SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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SILVIA FENEQUE, Index No.: 31498/2009

Plaintiff, Motion Date: 12/08/11

- against - Motion No.: 10

MTA BUS COMPANY and RAY CABRERA, Motion Seq.: 4

Defendants.

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The following papers numbered 1 to 15 were read on this motion by the defendants for an order pursuant to CPLR 3212 granting the defendants summary judgment on the issue of liability and dismissing the plaintiff's complaint:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....7 - 11
Reply Affirmation.....12 - 15

This is a personal injury action in which plaintiff, SILVIA FENEQUE, seeks to recover damages for injuries she sustained as a result of a fall that occurred at approximately 2:00 p.m. on April 20, 2009 at 23rd Avenue near College Point Boulevard in Queens County, New York.

At the time of the accident, plaintiff, Silvia Feneque, was a passenger on an MTA bus operated by defendant, Ray Cabrera, which was proceeding on route Q-65. Plaintiff alleges that she fell shortly after boarding when the bus suddenly accelerated and then braked abruptly before she had an opportunity to sit down. Plaintiff alleges that as a result of the fall she sustained a herniated lumbar disc at L4-5; a left shoulder torn rotator cuff requiring surgical intervention; left knee internal derangement also requiring surgical intervention; and left elbow derangement.

The plaintiff commenced this action by filing a summons and complaint on November 23, 2009. Issue was joined by service of

defendant's verified answer dated February 19, 2010. Defendants now move for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the plaintiff's complaint on the ground that the defendants were not negligent with regard to the plaintiff's fall and that the plaintiff was solely responsible for her injury.

In support of the motion, the defendants submit an affidavit from counsel, Eric K. Kim, Esq; a copy of the pleadings; a copy of the transcript of the examination before trial of the plaintiff Silvia Feneque; and a copy of the plaintiff's testimony at a statutory hearing.

The plaintiff, age 32, appeared at a statutory hearing pursuant to § 1276 of the Public Authorities Law on June 26, 2009, two months after her accident. At the time of the accident she was employed as a cook at a Columbian restaurant. Plaintiff testified that on the date in question she left her job and boarded the Q-65 bus at 33rd Street and College Point Boulevard. She was wearing sneakers and was carrying her purse on her right shoulder and an umbrella in her right hand. When she boarded the bus no other passengers were standing and there were seats available. Plaintiff stated that she was moving towards the middle of the bus to find a seat and had taken about six steps but before she had an oportunity to sit down, the driver the bus accelerated and then applied the brakes jerking the bus and causing her to fall backwards into the aisle. She stated that as a result of the fall she cut her finger and hit her head, shoulder, knee and back. After the plaintiff fell, the driver parked the bus and approached her to help her get up. An ambulance was called and the plaintff was taken to New York Hospital in Queens for further treatment.

The plaintff's examination before trial was held on April 19, 2011. At that time the plaintiff testified that she had seen a psychiatrist at Elmhurst Hospital because she was depressed that the accident left her unable to work and because she was having marital problems as a result of her physical condition. She stated that she told the psychiarist that she fell on the bus because the bus driver had accelerated too fast and then braked abruptly. With respect to the accident she again stated that after she entered the bus she took about 4 or 5 steps but the bus accelerated and braked and she fell backwards into the aisle before she was able to sit down.

Defendants' counsel, citing inter alia, Banfield v New York City Transit Authority, 36 AD3d3d 732 [2d Dept. 2007] and Rayford v County of Westchester, 59 AD3d 508 [2d Dept. 2009], contends

that the courts have held that to establish a prima facie cause of action for negligence against a common carrier for injuries sustained by a passenger as a result of the movement of the vehicle, the plaintiff must establish that the movement consisted of a jerk or lurch that was unusual and violent. Counsel contends that the plaintiff's testimony at her statutory hearing and at her examiation before trial is not sufficient to demonstrate, prima facie, that the bus made an unusual or violent movement. Defendants' counsel contends that the plaintiff's testimony characterizes the bus's movement as nothing more than the jerks and jolts commonly experienced in city bus travel. Defendants contend that as plaintiff has failed to make a prima facie case of negligence, summary judgment must be granted dismissing the complaint (citing Urquhart v New York City Tr. Auth., 85 NY2d 828 [1995]).

In opposition to the motion the plaintiff's counsel, Laurence L. Love, Esq., submits a copy of the plaintiff's bill of particulars; a copy of the plaintiff's April 19, 2011 deposition transcript; a copy of plaintiff's statutory hearing transcript; an affidavit of the plaintiff dated October 28, 2011; a copy of the MTA incident report for the subject accident.

In her affiavit dated October 28, 2011, plaintff states:

"When I got on the bus, I ascended the steps and paid my fare and began walking toward the back of the bus. The bus driver was already accelerating quite rapidly, at the moment that I paid my fare and the bus began to move forward at a very fast pace. Immediately I felt that the bus driver had taken off from the stop too fast and I was still not seated at this time. In fact, I was attempting to make my way toward the back of the bus and I felt the bus accelerating very quickly. I then felt, a few moments later, in the middle of the bus's rapid acceleration, that the brakes were being applied very rapidly and the bus then began to move forward and then backward in a very violent and unusual manner. This movement was so unusual and violent that I was unable to keep my balance or hold onto any of the poles or railings inside the bus to keep from falling. I noticed I was the only passenger that was not seated at the time of my fall. As a result of the extreme and sudden braking by the bus driver, I was thrown onto the floor of the bus quite a few feet from where I was standing at the time of the initial braking."

In the driver's accident report the driver states that the plaintiff sat down at the front of the bus. He states that he was driving between 22nd Avenue and 23rd Avenue on College Point Boulevard when the plaintiff got up out of her seat and started walking to the back of the bus. As she was walking he states that

she fell onto the floor. The supervisors report states that the plaintiff stumbled and fell in the aisle injuring her left shoulder.

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 (see see CPLR 3212 [b] Alvarez v Prospect Hosp., 68 NY2d 320; Zuckerman v City of New York, 49 NY2d 557 [1980]; Myers v Ferrara, 56 AD3d 78 [2d Dept. 2008]). The defendants have the burden of establishing, by proof in admissible form, their prima facie entitlement to judgment as a matter of law (see Myers v Ferrara, 56 AD3d 78 [2d Dept. 2008]). This burden may be satisfied only by the defendant's affirmative demonstration of the merit of the defense, rather than merely by reliance on gaps in the plaintiffs' case (see DeFalco v BJ's Wholesale Club, Inc., 38 AD3d 824 [2d Dept. 2007]; Cox v Huntington Quadrangle No. 1 Co., 35 AD3d 523[2d dept. 2006]; Pearson v Parkside Ltd. Liab. Co., 27 AD3d 539 [2d Dept. 2006]). Because a motion for summary judgment is a drastic remedy, the motion should not be granted if there are any triable issues of fact.

In order to establish a prima facie case of negligence against a common carrier for injuries sustained by a passenger as a result of the movement of the vehicle, the plaintiff must establish that the movement consisted of a jerk or lurch that was "unusual and violent" (Urquhart v New York City Tr. Auth., 85 NY2d 828[1995]; also see Rayford v County of Westchester, 59 A.D.3d 508 [2d Dept. 2009]; Martin v New York City Tr. Auth., 48 A.D.3d 522 [2d Dept. 2008]: Golub v New York City Tr. Auth., 40 A.D.3d 581{2d Dept. 2007]; Banfield v New York City Tr. Auth., 36 A.D.3d 732 [2d Dept. 2007]).

Upon review and consideration of the defendants motion the plaintiffs affirmation in opposition and the defendants' reply thereto this court finds as follows:

Here, in support of their motion which was for summary judgment dismissing the complaint on the ground that they were not at fault in the happening of the subject accident, the defendants failed to establish their prima facie entitlement to judgment as a matter of law.

First, the defendants failed to provide an affidavit from the bus driver or employee of the MTA providing defendants' version of the events thereby requiring plaintiff to proffer evidence of a triable factual issue. As stated above the defendant, as the movant, is required to make an affirmative

demonstration of the merit of the defense. Secondly, the deposition of the plaintiff and her testimony at the statutory hearing which was provided by the defendant in support of their motion raises a question of fact as to whether the jolt from the bus which caused her to fall was unusual and violent rather than just an ordinary jolt from a moving bus.

In this respect, the plaintiff, testifying through an interpreter consistently stated in both her statutory hearing and her examination before trial that the bus accelerated too rapidly and braked abruptly causing her to fall backward suddenly and violently in the aisle. As a result of her fall plaintiff testified that she sustained a cut to her finger and injuries to her shoulder, back and knee. According to her testimony, her fall was was so hard that the passengers asked her if she wanted an ambulance called to the scene. The ambulance came and transported her to New York Hospital in Queens County. This Court finds that plaintiff's testimony provided more than a mere characterization of the stop. It also provided objective evidence in the form of the nature of her injuries of the force of the stop sufficient to establish an inference that the stop was extraordinary and violent and more than the jerks and jolts commonly experienced in city bus travel. Therefore, the evidence submitted by defendants in support of the motion raised a triable issue of fact as to whether the stop at issue was unusual and violent, as opposed to whether the stop involved only the normal jerks and jolts commonly associated with city bus travel (see Black v County of Dutchess, 87 AD3d 1097 [2d Dept. 2011]; Urquhart v New York City Tr. Auth., 85 NY2d 828 [1995]; Jenkins v Westchester County, 278 AD2d 370 [2d Dept. 2000]).

Third, the affidavit submitted by the plaintiff in opposition to the motion also raised a question of fact as to the nature of bus's movements, the plaintiff's injuries and the negligence of the bus driver (see Aguila v. N.Y. City Transit Auth., 2 AD3d 761[2d Dept. 2003]).

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the defendants' motion for summary judgment is denied.

Dated: January 4, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.