

Davis v New York City Tr. Auth.

2012 NY Slip Op 31040(U)

April 16, 2012

Sup Ct, NY County

Docket Number: 105532/07

Judge: Peter H. Moulton

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

HON. PETER H. MOULTON

SUPREME COURT JUSTICE

PRESENT: _____

PART 40B

Justice

Index Number : 105532/2007

DAVIS, PATRICIA

VS.

NEW YORK CITY TRANSIT

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 *is decided per attached Petition and Order*

FILED

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HON. PETER H. MOULTON
SUPREME COURT JUSTICE

Dated: 4/18/12

[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 : STATE OF NEW YORK
COUNTY OF NEW YORK : PART 40B

----- X
PATRICIA DAVIS, as Administratrix of the :
Estate of JANICE CAMPBELL-PEGGRAM, deceased :

Plaintiff, : Index No. :
105532/07

-against-

NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN :
AND BRONX SURFACE TRANSIT OPERATING :
AUTHORITY (M.A.B.S.T.O.A.) AND ROLAND LEWIS :

Defendants. :
----- X

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MOULTON, J.:

This personal injury action was tried before a jury. The jury returned a verdict in plaintiff's favor for \$1.5 million. Defendants now move to dismiss the action, or, in the alternative, to set aside the jury's verdict in favor of a new trial.¹

FACTS

This action arose from injuries sustained by Janice Pegram-Thompson while riding a bus operated by defendants on January 24, 2006. The complaint alleges that she boarded the bus

¹The court considered the following submissions from the parties in considering the instant motion: 1) Defendants' Amended Notice of Motion and attached Affirmation and Exhibits and Memorandum of Law; 2) Plaintiff's Affirmation in Opposition and Memorandum of Law, and 3) Defendants' Reply Affirmation.

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[* 3]

that morning driving a motorized scooter. She was accompanied by her husband John Pegram. Mr. Pegram testified at trial that this was the first occasion his wife had used the scooter on a City bus. The bus driver strapped Ms. Pegram-Thompson in, but plaintiff claimed at trial that he did so incompletely, and therefore negligently. While the bus drove around Marcus Garvey Park in Harlem, Ms. Pegram-Thompson tipped over in her scooter and fell to the floor of the bus. She fractured her left femur and her right clavicle. Ms. Pegram-Thompson had previously been diagnosed with breast cancer, and she ultimately succumbed to that disease on March 19, 2007.

The location of the incident was listed in plaintiff's first notice of claim as "at or near 123rd by Marcus Garvey Park." Plaintiff later moved to amend the notice of claim to reflect that the location of the accident was "at or near 120th by Marcus Garvey Park." There is no mention in either notice of claim that the driver of the bus ran a stop sign during the course of the incident. The amended complaint states that the bus made a "sharp, fast, and reckless turn" while "proceeding southbound on 5th Avenue in the City and County of New York at about 120th Street." (Amended Complaint ¶¶ 23-25.) Plaintiff's Bill of Particulars and Supplemental Bill of Particulars both state that the accident

[*4]
occurred "at or near 120th Street and 5th Avenue by Marcus Garvey Park."

At trial, Mr. Pegram testified that the accident occurred at a different location and in a materially different way than the recitations of the accident stated in the notice of claim and the pleadings. Mr. Pegram testified that the bus drove through a blinking red light and dual stop signs at 124 Street and Mt. Morris Park West without stopping and at a rapid pace. According to Mr. Pegram, Ms. Campbell-Pegram was thrown from her motorized scooter when the bus made a left on to Mt. Morris Park West. This theory of the accident was asserted by plaintiff's counsel before the jury. It became plaintiff's theory of the case.

This testimony by Pegram also differed from that of the bus driver, Roland Lewis. Lewis testified that he stopped at dual stop signs at 124th Street and Mt. Morris Park West, turned left, and then proceeded at normal speed down Mt. Morris Park West. He testified that he made a second turn on to 120th Street, and that it was around the time that he made that turn that he heard passengers began to shout that a passenger had fallen. Mr. Lewis testified that there was a traffic signal at 120th Street, and that it was green. It was not disputed at trial that this intersection had a traffic signal, as opposed to the stop sign and blinking red

light deployed at 124th Street and Mt. Morris Park West. Mr. Lewis disagreed that the accident occurred at 124th Street and Mt. Morris Park West. The defendants' accident reports indicate that the accident occurred at 120th Street and Mt. Morris Park West. The ambulance call report indicates that the ambulance reported to that intersection.

The discrepancies between Mr. Pegram's testimony and the plaintiff's amended notice of claim and pleadings thus were not cured by defendants' adoption at trial of Pegram's description of the accident location.

DISCUSSION

It is well-established that "[t]he purpose of a notice of claim is to allow the municipal defendant to make a prompt investigation of the facts and preserve the relevant evidence." (Lomax v New York City Health and Hospitals Corporation, 262 AD2d 2, 4.) An accurate notice of claim allows the municipality or other governmental entity to investigate the accident scene "while the facts surrounding the incident [are] still fresh." (Ilera v New York City Transit Auth., 181 AD2d 658, 659.)

The Court of Appeals stated in Brown v City of New York (95 NY2d 389, 393):

[*6]
[C]ourts should focus on the purpose served by a Notice of Claim: whether based on the claimant's description municipal authorities can locate the place, fix the time, and understand the nature of the incident.

Misidentification of the accident site can fatally undermine the purposes of a notice of claim. The late Justice Evans stated that "[e]rrors in location designation, however innocently made, are inherently misleading." (Matter of Crespo, 123 Misc2d 862, 863; see also Charleston v Incorporated Village of Cedarhurst, 62 AD3d 641; Edgehill v City of New York, 260 AD2d 597; Williams v City of New York, 156 AD2d 361.)

Here defendants were prejudiced by plaintiff's change at trial in identifying the accident site because the change was not only one of location, but also one that concerned the etiology of the accident. At trial, plaintiff's argument that the accident occurred at 124th Street -- not at 120th Street, as set forth in the amended notice of claim - was accompanied by the assertion that the bus driver ignored stop signs and a red blinking light to make the left turn. This describes an even greater degree of negligence than taking a left turn at excessive speed when the traffic signal is green. Where a plaintiff waits too long to amend his notice of claim to assert new factual predicates for negligence liability, his

pre-trial motion to amend the notice of claim will be denied and the action dismissed with prejudice. (Chipurnoj v Manhattan and Bronx Surface Transit Operating Auth., 216 AD2d 171; Konsker v City of New York, 172 AD2d 361, app denied, 78 NY2d 858.) A fortiori, a claim must be dismissed when a plaintiff attempts to change at trial the facts contained in the notice of claim.

Plaintiff argues that defendants had ample information to investigate the accident, and did investigate immediately after the accident. It is true that the City's investigation timely went forward at 120th Street, but, until trial, the City never knew that there would be an alternate narrative of the accident presented by plaintiff. Instead, once the notice of claim was amended, the plaintiff's complaint and bills of particulars adhered to the claim that the accident that caused plaintiff's injuries occurred at the left turn at 120th Street. This repetition of the accident site in pleadings deters a defendant from further investigation. (See Charleston v Incorporated Village of Cedarhurst, 62 AD3d at 642.) Indeed, by successfully moving to amend the notice of claim to change the accident location from 123rd Street to 120th Street, the plaintiff appeared to give even greater validity to the 120th Street accident location. Rather than correcting its amended notice of claim (cf Lomax, supra. 262 AD2d at 3), the plaintiff took steps

that gave defendants greater assurance that the claimed accident location was at 120th Street and Mt. Morris Park West.


Given the prejudice to defendants, the court sets aside the jury's verdict pursuant to CPLR 4404(a). As plaintiff's time to amend the notice of claim has long expired, and as the court has no discretion to extend the time, this action must be dismissed. (General Municipal Law §§ 50-e(5), 50-i(1).)

CONCLUSION

The motion is granted. The jury's verdict is vacated and set aside and the complaint is dismissed. This constitutes the decision and order of the court.

FILED

DATE: April 16, 2012

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J.S.C.

**PETER H. MOULTON
JUDGE, CIVIL COURT**