

Lee v Manhattan & Bronx Surface
2016 NY Slip Op 31251(U)
June 30, 2016
Supreme Court, New York County
Docket Number: 157360/2013
Judge: Michael D. Stallman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number: 157360/2013
LEE, JEAN MARIE
vs.
MANHATTAN AND BRONX SURFACE
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. 157360/2013

MOTION DATE 1/15/16

MOTION SEQ. NO. 002

The following papers, numbered 13-14, 16-24, 28-47, were read on this motion for summary judgment

Notice of Motion —Affirmation — Exhibits A-F —Affidavit of Service

No(s). 13-14, 16-24

Affirmation in Opposition — Exhibits A-O—Affirmation of Service

No(s). 28-46

Upon the foregoing papers, it is ordered that defendants’ motion for summary judgment is denied.

On June 17, 2012 plaintiff was a bus passenger on a M7 bus, who was allegedly propelled to the floor of the bus due to a sudden, unusual, and violent jerk as the bus approached the bus stop at Amsterdam Avenue and West 86th Street in Manhattan. Plaintiff claims that she fractured her right wrist, which required surgery.

Defendant George Black was the bus operator. Plaintiff’s daughter, Robyn Lee, and her daughter’s friend, Sheila Shayon, claim that they were also passengers on the bus.

Defendants now move for summary judgment dismissing the action on the ground that the jerk was not abrupt or violent. Plaintiff opposes the motion.

(Continued...)

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

Lee v Manhattan and Bronx Surface Tr. Operating Auth., Index No. 157360/2013

“To establish a prima facie case of negligence against a common carrier for injuries sustained by a passenger when the vehicle comes to a halt, the plaintiff must establish that the stop caused a jerk or lurch that was ‘unusual and violent’. Proof that the stop was unusual or violent must consist of more than a mere characterization of the stop in those terms by the plaintiff.”

(*Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 830 [1995].) The plaintiff’s proof must provide “objective evidence of the force of the stop sufficient to establish an inference that the stop was extraordinary and violent, of a different class than the jerks and jolts commonly experienced in city bus travel and, therefore, attributable to the negligence of defendant.” (*Id.*; *Disalvatore v New York City Tr. Auth.*, 45 AD3d 402 [1st Dept 2007]; *Fonseca v Manhattan and Bronx Surface Tr. Operating Auth.*, 14 AD3d 397 [1st Dept 2005].)

“‘No ‘hard and fast’ rule can be formulated as to precisely what amount of jerking or jolting of a streetcar or bus will give rise to an inference of negligence and, conversely, what amount of such jerking or jolting is usual and ordinary, incidental to the operation of such vehicle. . . . At precisely what point such violent movements lose their character as incidents reasonably to be expected during the course of travel and assume the status of actionable negligence is a question of fact to be determined in the light of the surrounding circumstances.’”

(*Harris v Manhattan and Bronx Surface Tr. Operating Auth.*, 138 AD2d 56, 58 [1st Dept 1988][citation omitted].) The fact that no other standing bus passengers fell may constitute evidence for the trier of fact to conclude that the movement of the bus was not unusual or violent. (*Pfleshinger v Metropolitan Transp. Auth.*, 137 AD3d 516 [1st Dept

(Continued...)

Lee v Manhattan and Bronx Surface Tr. Operating Auth., Index No. 157360/2013

2016]; see *Martin v New York City Tr. Auth.*, 48 AD3d 522 [2d Dept 2008] [jury could have reasonably concluded that the plaintiff's fall was not caused by any negligence on the part of the bus operator because none of the other passengers on the crowded bus was caused to fall by the movement of the bus].)

Here, the testimony of plaintiff and the averments of Sheila Shayon describing the force of the stop raises issues of fact and credibility as to whether the movement of the bus was "unusual and violent," rather than belonging to the class of "jerks and jolts commonly experienced in city bus travel." (*Branda v MV Pub. Transp., Inc.*, 139 AD3d 636 [1st Dept 2016].) Plaintiff testified at her deposition, "I was holding onto the metal pole and the bus stopped violently and it threw me down the stairs face down on the floor of the bus." (Hardick Affirm., Ex C [Jean Lee EBT], at 17; see *Disalvatore*, 45 AD3d at 403 [plaintiff testified that she was thrown to the floor and then slid down the aisle].) Shayon states that the movement of the bus propelled her "from [her] seat all the way into the partition in front of [her]." (Hames Affirm., Ex E [Shayon Aff.] ¶ 2.)

Defendants' reply affirmation is rejected as untimely. The reply affirmation was efiled six days after the motion was fully submitted on the return date, January 15, 2016. Although defendants' counsel claims that the parties stipulated to extend the return date to January 25, 2016, no such stipulation (which would need to be so-ordered) was efiled on NYSCEF.


In any event, defendants' reply arguments would only raise issues of credibility. Defendants essentially argue that the bus cannot have jerked violently because plaintiff testified at her deposition that the bus

(Continued...)

was moving "slowly" immediately before the alleged jerk occurred, while plaintiff's daughter testified that the bus was "gradually slowing down." (Jean Lee EBT, at 19; Hardick Affirm., Ex D [Robyn Lee EBT], at 14.)

Whether an allegedly sudden, immediate stop of a bus going "slowly" or "gradually slowing down" could have produced enough force to have propelled plaintiff and Shayon as forcefully as they claim present issues of fact and credibility for the trier of fact. Absent information about the actual speed of the bus at the moment of the alleged stop, along with an expert opinion of the force that might be generated at that speed upon immediate braking, the Court cannot determine, as a matter of law, that the alleged sudden stop/jerk was either unusual, or commonly experienced in city bus travel. The Court's role on this motion for summary judgment is "limited to issue finding, not issue determination." (*Passos v MTA Bus Co.*, 129 AD3d 481, 483 [1st Dept 2015].)

Dated: 6/30/16
New York, New York

 _____, J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

HON. MICHAEL D. STALLMAN