Manager for Coach, who states that Coach is a holding company that owns numerous subsidiary companies and does not own or operate any buses.

A parent corporation will not be held liable for the torts or obligations of a subsidiary, unless it can be shown that the parent corporation exercised complete dominion and control over the subsidiary. Potash v. Port Authority of New York and New Jersey, 279 A.D.2d 562 (2d Dept. 2001).

As a general rule, the law treats corporations as having an existence separate and distinct from that of their subsidiaries. *See* Port Chester Elec. Constr. Corp. v. Atlas, 40 N.Y.2d 652 (1980). However, at times, the courts will disregard the separate legal personality of the corporation and assign liability to its owners where necessary "to prevent fraud or to achieve equity." International Aircraft Trading Co. v. Manufacturers Trust Co., 297 N.Y. 285 (1948). But, such liability can never be predicated solely upon

the fact of a parent corporation's ownership of a controlling interest in the shares of its subsidiary. At the very least, there must be direct intervention by the parent in the management of the subsidiary to such an extent that "the subsidiary's paraphernalia of incorporation, directors and officers" are completely ignored. Lowendahl v. Baltimore & Ohio R. R. Co., 247 A.D. 144 (1st Dept. 1936).

The fact that the Bus displayed the words "Coach USA" on the outside, is, therefore, not enough impose liability upon Coach, who is merely a parent corporation of its subsidiaries, Hudson Lines, Hudson Corp., and Short Line. This is similar to cases where the name of a parent company is printed on a product, but the record indicates that a different entity was responsible for the manufacture and distribution of the product. In such cases, there is no liability imposed on the parent. Bova v. Caterpillar, Inc, 305 A.D.2d 624 (2d Dept. 2003); *see* D'Onofrio v. Boehlert, 221 A.D.2d 929; Pangallo v. Mitsubishi Intl. Corp., 220 A.D.2d 650. The court, therefore, grants Coach's motion for summary judgment dismissing the complaint as against it.

III. Indemnification

The Port Authority also moves for summary judgment on its first cross-claim for failure to maintain insurance and indemnification against the Hudson defendants. The Hudson defendants have generally moved for summary judgment dismissing the cross-claims against them. Although the Port Authority is, by virtue of this decision, no longer a direct defendant in this case, the cross-claims may be relevant to the extent they bear upon the Port Authority's claims for its defense costs thus far.

In June 1965, Hudson Lines entered into a Licensing Agreement (the

"Agreement") with the Port Authority. Paragraph 8(d) of the Agreement, relied upon by the Port Authority, provides:

> Liability to third persons for personal injury (including death), or for property damage, caused in part by acts or omissions for which the carrier is responsible and in part by acts or omissions for which the Port Authority is responsible (or caused by acts or omissions for which the carrier, Port Authority and one or more persons who have entered into undertakings with the Port Authority similar to this provision are all responsible), and the expense of defense thereof and settlement therefor, shall be borne by all the responsible parties in equal shares.

In April 1993, the Agreement was supplemented. Paragraph 3 requires Hudson Lines to obtain insurance covering the carriers' operations, in which the Port Authority should be included as an additional insured.

None of the Hudson defendants argue that they are not bound by the Agreement as supplemented. Contrary to the Port Authority's arguments, the plain language of paragraph 8(d) does not provide for contractual indemnification in this case. Paragraph 3 of the supplement, however, does require the carrier to obtain comprehensive general liability insurance naming the Port Authority as an additional insured. The insurance procurement provision of the supplementary agreement is separately enforceable from any indemnification provision. Inner City Redevelopment Corp. v. Thyssenkrup Elevator Corp., __ AD3d __ (1st Dept. 2010); Town of Hempstead v. East Coast Resource Group, LLC, 67 A.D.3d 777 (2d Dept. 2009). By stipulation and order dated 4/15/10, the Hudson defendants affirmatively admitted that no such insurance was obtained.

The court, therefore, grants the Port Authority's motion for summary judgment on its first cross-claim on the issue of liability only. Damages must be proven at trial.

Conclusion

The Port Authority's cross-motion for summary judgment and Coach's motion for summary judgment is granted. Hudson Lines, Hudson Corp. and Short Lines' motion for summary judgment is denied, as they have not tendered sufficient evidence to eliminate any material issues of fact from the case. Since the note of issue has been filed, this case is ready to be tried. Plaintiff shall serve the Office of Trial Support with a copy of this decision and order so the case may be scheduled for trial.

In accordance herewith, it is hereby:

ORDERED that defendant, THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY's cross-motion for summary judgment dismissing the complaint and cross-claims against it is GRANTED ; and it is further

ORDERED that defendant, COACH USA, INC.'s motion for summary judgment dismissing the complaint is GRANTED; and it is further

ORDERED that the Port Authority's motion for summary judgment on the 1st cross-claim is GRANTED as to defendants, HUDSON TRANSIT CORPORATION, SHORT LINE TERMINAL AGENCY, INC. A/K/A SHORT LINE BUS CO., HUDSON TRANSIT LINES, INC.'s and COACH USA, INC., on the issue of liability, with the issue of damages reserved for trial; and it is further

ORDERED that defendant, HUDSON TRANSIT CORPORATION, SHORT LINE

TERMINAL AGENCY, INC. A/K/A SHORT LINE BUS CO., HUDSON TRANSIT LINES, INC.'s motion for summary judgment dismissing the complaint is DENIED; and it is further

ORDERED that since the note of issue has been filed, this case is ready to be tried on the remaining issues. Plaintiff shall serve the Office of Trial Support with a copy of this decision and order so the case may be scheduled for trial; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
December 20, 2010

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.

FILED

DEC 21 2010

NEW YORK
COUNTY CLERK'S OFFICE