

Moschella v New York City Tr. Auth.

2014 NY Slip Op 33966(U)

April 23, 2014

Supreme Court, New York County

Docket Number: 109125-2004

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. George J. Silver
Justice

PART 10

MARIA C. MOSCHELLA and JOHN HERNDON

INDEX NO. 109125-2004

- v -

MOTION DATE _____

NEW YORK CITY TRANSIT AUTHORITY

MOTION SEQ. NO. 003

The following papers, numbered 1 to 4, were read on this motion for _____

Notice of Motion, Affirmation, Exhibits & Amended Exhibits -----

No(s). 1, 2

Plaintiffs' Opposition & Exhibits -----

No(s). 2

Reply Affirmation-----

No(s). 4

FILED
APR 24 2014
NEW YORK
COUNTY CLERKS OFFICE

Upon the foregoing papers, the motion is decided as follows:

At the close of plaintiffs Maria C. Moschella's ("Moschella") and John Herndon's (collectively "plaintiffs") evidence in the trial of this pedestrian knockdown action, defendant New York City Transit Authority ("defendant") moved pursuant to CPLR § 4401 for a directed verdict dismissing plaintiffs' complaint on the ground that plaintiffs failed to prove that Moschella sustained a serious injury as a result of defendant's negligence. Specifically, defendant contended that Moschella's non-treating expert physician, Dr. Lee, was not asked hypothetical questions regarding the causation of Moschella's injuries or whether she sustained a serious injury as that term is defined by Insurance Law § 5102 [d]. Defendant also contended that plaintiffs failed to establish a prima facie case of negligence on defendant's part. Plaintiffs opposed the motion. The court reserved decision and thereafter the jury returned a verdict finding defendant 70 percent liable for the accident and plaintiff 30 percent liable. The jury also found that, as a result of the accident, Moschella sustained a fracture, a significant limitation of use of a body

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

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check as appropriate: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

function or system and a permanent consequential limitation of use of a body organ or member.

Following the jury's verdict, defendant renewed its motion to dismiss. This court issued a written decision dated July 3, 2013 denying defendant's motion for a directed verdict, finding that the jury had a rational basis to conclude that Moschella's injuries, which were severe, were proximately caused by defendants' negligence. Specifically, the court held that based upon Moschella's testimony as to how the accident happened, which the jury obviously accepted as evidenced by its apportionment of fault among the parties, the results of defendant's negligence were "within the experience and observation of ordinary an layman" (*Lanpont v Savas Cab Corp.*, 244 AD2d 208 [1st Dept 1997]) and, therefore, expert medical testimony on the issue of causation was unnecessary. Defendant now moves pursuant to CPLR § 2221 for leave to reargue its motion for a directed verdict. Plaintiffs oppose the motion.

A motion for leave to reargue under CPLR § 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted (*id.*). Because the court's July 3, 2013 order failed to address and resolve defendant's arguments on the issue of liability defendant's motion to reargue is granted. Upon reargument, defendant's motion for a directed verdict is denied.

A trial court's grant of a CPLR § 4401 motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party (*Szczerbiak v Pilat*, 90 NY2d 553, 556, 686 NE2d 1346, 664 NYS2d 252 [1997]). In considering the motion for judgment as a matter of law, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant (*id.*).

To carry the burden of proving a prima facie case, the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury (*Derdiarian v Felix Constructor Corp.*, 51 NY2d 308, 414 NE2d 666, 434 NYS2d 166 [1980]). In circumstantial cases such as this, the possibility that an accident may have been caused by factors other than a defendant's negligence does not mandate a conclusion that the plaintiff failed to make out a prima facie case (*Brito v Manhattan & Bronx Surface Transit Operating Auth.*, 188 AD2d 253 [1st Dept 1992]).

Considering the facts in the light most favorable to Moschella, and affording plaintiffs every inference that can be properly drawn from the record, the evidence proffered by Moschella was sufficient to permit the jury to draw a reasonable inference of negligence on defendant's part. Moschella testified that she was knocking on the door of defendant's bus with her hand, which was approximately ten or eleven inches away from her body as she knocked. While she was knocking on the door of the bus Moschella could see the bus driver through the glass portion of the bus's door. The bus driver was sitting in the driver's seat looking straight ahead with his hands on the steering wheel. When Moschella knocked on the door the bus driver turned his head to the right toward the door of the bus. There was no verbal communication between Moschella and the bus driver. After the bus driver turned toward the door Moschella continued knocking, waiting to see if the bus driver would give her a signal as to whether or not he was going to open the bus door to allow Moschella to get on the bus. The bus driver gave no signal but instead turned his head away from the door and toward the bus's front windshield. Moschella then heard the bus begin to accelerate. As Moschella, who was still standing in front of the bus's closed door, saw the bus door begin to move she attempted to move back from the bus by raising her right foot and pivoting. As Moschella did so she felt an impact to the upper left area of her back near her shoulder. Moschella never saw what portion of the bus struck her but testified that it was something between the door of the bus and the front passenger side wheel. Moschella testified that after she was struck in the shoulder area she lost her balance and fell onto the sidewalk, close to the curb. Moschella testified that her left elbow, however, was sticking off of the curb. Moschella then felt another impact

on her elbow and a rubbing, circular motion scrapping her skin. Moschella did not see what caused the impact or the rubbing sensation on her skin. Moschella testified that the impact she experienced to her elbow felt as if something was crushing her bones. After the circular motion stopped, Moschella saw the rear of the bus as it crossed Fifth Avenue.

Moschella's testimony, when viewed in combination with the timing and proximity of the bus's movement, permits an inference that the bus operator negligently pulled the bus pulled away and that a portion of the bus struck Moschella, knocked her down, and then ran over her left elbow (*McCleery v Consol. Edison of N.Y., Inc.*, 49 AD3d 312, 314 [1st Dept 2008, Saxe, J. dissenting] *revd* 11 NY3d 778 [2008]). Moreover, the evidence of the nature of Moschella's injuries, which included a fracture of the distal humerus of her left elbow, which her medical expert, Dr. Lee, described as a crush injury, and a degloving injury to the soft tissues, coupled with the position of her body, and more particularly, her left elbow, after she fell to the sidewalk, were sufficient to permit a reasonable inference by the jury of negligence on defendant's part (*Brito*, 188 AD2d at 254-55).

The court adheres to its July 3, 2013 decision that Moschella established that she sustained a serious injury under Article 51 of the Insurance Law and that defendant's acts were the proximate cause of her injuries. The results of defendant's alleged negligence are such that they are within the experience and observation of ordinary laypersons and therefore the jury could draw a conclusion as to causal relationship without the necessity of expert medical testimony on the issue (*Mitchell v Coca-Cola Bottling Co.*, 11 AD2d 579 [3rd Dept 1960]).

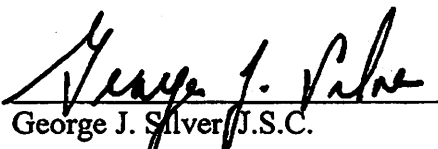
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Accordingly, it is hereby

ORDERED that defendant's motion to reargue is granted and, upon reargument, defendant's motion for a directed verdict is denied.


George J. Silver/J.S.C.

GEORGE J. SILVER

Dated: APR 23 2014
New York County