

Demetria Davidson v New York City Tr. Auth.
2016 NY Slip Op 31565(U)
August 15, 2016
Supreme Court, New York County
Docket Number: 154737/2013
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

DEMETRIA DAVIDSON,

INDEX NO. 154737/2013

Plaintiff,

MOTION DATE 5/12/16

MOTION SEQ. NO. 002

- v -

**NEW YORK CITY TRANSIT AUTHORITY and GLADYS
HAMPTON HOUSE ASSOCIATES LIMITED
PARTNERSHIP,**

Defendants.

The following papers, numbered 45-67, 70-71, were read on this motion for summary judgment

Notice of Motion —Affirmation —Affirmation of Service—No Fee
Authorization— Exhibits A-J

No(s). 45-58

Affirmation in Opposition —Affidavit— Exhibits A-E;
Affirmation in Opposition

No(s). 59-67; 70

Reply Affirmation

No(s). 71

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant New York City Transit Authority is denied.

Plaintiff alleges that, on February 20, 2013, at approximately 7:15 a.m., she fell as she exited from the front doors of an M10 bus, at the northwest corner of West 129th Street and Frederick Douglass Boulevard in Manhattan. Defendant New York City Transit Authority (NYCTA) now moves for summary judgment on the grounds that the NYCTA did not breach its duty to provide plaintiff with a safe place to alight from the bus. Plaintiff and co-defendant Gladys Hampton House Associates Limited Partnership both oppose the motion.

(Continued...)

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

At her deposition, plaintiff testified that she boarded a M10 bus on Eighth Avenue between West 147th and West 148th Streets, carrying her baby in a chest carrier and carrying a diaper bag. (Coffey Affirm., Ex G [Plaintiff's EBT], at 10.) Plaintiff testified that she was on her way to drop off her child with her babysitter before going to work. (*Id.* at 8) When the bus stopped at West 129th Street and Eighth Avenue, plaintiff stood up from her seat, went to exit the front doors, and then fell as she stepped off the bus. Plaintiff stated, "So, I went to step off the bus with my right foot, my left foot was still on the bus. I fell." (*Id.* at 19.) She testified, "the side of my right foot made contact first. Then my arms and my cupped hands to shelter the baby and then I rolled." (*Id.* at 23.)

According to plaintiff, she stepped on concrete, on the sidewalk, and the ground was uneven. (*Id.* at 20.) At her deposition, plaintiff marked an "X" on a photograph depicting the area where she claims the bus had stopped, which was marked as Defendant's Exhibit D. (*Id.* at 44-45.) The "X" appears to be near a tree well. (See Peters Opp. Affirm., Ex C.) Plaintiff was asked, "Now, can you describe the sidewalk where you marked the X where the bus stopped?" (*Id.* at 46.) She answered, "It's uneven. It looked like they had tried to do some patchwork on it or whatever you call it when you're trying to repair the concrete." (*Id.*)

The bus operator, non-party Doris McCoy, testified at her deposition that her bus headed southbound, and at the corner of West 129th Street and Frederick Douglas Boulevard, she drove past the bus shelter to drop off passengers. (Coffey Affirm., Ex J [McCoy EBT], at 20.) According to McCoy, "The bus shelter is too short to have the bus go in and you have to align the bus as straight as you can and that's at the bus stop itself, there is not room." (*Id.*) McCoy testified that plaintiff exited through the front doors. (*Id.*)

McCoy testified, in relevant part:

(Continued...)

“Q. Did you see her step off the bus?

A. I can’t recall. She did get off the bus and then the commotion. It wasn’t like she tumbled out of the bus onto the concrete.

Q. Did you witness her safely getting off the bus prior to the commotion?

A. Yes.

*** * ***

Q. So you saw her get off and next thing, a commotion?

A. I opened the door and then the commotion. Was I actually looking at her, I can’t say.

Q. You saw her after she was on the ground?

A. Yes.

*** * ***

Q. So are you saying she took a couple of steps prior to falling?

A. Yes.

Q. But you never witnessed her taking those steps, did you?

A. No.”

(McCoy EBT, at 24-26.)

“A common carrier owes a duty to its passengers to stop at a place where they may safely disembark and leave the area. 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, 294–95 [1st Dept 2005], *affd* 6 NY3d 800 [2006] [internal citations, quotation marks, and emendation omitted].)

(Continued...)

Here, the NYCTA failed to set forth evidentiary facts sufficient to entitle it to judgment as a matter of law. Although the NYCTA contends that it is not liable because plaintiff safely took several steps after exiting the bus (*Blye v Manhattan and Bronx Surface Tr. Operating Auth.*, 124 AD2d 106 [1st Dept 1987], *affd* 72 NY2d 888 [1988]; *Otonoga v City of New York*, 234 AD2d 592 [2nd Dept 1996]), McCoy's testimony was inconclusive. McCoy stated at her deposition that plaintiff fell after taking several steps, but she also testified that she did not see plaintiff taking those steps. In any event, plaintiff testified that she fell as her right foot stepped off the bus, which contradicts McCoy's version of plaintiff's fall.

The NYCTA also argues that plaintiff had tripped "into a latent defect on the sidewalk that was not visible to the driver." (Coffey Affirm. ¶ 20.) As the NYCTA indicates, whether it breached the duty to provide plaintiff a safe place to alight from the bus will depend on whether the bus operator could or could not have observed the alleged defect from the operator's vantage point. (*Lovato v New York City Tr. Auth.*, 50 AD3d 969 [2d Dept 2008]; *Engram v Manhattan and Bronx Surface Tr. Operating Auth.*, 190 AD2d 536 [1st Dept 1993]; *see also Malawer*, 18 AD3d at 294–97 [discussing whether bus driver was aware of an icy subway grating].)

However, the NYCTA failed to offer proof as to McCoy's knowledge or assessment of the conditions at the place where she allowed plaintiff to disembark. (*Diaz v City of New York*, 31 AD3d 299, 300 [1st Dept 2006].) McCoy did testify at her deposition that she looks "that it is clear." (McCoy EBT, at 32.) However, the NYCTA did not cite any portion of her testimony as to whether McCoy saw the area of concrete patchwork where plaintiff asserts the bus had stopped. The photographs that the NYCTA and plaintiff submitted raise triable issues of fact as to whether McCoy could have observed the concrete patchwork from the driver's vantage point as the bus was pulling up to its stop on February 20, 2013 at 7:15 a.m.

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Lovato (50 AD3d 969), which the NYCTA cites, is distinguishable. There, the Appellate Division, Second Department set aside a jury verdict in an action involving a plaintiff who fell on a raised and uneven street. At trial, plaintiff submitted into evidence a photograph of the area in question. The Appellate Division ruled that the photograph "does not show a foreseeable hazard for which liability can be imposed, and "even if it did show such a hazard, the bus driver could not have observed it from his vantage point."

Here, unlike *Lovato*, the sidewalk patchwork appears to be visible in the black and white photographs that plaintiff submitted. The Court notes that, under the Rules of the City of New York, "patchwork", as defined therein, is considered a "substantial defect" of a sidewalk. (34 RCNY 2-09 [f] [5] [ix].) Furthermore, "[a]ll [sidewalk] flags containing substantial defects shall be fully replaced. Patching of individual flags is not permitted." (34 RCNY 2-09 [f] [4] [viii].)

Dated: 8/15/16
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

NOT RECORDED