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

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LYNETTE HINDS,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY and ALL TRANSIT, LLC,

Defendants.

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Index Number: 155652/2012

DECISION AND ORDER

HON. MICHAEL D. STALLMAN, J.:

Plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on the issue of liability.

BACKGROUND

Plaintiff alleges that, on March 18, 2011, while in the process of exiting from an Access-A-Ride vehicle (the bus), the bus's driver, Kim Johnson, improperly operated the mechanized elevator mechanism (the lift), causing plaintiff to fall and injure herself (bill of particulars, items 1, 13, 14). Plaintiff states that while standing with the aid of a cane on her right side, she had her right foot on the ground and her left foot still on the lift and that Johnson caused the lift's flap to engage, pushing plaintiff off the

lift, resulting in her falling on the ground, also pulling down Johnson, who had attempted to prevent plaintiff's fall, and injuring her left knee, right shoulder, neck and back (plaintiff EBT at 55-58, 62, 70). Plaintiff further stated that she and Johnson were the only witnesses to the accident. Plaintiff states that she spoke with Johnson's supervisor after the accident (*id.* at 131-132, 71).

New York City Transit Authority (the TA) admits ownership of the bus. (Answer ¶ 9). All Transit, LLC (All Transit) is a company that operates Access-A-Ride vehicles, including the bus, to transport disabled persons to and from specified locations (Johnson EBT at 11-12).

Johnson stated that, on March 18, 2011, she was employed by All Transit and was driving the bus, and that she picked up plaintiff from her home and transported her on the bus to the scheduled destination (*id.* at 53-54, 57-58). Johnson further stated that as part of plaintiff's exit, plaintiff got on the lift, that Johnson pushed the button of the lift so that plaintiff would be lowered to the ground level, that Johnson glanced away for a second and that while plaintiff was in the process of getting off the lift, Johnson accidently pushed the button, causing the flap to raise and plaintiff fell to the ground, but that Johnson did not fall (*id.* at 71-75).

Johnson also stated that plaintiff did not appear to be injured and that plaintiff did not want Johnson to call for an ambulance (*id.* at 75-77). Johnson further stated that she called her supervisor to report the accident, but disputed plaintiff's account that plaintiff also spoke with Johnson's supervisor (*id.* at 78-79). Johnson also stated that she had previously inspected the lift earlier that morning, that the lift was not damaged, that it was operating properly, that there were no foreign substances on it and that she was unaware of any prior problems with it (*id.* at 87-89).

Plaintiff contends that because both she and Johnson stated that Johnson pushed the lift's button, engaging the flap before plaintiff had completely exited the bus, causing plaintiff to fall, she is entitled to summary judgment. Defendants note the differences between Johnson's and plaintiff's accounts, including whether plaintiff fell on Johnson, whether plaintiff spoke with Johnson's supervisor after the accident and whether plaintiff needed assistance after the accident. Defendants assert that the conflicting accounts raise questions of fact as to how the accident occurred.

DISCUSSION

A party seeking summary judgment must make a prima facie case showing entitlement to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets the burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Flomenbaum v New York University*, 14 NY3d 901, 902 [2010]; Zuckerman *v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

Negligence requires that "a plaintiff must demonstrate the existence of a duty of care owed to the plaintiff, a breach of that duty, and that the breach of such duty was a proximate cause of [plaintiff's damages]" (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 92 AD3d 148, 159 [2d Dept 2011], *affd* 20 NY3d 342 [2013]).

A common carrier has the duty to "keep the transportation vehicle safe . . . [and to] maintain a safe means of ingress and egress for the use of its passengers" (*Bingham v New York City Tr. Auth.*, 8 NY3d 176, 180 [2007]). It "is subject to the same duty of care as any other potential tortfeasor - reasonable care under all the circumstances of the particular case" (*Bethel v New York City Tr. Auth.*, 92 NY2d 348, 356 [1998]; *see also Basso v Miller*, 40 NY2d 233, 240-241 [1976]).

However, "[n]egligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination. Only if it can be concluded as a matter of law that defendant was negligent, may summary judgment be granted in a negligence action" (*Ugarizza v Schmeider*, 46 NY2d 471, 474 [1979]; *see also McCummings v New York City Tr. Auth.*, 81 NY2d 923,

926 [1993], *cert denied* 510 US 991 [1993]).

Plaintiff has established her prima facie case for summary judgment. Plaintiff alleges that the bus driver activated the flap before plaintiff completed alighting from the lift, when her left foot was still on the lift, thereby causing her to fall and sustain injury. She also cites to the bus driver's deposition testimony where the bus driver testified that, "after plaintiff placed her right foot on the grass," the bus driver "glanced away for a second" and accidentally pressed the button for the flap mechanism while plaintiff's foot was still on the lift, and plaintiff fell afterwards (Johnson EBT at 72-73). Thus, plaintiff has made a prima facie case of negligence due to the inattentive acts of the bus driver and a causal connection with plaintiff's alleged injuries. Plaintiff also made a prima facie showing, both through her deposition testimony and medical evidence (*see* Steinberg Affirm. Ex. H, I) that the accident caused injuries.

Defendants have not met their burden of demonstrating the existence of a triable question as to any material factual issue. The bus driver's account does not dispute that the bus driver's premature activation of the flap mechanism caused the alleged incident. Neither can it be disputed that such premature activation, when the driver failed to make sure plaintiff

had safely alighted from the lift, constituted a failure to use reasonable care under the circumstances, thereby breaching the duty of care owed to plaintiff, a disabled passenger. The different accounts of whether plaintiff fell on Johnson, whether plaintiff spoke with Johnson's supervisor after the accident and whether plaintiff needed assistance after the accident are immaterial because there is no dispute as to Johnson's looking away from plaintiff and activating the lift, which caused plaintiff to fall. Johnson's act, under the circumstances, was negligent as a matter of law. No reasonable view of the undisputed evidence of the bus driver's acts and omissions can be consistent with the duty of care owed to the plaintiff passenger. As to the nature and extent of plaintiff's alleged injuries, these allegations do not relate to liability. Defendants do not present evidence showing that plaintiff was not injured at all or that none of plaintiff's claimed injuries were caused by the incident. Thus, defendants have not raised any material triable questions of fact as to liability.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability is granted; and it is further

ORDERED that plaintiff shall, within 30 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the General Clerk's Office and said Clerk shall cause the matter to be placed upon the calendar for trial of the issues of injury and damages.

Dated: May 19, 2014
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN