

Bhatti v MTA Bus Co.
2013 NY Slip Op 30628(U)
March 28, 2013
Sup Ct, New York County
Docket Number: 103668/11
Judge: Arlene P. Bluth
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SC-ANNEXED ON 4/2/2013
**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

HON. ARLENE P. BLUTH

PRESENT: _____
Justice

PART 22

Index Number : 112878/2010
BHATTI, MADIHA
vs.
MTA BUS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for TI'S MSJ on liab

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1
Answering Affidavits — Exhibits _____ | No(s) 2
Replying Affidavits _____ | No(s) 3

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER**

FILED
APR 02 2013
COUNTY CLERKS OFFICE
NEW YORK

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

Dated: 3/28/13

Arlene P. Bluth, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Index No.: 103668/11
Mot Seq 001

Madiha Bhatti,

Plaintiff

DECISION/ORDER

-against-

MTA Bus Company and Joseph Ferrara,

Defendants.

HON. ARLENE P. BLUTH, JSC

FILED
APR 02 2013
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff's motion for summary judgment against defendants of the issue of liability is denied.

In this action, plaintiff seeks damages for personal injuries she incurred when she was a pedestrian hit by a bus driven by defendant Ferrara and owned by defendant MTA on October 28, 2009. Plaintiff was crossing East 34th Street in Manhattan and defendant was turning right onto East 34th Street from 2nd Avenue.

In order to prevail on its motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 (1986). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing. *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872, 433 NYS2d 1015 (1980). In opposing such a motion, the party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. *Zuckerman v City of New York*, 49 NY2d 557 at 562, 427 NYS2d 595 (1980).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-

moving party and must not decide credibility issues. (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990], *lv. denied* 77 NY2d 939, 569 NYS2d 612 [1991]).

As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th Street Development Corp.*, 161 AD2d 218, 554 NYS2d 604 [1st Dept 1990]), or where the issue is even arguable or debatable (*Stone v Goodson*, 8 NY2d 8, 200 NYS2d 627 [1960]).

Parties' Contentions

In support of her motion, plaintiff submits her affidavit and the affidavit of a police detective, Tim O'Gorman, who happened to witness the accident. Both of them say that plaintiff was in the crosswalk crossing 34th Street when she was struck by the turning bus. Plaintiff claims that at the point of impact she was past the dotted lines separating the two westbound travel lanes of 34th Street and the detective says she was just before the second lane of westbound traffic. In any event, they both say that she was in the crosswalk when the bus struck her.

The Court notes that a police report is annexed to the moving papers and attributes a statement to defendant Ferrara to the effect that he hit the pedestrian while she was in the crosswalk but never saw her.

Defendant presents the affidavit of Priscilla Hoffman, a front seat passenger of the Ferrara's bus, who was sitting on the opposite side of the driver. She said that the traffic light on 2nd Avenue was yellow but that a traffic enforcement agent waved the bus to make the right turn. She said that another bus, right in front of theirs, was also waved on. She swears that "When the woman [plaintiff] entered the street, she ran between the two turning buses that were being

waved by the traffic agent. She was not looking at her surroundings and appeared not to see the bus, as she kept going and walked quickly into the right front corner of the bus as it continued to turn.” Much of the rest of Ms. Hoffman’s affidavit is conclusory, but the foregoing quote is based upon her personal observations.

In his deposition, defendant driver says he never saw the plaintiff despite his continual scanning for pedestrians, that contact was made when he was about three-quarters through the turn and that it appears she was in one of his blind spots when contact was made. As he was three quarters through the turn, only the back of the bus would have been in the crosswalk, and the front of the bus, where contact was made, would have been 25 to 30 feet away from the crosswalk. He said he never spoke to the police at the scene and only spoke with his supervisor.

Analysis

In support of her motion, plaintiff, through her affidavit and that of eyewitness Detective O’Gorman, has made a prima facie showing, thus shifting the burden to defendants to rebut this showing, which they have done by submitting Ferrara’s transcript and Hoffman’s affidavit.

The parties have presented two versions of the circumstances surrounding their accident: plaintiff claims that the bus hit her while she was crossing the street in the crosswalk and defendant claims, through Ms. Hoffman’s affidavit, that plaintiff ran out into the street between two buses, wasn’t looking where she was going, and walked into the turning bus.

In reply, plaintiff argues that this Court must ignore Ms. Hoffman’s affidavit because it is not credible and conflicts with all the credible evidence. Yet plaintiff has not cited a single case which allows this Court to set aside this witness’s affidavit as incredible on a summary judgment motion.

This Court's view of Ms. Hoffman's affidavit, in light of all the other evidence, is irrelevant; on this motion, it is the Court's duty to determine whether there are issues of fact. It is up to the jury to determine which witnesses they believe. The cold fact is that Ms. Hoffman swears she saw something different than what Detective O'Gorman saw and it is up to the jury to weigh the credibility of all the witnesses.

Because there is an issue of fact as to plaintiff's actions (whether she ran between turning buses and otherwise acted negligently) and defendant's actions (whether he should have seen her in the crosswalk and stopped the bus even if the traffic agent waved him on), plaintiff's motion for summary judgment on the issue of liability is denied. *See Odikpo v American Transit, Inc.*, 72 AD3d 568, 569, 899 NYS2d 219, 220 (1st Dept 2010) (the parties' testimony as to the manner in which each driver controlled his vehicle, the circumstances surrounding their collision, and the chain of events leading up to the collision involving plaintiff's vehicle raise questions of fact, which are best left for a jury to decide).

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on liability is denied.

This is the Decision and Order of the Court.

Dated: March 28, 2013
New York, New York



HON. ARLENE P. BLUTH, JSC

FILED
APR 02 2013
COUNTY CLERK'S OFFICE
NEW YORK