

**Bruno v Port Auth. of N.Y. & N.J.**

2016 NY Slip Op 30721(U)

April 14, 2016

Supreme Court, New York County

Docket Number: 15691/12

Judge: Jennifer G. Schechter

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

-----x  
KATHLEEN BRUNO,

Plaintiffs,

Index No.15691/12

-against-

THE PORT AUTHORITY OF NEW YORK AND  
NEW JERSEY and HUDSON TRANSIT LINES, INC.,  
Defendants.

-----x  
JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3212, defendant Hudson Transit Lines, Inc. (Hudson) moves for summary judgment dismissing all claims and cross-claims against it. Defendant The Port Authority of New York and New Jersey (Port Authority) cross-moves for summary judgment on its cross-claim against Hudson for contractual indemnification and for dismissal of Hudson's cross-claims.

Background

Plaintiff, Kathleen Bruno (Bruno), was injured on September 11, 2011 when she tripped because of a hole on the platform of gate 310 as she was exiting a bus at the Port Authority.

Specifically, plaintiff testified that the bus pulled into the gate and about fifteen people got off before her (Cross-Motion [Cross], Ex G at 25:2-26:2). Plaintiff held onto the handrail, she stepped down with her left foot into a hole and fell injuring her ankle (*id.* at 26:20-27:25). Plaintiff first noticed the hole when she fell (*id.* at 31:9-

11). She further testified that the bus driver was behind her on the bus and came to help her and stated "they're supposed to fix that hole" (*id.* at 31:17-20, 33:11-12). Later, "one of the bus drivers from the Port Authority had come over after [she fell] and said to [her] that [she] should get an attorney because three people had fallen in that same spot" (*id.* at 80:21-81:2).

James Okie, the bus driver, testified that on the date of the accident, he remembered "pulling up to the gate, opening the door, shutting the bus off, getting out of the bus, and watching people get off the bus. . . . They got off, and I turned around and then I saw [Bruno] on the floor and that was it" (Cross, Ex H at 41:16-22, 41:3-25, 43:25-44:6). He also testified that he did not actually see her fall and that he was about six feet away by the luggage compartment (*id.* at 44:12-21). After she fell he noticed a shallow hole that appeared to have been patched and repatched (*id.* at 56:7-57:25, 88:17-20, 97:12-15). He did not recall making any comment about the hole and he did not recall another bus driver coming to assist plaintiff or commenting (*id.* at 52:7-23, 88:14-16).

Philip Weiner, a Hudson operations supervisor, testified that if he noticed any safety issues or defects, he would

report them to the Port Authority but that during the course of his employment he has not had to report anything in writing (Cross, Ex I at 46:3-12).

Michael Scanio, a maintenance unit supervisor for the Port Authority testified that maintenance units perform inspections of the gates and sidewalks once a year and perform repairs in response to reports they receive (Cross, Ex J at 22:4-18, 27:10-13). He also testified that during the course of a day he receives radio transmissions or phone calls when repairs are needed. He had received such notice that there was an unsafe condition at gate 310 on March 7, 2011 (*id.* at 31:15-32:22). When he went to check it, he saw a small hole in the pavement of the sidewalk where passengers were unloaded and it was repaired later on the same day (*id.* at 33:13-14, 34:6-8, 34:24-35:2). He did not know who had reported the hazard or whether it was reported because someone tripped on it (*id.* at 37:7-13). He swore that from the date the hole was repaired through September 12, 2011, he was not aware of any incidents involving the area and between March 7, 2011 and September 11, 2011 no further repairs were made to the hole (*id.* at 41:5-13, 42:17-20).

Hudson moves for summary judgment urging that the Port Authority breached its duty to maintain and repair the bus

terminal pursuant to its Bus Carrier License Agreement with the Port Authority (Licence Agreement), and that the Port Authority had the responsibility to make necessary repairs and keep the facility in good operating condition (Affirmation in Support [Supp] at ¶¶ 25, 36-39). Therefore, because Hudson did not have any duty to repair the premises, it urges that summary judgment should be granted dismissing all claims and cross-claims against it.

The Port Authority opposes the motion arguing that there is a question of fact as to whether Hudson breached its duty as a common carrier to provide a safe location to disembark from the bus. It further urges that there are material questions of fact regarding the parties' obligations under the License Agreement.

The Port Authority cross-moves for summary judgment on its cross-claim for contractual indemnification and for dismissal of Hudson's cross-claims. Hudson opposes the cross-motion urging that the indemnification provision does not apply to this action because the Port Authority was negligent.

#### Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues (see *Glick & Dolleck v Tri-Pac Export Corp*, 22

NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden, which is "a heavy one," is on the movant to make a *prima facie* showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts (see *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "Where the moving party fails to meet this burden, summary judgment cannot be granted, and the non-moving party bears no burden to otherwise persuade the Court against summary judgment. Indeed, the moving party's failure to make a *prima facie* showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

Hudson has failed to meet its heavy burden. "A common carrier owes a duty to an alighted passenger to stop at a place where the passenger may safely disembark and leave the area" (*Miller v Fernan*, 73 NY2d 844, 845 [1988]). Hudson, as a common carrier, has a duty to provide a safe passage off the bus and should not place passengers in the position where they must follow a dangerous path off the bus (see *Abraham v Port Auth. of N.Y. & N.J.*, 29 AD3d 345,, 346-7 [1<sup>st</sup> Dept 2006]).

"Liability rests upon a 'finding that the placement of the bus dictates that the passenger, in order to board [or exit] the bus, must negotiate a dangerous or defective path'. Whether a common carrier has breached its duty in this regard is generally a question of fact to be determined by the jury." (*Malawer v New York City Tr. Auth.*, 18 AD3d 293, 295 [1<sup>st</sup> Dept 2005] citations omitted).

To prevail on its motion for summary judgment, Hudson was required to set forth evidentiary facts sufficient to entitle it to judgment as a matter of law. Hudson failed to meet this burden. Hudson has not shown that either the path was safe or that a safe alternative path existed (*Connolly v Rogers*, 195 AD2d 649 [3d Dept 1993]). In addition, even if the Port Authority breached its duty to make necessary repairs, it does not absolve Hudson's duty to provide a safe path off the bus. There are also issues of fact as to whether Hudson had notice of the hole and defect at gate 310. There is conflicting testimony as plaintiff testified that Mr. Okie indicated that he knew the hole existed and was supposed to be fixed and that another bus driver saw other passengers trip in that same location (*Cross*, Ex G at 33:11-12, 80:21-81:2).

Hudson's alternate arguments also fail. On the one hand it urges that the condition was open and obvious, and on the other that the bus driver could not have seen or remedied it.

Again, these arguments fail as Hudson still had a duty to provide a safe path of disembarkation for its passengers. Accordingly, summary judgment is denied.

#### Contribution and Indemnification

Hudson also moves for dismissal of the Port Authority's cross-claims for contribution, indemnification and breach of contract. The Port Authority cross-moves for summary judgment dismissing Hudson's cross-claims for common law indemnification and contribution and for summary judgment on its cross-claim for contractual identification.

Section 7.8(b) of the License Agreement provides that Hudson "shall promptly notify the Port Authority of any and all improvements thereon or alterations thereto or repairs of which it may have knowledge that may be required at any time thereafter . . . [Hudson] shall have no obligation to make any such alterations, repairs or improvements" (Cross, Ex L at 16). "Except as otherwise provided in this Agreement, the Port Authority shall make such repairs as may be necessary to keep the Facility in good operating condition. [Hudson] shall have no claim or remedy against the Port Authority for breach of such obligation, unless reasonable notice of the necessary repairs shall have been given to the Port Authority in writing" (Cross, Ex L at 11).

Pursuant to Section 9.1 of the License Agreement,

"[Hudson] shall indemnify and hold harmless the Port Authority . . . (and shall reimburse the Port Authority for the Port Authority's costs and expenses including reasonable legal expenses . . . incurred in connection with the defense of) all claims and demands of third persons including but not limited to those for . . . personal injuries . . . arising out of (x) any default of [Hudson] in performing or observing any term or provision of this Agreement, or (y) the use and occupancy of the Space by [Hudson] . . . (except to the extent resulting from the Port Authority's negligence or willful misconduct), or (z) any of the acts or omissions by [Hudson] . . ."

(*id.* at 18 [emphasis added]; compare *Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412 [2006]).

In addition, Section 9.2 of the License Agreement required Hudson to maintain an insurance policy that covers the operations of Hudson and names the Port Authority as an additional insured (*id.* at 1-19).

Here, there are questions of fact about Hudson and the Port Authority's knowledge of the defective condition and whether Hudson and/or the Port Authority had knowledge of, created or contributed to the dangerous condition.

Plaintiff testified that the bus driver and another bus driver knew of the condition, knew that it was a hazard and stated that it should have been fixed. The bus driver testified that he first noticed the condition, which looked

like it had been patched and repatched, after plaintiff was injured and did not recall stating that the hole should have been fixed. Nor did he recall another driver speaking to plaintiff (Cross, Ex J at 52:7-23, 56:7-57:25, 88:14-20, 97:12-15). Hudson's alleged knowledge also raises questions as to whether anyone from Hudson notified the Port Authority of the condition and if so, when and whether Hudson should have used that gate to allow passengers to disembark. Based on these questions of fact, Hudson's motion for summary judgment dismissing the cross-claims must be denied.

The Port Authority knew of the defective condition of the platform in March 2011 and made repairs. It maintains that between the time it was repaired and plaintiff's accident it did not receive any further reports or complaints (Cross, Ex J at 41:5-13, 42:17-20. It is unclear from the evidence presented, however, whether the Port Authority sufficiently repaired the hole, how many times it was repaired and whether there was any negligence in how the repairs were made. Because Hudson has no obligation to indemnify the Port Authority for personal injuries resulting from the Port Authority's own negligence, the cross-motion must be denied (Cross, Ex L at 18 [9.1 (a)]).

There is no basis, moreover, for awarding summary judgment on any of the parties' other claims.

Accordingly, it is

ORDERED that defendant Hudson's motion for summary judgment is denied in its entirety; and it is further

ORDERED that the Port Authority's cross-motion is denied.

This constitutes the Decision and Order of the Court.

Dated: April 14, 2016

  
\_\_\_\_\_  
HON. JENNIFER G. SCHECTER