

Grapel v Metropolitan Tr. Auth.
2011 NY Slip Op 31267(U)
May 11, 2011
Supreme Court, New York County
Docket Number: 117959/09
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. MICHAEL D. STALLMAN**

PART 21

Index Number : 117959/2009

GRAPEL, ANNE

vs

METROPOLITAN TRANSIT AUTHORITY

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 117959/09
MOTION DATE 3/11/11
MOTION SEQ. NO. 001
MOTION CAL. NO. 57

The following papers, numbered 1 to 4 were read on this motion to/for Summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A I

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1-2</u>
<u>3</u>
<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *for summary judgment is decided in accordance with the annexed memorandum decision and order.*

FILED

MAY 13 2011

NEW YORK COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 5/11/11

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X
ANNE GRAPEL,

Plaintiff,

Index No. 117959/09

- against -

METROPOLITAN TRANSIT AUTHORITY and MTA NEW
YORK CITY TRANSIT,

Defendants.

Decision and Order
FILED

MAY 13 2011

-----X
HON. MICHAEL D. STALLMAN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this personal injury action, plaintiff alleges that the Access-A-Ride service dropped her off at the wrong location, and that she fell while attempting to cross the street after leaving the area where the Access-A-Ride driver had left her. Defendants move for summary judgment dismissing the complaint. The issues presented are (1) whether defendants' duty as a common carrier to a disabled passenger extended beyond the point when plaintiff was left off at a safe location, and required defendants to ensure that plaintiff entered the location where plaintiff had requested to be taken; and (2) whether such a duty was breached; and (3) whether the breach was a proximate cause of plaintiff's fall.

BACKGROUND

When plaintiff successfully applied to the MTA New York City Transit's paratransit service, Access-A-Ride, plaintiff's signed application indicated that she had stopped traveling by public transit bus because of "difficulty breathing, leg pain." Cohen Affirm., Ex G.¹ On page 9 of the

¹ Plaintiff signed the application, but the application states that her daughter-in-law completed the application.

application, where applicants are asked to “check off all of the disabilities or conditions that prevent you from boarding, riding or disembarking from public transit buses or subways,” plaintiff’s application indicated “Peripheral Vascular Disease” and “Thrombosis.” *Id.* On page 10 of the application, where applicants are asked to describe how each disability or condition checked on the previous page prevents them from using public transits buses or subways, plaintiff’s application stated, “pain in legs from clots, multiple blood clots in lungs cause difficulty breathing.” *Id.* The application asked, “Indicate which support device(s) you use when traveling or walking outside your home.” Plaintiff’s application indicated, “I do not require a support device.” *Id.* The application also asked, “Do you currently travel with a Personal Care Attendant (PCA), a person such as a home attendant who assists you regularly when you travel outside your home?” Plaintiff’s application indicated, “No.” *Id.*

According to plaintiff, she called on July 29, 2009 to request that Access-A-Ride pick her up at her home on July 30 and take her to “Special Surgery Hospital.” Cohen Affirm., Ex D [Grapel EBT] at 30. Plaintiff testified that she “didn’t know the address. I just told them were I want to go.” *Id.* Plaintiff stated that she was going to the Hospital for Special Surgery to visit her daughter, Linda, who had a hip operation. *Id.* Plaintiff anticipated that her daughter in law, Susie Grapel, was going to meet plaintiff when she arrived at the Hospital for Special Surgery. *Id.* at 39.

According to plaintiff, when the Access-A-Ride driver arrived the next day, plaintiff told the driver that she had difficulty walking, the only physical limitation that she mentioned to the driver. *Id.* at 22. Plaintiff testified that the driver did not ask plaintiff if she had any mental limitations, and that plaintiff did not tell the driver that she had any mental limitations. *Id.* Plaintiff never mentioned to the driver that her daughter in law was going to be meeting plaintiff at the location. *Id.* at 41.

The driver, Dawn Fiedtkou, testified at her EBT that she was supposed to pick up the plaintiff at “271 Grand Central Pkwy Bldg #1 Queens” and drop her off at “535 E 70th St Manhattan,” as reflected in an “Access-A-Ride Trip Ticket.” Cohen Affirm Ex E [Fiedtkou EBT], at 15; *see also* Cohen Affirm., Ex H. The trip ticket indicated that plaintiff had a Personal Care Attendant (PCA), but Fiedtkou testified that plaintiff did not have a PCA with her, which Fiedtkou discussed with her supervisor. Fiedtkou EBT, at 23. According to Fiedtkou, the supervisor

“said, well, she noticed that this client was suppose[d] to have a PCA, was a PCA with her. And I said, ‘no.’ She said ‘why didn’t you indicate it on the trip ticket.’ I said ‘I asked her where is her PCA[’] and she said ‘she’s not coming.’ She appeared to be, I mean, functional by herself so I said, ‘okay.’”

Id. at 23. After Fiedtkou picked up the plaintiff, she picked up a second passenger named Samuel, who was to be dropped off at “New York Presbyterian Hospital, the Star Pavilion.” *Id.* at 16.

Fiedtkou testified that she pulled the vehicle over to the shoulder of the road, in front of 535 East 70th Street, and helped plaintiff out of the vehicle. *Id.* at 21. According to Fiedtkou, plaintiff walked towards the building, and Fiedtkou got back into her car. *Id.* Fiedtkou testified that she did not proceed elsewhere to drop Samuel off, because he got out at the same location. *Id.* According to Fiedtkou, Samuel “said he was early and he doesn’t want to go to his appointment so he was going somewhere else.” *Id.* at 22.

Plaintiff testified to a different version of the events. According to plaintiff, when the driver got to the location where plaintiff was let off, “she [the driver] said we are at the wrong building and I will cross you over the street. So she crossed me over and she said, there is the building.” Grapel EBT, at 46. Plaintiff testified, “[t]he man got off and he said I will walk. He saw that it was the wrong building. He said never mind, I will walk over to the hospital.” *Id.* at 47. Plaintiff testified

that the driver escorted plaintiff across the street and got the plaintiff up on to the sidewalk on the other side of the street. *Id.* at 48, 51. According to plaintiff, the driver “left [her] on the sidewalk and said this is the building, go in.” *Id.* at 51.

Plaintiff testified that she went inside the building and said to a woman at the desk inside, “I wanted to visit my daughter, she is in this building.” *Id.* at 52, 53. According to plaintiff, “they told me this is a cancer hospital.” *Id.* at 52. The woman allegedly said to plaintiff, “[Y]ou are in the wrong place and you have to cross over First Avenue.” *Id.* at 53. Plaintiff claims that she left the building and injured herself when she started to walk back across the street. Plaintiff testified,

“Well, what happened, it was so crowded when I walked out and I saw that crowd, I really got bewildered. I didn’t know where I was. So I said I better stand behind the crowd. And I stood right behind the crowd and I followed the crowd. And all of a sudden, I don’t know, I didn’t see a step and I fell. But I was standing right behind the crowd. And they were just about to cross First Avenue – yeah to get to First Avenue, and they started running. I don’t know, the light must have changed. And I got all mixed up, I said I better stay in one place and follow the crowd, and that’s what’s happened. And there was a step, I didn’t see it.”

Id. at 57. When asked what plaintiff meant by “missing a step,” plaintiff answered,

“I never saw it. I don’t even know if there was a step there. That’s what they told me, I missed a step.

Q. Who told you [that] you missed a step?

A. My daughter-in-law. I don’t know. I don’t even know if there was a step there.”

Id. at 58. Later in her deposition, plaintiff was asked, “Do you know what caused you to fall?”

Plaintiff answered, “No.” *Id.* at 63.

DISCUSSION

The standards of summary judgment are well settled.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.”

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)(internal citations omitted).

Defendants argue that the complaint should be dismissed because, as a common carrier, they did not breach any duty owed to plaintiff as a passenger. Defendants also contend that plaintiff’s accident was caused by an intervening, superseding act, and that plaintiff is speculating as to what caused her fall.

Plaintiff argues that defendants had a duty to ensure that plaintiff, a handicapped person, entered the correct building. In support of this contention, plaintiff cites Access-A-Ride guidelines, which state that Access-A-Ride offers “door-to-door paratransit service.” *Cohen Affirm.*, Ex I. Plaintiff argues that the link of causation was not broken, in that it was a foreseeable consequence that plaintiff would fall if brought to the wrong location given plaintiff’s age, health, and “previous history of falling.” *Rosenfeld Opp. Affirm.* at 3.

“It has long been the rule that a common carrier owes a duty to an alighting passenger to stop at a place where the passenger may safely disembark and leave the area. Once that occurs, no further duty exists . . .” *Smith v Sherwood*, 16 NY3d 130, 133 (2011). A common carrier engaged in the transportation of disabled passengers not only “ha[s] a duty to exercise reasonable care for plaintiff’s safety in keeping with the dangers and risks known to the carrier or which it should reasonably have anticipated, but [also] a duty to exercise additional care for his safety as was reasonably required for [the plaintiff’s] disabilities. . .” *Cunningham v Vincent*, 234 AD2d 648, 651

(3d Dept 1996), citing *O'Leary v American Airlines*, 100 AD2d 959 (2d Dept 1984) (internal quotation marks omitted).

According to the driver, plaintiff was dropped off at 535 East 70th Street in Manhattan, the address listed on the Access-A-Ride trip ticket as plaintiff's destination. The driver's deposition testimony establishes that plaintiff safely alighted from the Access-A-Ride vehicle. By contrast, under plaintiff's version of the events, the driver stated to plaintiff that the vehicle had stopped in front of "the wrong building," but the driver escorted plaintiff across the street to the building where the driver believed that plaintiff should have been dropped off.

It is not clear from plaintiff's testimony whether the building to which the driver allegedly escorted plaintiff was the address where the driver was to have dropped off plaintiff, i.e., 535 East 70th Street, as reflected on the trip ticket. It is not reasonable to infer from plaintiff's deposition that the driver had escorted plaintiff to an address where the driver should not have dropped off plaintiff. Although plaintiff testified that the person at the desk inside the building informed plaintiff that her daughter was not in the building, plaintiff had testified that she had not given Access-A-Ride a specific address.

Although there is a question of fact regarding whether the driver dropped off plaintiff in front of the requested building, or escorted plaintiff across the street, it is unnecessary to resolve that factual issue, because plaintiff was left off at a safe location, terminating the duty owed to her by defendants as a common carrier. *Smith*, 16 NY3d at 134. In *Smith*, a public bus dropped off a twelve year old boy on the side of a four lane road, opposite from where the boy usually disembarked. The driver had gone past the boy's stop on the west side of the street, turned around in a parking lot (pursuant to its scheduled route), and stopped on the east side of the street to let the

boy off. The boy was injured when he crossed in front of the school bus and was struck by an automobile traveling in the same direction of the bus. The Court of Appeals ruled, "Although plaintiff correctly notes that there is a question of fact regarding the reason why Derek was dropped off on the east side of South Salina Street instead of the west side, it is unnecessary to resolve that factual issue because Derek exited the bus at a safe location, terminating the duty owed to him by [the bus company and bus driver]." *Id.*

Plaintiff's argument that defendants had a heightened duty to ensure that plaintiff entered "the right building," given plaintiff's disability, is not persuasive under the particular circumstances of this case. Plaintiff essentially argues that the duty of the common carrier of a disabled person should be extended beyond the point at which the disabled person safely alights from the vehicle, or beyond the point at which the driver no longer assists plaintiff.

Plaintiff testified that she did not give a specific address where she wanted to be dropped off, and that she did not inform the driver that someone would be waiting to meet plaintiff at the drop off location. Second, plaintiff's disclosed disabilities would not have suggested to defendants that plaintiff needed the assistance of another person to make sure that plaintiff did not forget where she had to go, or that plaintiff did not wander away from the destination where the driver was supposed to drop off plaintiff. Plaintiff's application disclosed that she suffered from peripheral vascular disease and thrombosis, not cognitive or psychological limitations, visual limitations, or balance limitations.

The Court does not suggest that Access-A-Ride did not have a duty as a common carrier to transport a passenger to a specific location as requested by the disabled passenger. However, it is undisputed that plaintiff did not give a street address to Access-A-Ride. There is no independent

evidence as to the address of the Hospital for Spēcial Surgery, or whether it has more than one building address or entrance. Thus, it cannot be said, under the circumstances presented, that defendants breached their duty. Even assuming, for the sake of argument, that plaintiff was not escorted to the Hospital for Special Surgery, based on the hearsay statement of a desk attendant that plaintiff was “in the cancer building,” there is no nexus between defendants’ purported negligence and the resulting injury.

Feder v Tower Air, Inc. (12 AD3d 190 [1st Dept 2004]) is instructive. In that case, the plaintiff was an airline passenger who had been transported in a wheelchair to the waiting area near the curb outside the terminal, because he was not able to walk for long distances. The Appellate Division, First Department, rejected plaintiff’s argument that the wheelchair had been removed prematurely, reasoning,

“The bare assertion that premature removal from the wheelchair started the chain of events which led to his fall and injury, is far too attenuated here, in view of the myriad possible causes for his falling. Without some evidence as to what caused the fall, a nexus cannot be made between the purported negligence and the resulting injury. Even if defendant arguably furnished the occasion for the accident, there is insufficient evidence that it caused it.”

Feder, 12 AD3d at 191. Like the plaintiff in *Feder*, plaintiff here is not able to walk for long distances, and plaintiff here testified at her deposition that she did not know what caused her to fall. The alleged chain of events that led up to plaintiff’s fall—such as the crowd that formed outside the building, the plaintiff’s decision to follow the crowd, and the sudden run of the crowd—are all too attenuated from defendants’ alleged negligence in escorting plaintiff to “the wrong building.”

Thus, even under plaintiff’s version of the facts, defendants would be entitled to summary judgment as a matter of law.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted, the complaint is dismissed, and the Clerk is directed to enter judgment in favor of defendants Metropolitan Transportation Authority, sued herein as Metropolitan Transit Authority and MTA New York City Transit, with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: May 11, 2011
New York, New York

ENTER:



J.S.C.

HON. MICHAEL D. STALLMA

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MAY 13 2011

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