Guzman v Waxter
2017 NY Slip Op 30382(U)
January 20, 2017
Supreme Court, Bronx County
Docket Number: 309188/12
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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FELIPA GUZMAN,

Plaintiff(s),

- against -

CHARLIE M. WAXTER,

Defendant(s).

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CHARLIE M. WAXTER,

Third-Party Plaintiff(s),

- against -

NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY AND "JOHN DOE," THE NAME BEING FICTITIOUS AND THE IDENTITY OF SAID PERSON UNKNOWN,

Third-Party Defendant(s).

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DECISION AND ORDER

Index No: 309188/12

In this action for negligence, third-party defendants move seeking an order dismissing the third-party complaint pursuant to CPR § 3211, on grounds, *inter alia*, that the complaint fails to state a cause of action. Saliently, third-party defendants contend that to the extent the action against them for contribution stems from their alleged failure to provide plaintiff with a safe place to alight from their bus, such action must be dismissed because they did, in fact, provide plaintiff with a safe place to alight. Defendant/third-party plaintiff (hereinafter "defendant") opposes

the instant motion asserting that questions of fact with respect to whether third-party defendants failed to safely discharge plaintiff from their bus - such failure constituting negligence - precludes dismissal of this the third-party action.

For the reasons that follow hereinafter, defendants' motion, treated as one for summary judgment[1], is hereby denied.

According to the complaint, the instant action is for alleged personal injuries sustained by plaintiff as a result of a motor vehicle accident. Specifically, the complaint alleges that on June 16, 2011, at or near 3407 White Plains Road, Bronx, NY, plaintiff, while a pedestrian, was struck by a vehicle owned and operated by

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[1] The Court notes that third-party defendants conflate the burdens of proof imposed by CPLR § 3211(a)(7) and CPLR § 3212; utilizing CPLR § 3211(a)(7) as the basis for dismissal while nevertheless making arguments and submitting proof appropriate to a motion for summary judgment pursuant to CPLR § 3212. A motion to dismiss pursuant to CPLR 3211(a)(7) is directed at the pleadings where all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). Accordingly, on a motion to dismiss for failure to state a cause of action the court usually doesn't concern itself with evidence beyond the four corners of the complaint. The only exception to the foregoing is that promulgated by the Court of Appeals in *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]), namely that extrinsic evidence can be used to negate the allegations in the complaint, and when that is the case, dismissal will eventuate because the, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Leon v Martinez, 84 NY2d 83, 88 [1994]). Here, however, as will be discussed below, third-party defendants rely solely on testimony in support of their motion, which to the extent it can pursuant to CPLR § 3212, is clear indication that it seeks summary judgment.

defendant. It is alleged that defendant was negligent in the operation of his vehicle, such negligence causing the instant accident and resulting injuries. According to the third-party complaint, defendant alleges that the foregoing accident was the result of third-party defendants' negligence inasmuch as, *inter alia*, immediately prior to the accident alleged plaintiff was a passenger within third-party defendants' bus from which she was improperly allowed to exit. Defendant alleges that should he be found liable to plaintiff, then third-party defendant is liable to defendant in contribution.

Third-party defendants' motion is denied inasmuch as they fail to establish prima facie entitlement to summary judgment. Specifically, third-party defendants' only competent evidence - plaintiff's deposition testimony - fails to establish - as argued - that plaintiff was discharged when it was safe and in the absence of any foreseeable danger .

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively

demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]).

Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing summary judgment in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact. Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary

> judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [internal citations omitted]). Accordingly, generally, if the opponent of a motion for summary judgment seeks to have the court consider inadmissible evidence, he must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for

summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). When the proponent of a motion for summary judgment fails to establish prima facie entitlement to summary judgment, denial of the motion is required "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

It is well settled, that "[a] common carrier owes a duty to an alighting passenger to stop at a place where the passenger may safely disembark and leave the area" (*Miller v Fernan*,73 NY2d 844, 846 [1988]; *Smith v Sherwood*, 16 NY3d 130, 133 [2011]; *Fagan v Atlantic Coast Line R.R. Co.*, 220 NY 301, 306 [1917]; *Kasper v Metropolitan Transp. Authority Long Island Bus*, 90 AD3d 998, 999 [2d Dept 2011]). Thus, any duty owed by a common carrier to its passengers generally ends upon that passenger's exit from the common carrier's vehicle (*Wisoff v County of Westchester*, 296 AD2d 402, 402 [2d Dept 2002] ["duty to the infant plaintiff as a passenger terminated when the infant plaintiff alighted safely onto the sidewalk"]; *Sigmond v Liberty Lines Transit, Inc.*, 261 AD2d 385. 387 [2d Dept 1999]). However, it is well settled that the duty of a common carrier with respect to its passengers also requires it to exercise "reasonable and commensurate care in view of the dangers to be apprehended" (*Shahzaman by Shahzaman v Green Bus Lines Co.*, 214 AD2d 722, 723 [2d Dept 1995]; Fagan at 306; *Blye*

v Manhattan & Bronx Surface Tr. Operating Auth., 124 AD2d 106, 109 [1st Dept 1987]). Thus, when the common carrier is aware of a foreseeable risk upon disembarkation, such as when a passenger has obvious limitations, the duty of care is heightened, requiring that the common carrier exercise "special care and attention beyond that given to the ordinary passenger [and] which reasonable prudence and care demand[] for his exemption from injury" *Fagan* at 307; *Kasper* at 999 ["To a disabled passenger, a common carrier has a duty to use such additional care or to render such aid for his or her safety and welfare as is reasonably required by the passenger's disability and the existing circumstances, provided that the common carrier's employees knew or should reasonably have known of the passenger's disability."]; *Kelleher v F.M.E. Auto Leasing Corp.*, 192 AD2d 581, 582 [2d Dept 1993] ["The evidence clearly established the decedent's intoxication at the time he was pulled from the cab, and as such, the defendant common carrier was under a special duty, with regard to the decedent by reason of his insensible condition of exercising such care, precaution and aid as were reasonably necessary for his safety, and of bestowing upon him any special care and attention beyond that given to the ordinary passenger" (internal quotation marks omitted).]).

In *Smith*, for example the Court of Appeals granted the motion by defendants, the owner and operator of a bus, which sought summary judgment over the claims asserted by plaintiffs (*Smith* at

134). In that case, the infant plaintiff was injured when he was struck by a car while attempting to cross the street in front of the bus from which he had just alighted (*id.* at 133). In granting summary judgment in favor of defendants, the court held that under the common law, generally, the only duty owed to a passenger by a common carrier when a passenger disembarks from its bus is to provide him/her with a safe place to alight. Specifically, the court stated that

> It has long been the rule that a common carrier owes a duty to an alighting passenger to stop at a place where the passenger may safely disembark and leave the area. Once that occurs, no further duty exists, even if the disembarking passenger is a schoolchild who attempts to cross a street by passing in front of a stopped bus Although plaintiff correctly notes that there is a question of fact regarding the reason why Derek [the plaintiff] was dropped off on the east side of South Salina Street instead of the west side, it is unnecessary to resolve that factual issue because Derek exited the bus at a safe location, terminating the duty owed to him by Centro [the defendant-owner] and Gray [the defendant-operator]

(*id.* at 133-134 [internal citations and quotation marks omitted]). Contrariwise, in *Fagan* the Court of Appeals upheld a jury verdict in favor of plaintiffs, which found defendant, a railroad company, liable for the death of deceased plaintiff (*Fagan* at 313). In that case, deceased plaintiff was visibly intoxicated when he boarded defendant's train and asked that he be dropped off at a stop near

his home (*id.* at 305). Upon reaching his stop, defendant's employee escorted deceased plaintiff off the train, sat him down at the train depot and left him there (*id.*). The next morning, deceased plaintiff was found dead on the tracks near the depot and it appeared that he had been run over by several trains (*id.*). In rendering judgment in plaintiff's favor, the court noted that a common carrier's obligation is not limited to providing a passenger with a safe place to alight its vehicle, but that additionaly,

> [t]he defendant [a common carrier] was under the special duty, with regard to the intestate by reason of his insensible condition, known to the conductor, of exercising such care, precaution and aid as were reasonably necessary for his safety, and of bestowing upon him any special care and attention beyond that given to the ordinary passenger which reasonable prudence and care demanded for his exemption from injury. The care which it was bound to exercise with respect to his safety would have reference to his known condition and the situation as a whole

(*id.* at 307). Thus the court reasoned that by reason of deceased plaintiff's apparent intoxication defendant had additional responsibilities to a disembarking passenger and in addition to the

> the general duty to stop at Carson [deceased plaintiff's stop] for a time reasonably sufficient to enable the passenger to alight, at a place so that he could, using reasonable care, alight safely and pass by a way reasonably apparent, accessible and safe to the depot at Carson, or a designated and

> proper place, and thence from the property of the defendant; or, in the absence of such a way, to take reasonable and proper precautions to protect him and make safe his passing from the place of alighting to the depot or an appointed exit from its property. It was [also] bound to exercise reasonable and commensurate care in view of the dangers to be apprehended. The relation of passenger and carrier does not, under ordinary conditions, terminate until the passenger has had a reasonable opportunity to safely alight and pass from the station premises of the carrier

(*id.* at 306-307 [internal citations omitted]). Essentially, the court held that deceased plaintiff's intoxication gave rise to heightened duty of care requiring the common carrier to guard against foreseeable injury to it passenger. In *Fagan*, deceased plaintiff's resulting demise was, in the court's view, readily foreseeable inasmuch as

> The depot was a small, one-story frame building and was open that night until midnight. In it was a telegraph office in which two small oil lamps were burning. Outside of it no lamp or light was burning. The evidence does not disclose that a person sitting where the intestate was could see any window or light within it. Between the intestate and the depot was no platform, walk, road or pathway. There was the siding track, so filled in, in parts, that wagons could pass over or along it. Carson was a hamlet, scarcely more than a clearing in woodland with a few scattered buildings, or the crossing of a railroad by a country highway. The intestate had lived there through the seven or eight months last prior to his death. There was no evidence that a

> person seated as he was could see anywhere a light or a lighted window. After the intestate was assisted from the train and before he was discovered, defendant's trains had passed upon the track as follows: South-bound trains at nine o'clock and thirty-five minutes and eleven o'clock and thirty-five minutes P.M., and two o'clock and ten minutes, two o'clock and forty-three minutes and seven o'clock and twenty-two minutes A.M.; north-bound trains, three o'clock and forty-two minutes, four o'clock and thirty-eight minutes, six o'clock and thirty-three minutes A.M.

(*id.* at 305). In sum, the court in *Fagan* held that given deceased plaintiff's intoxication, the complete absence of anyone at the depot to aid him - or more specifically, to prevent him from doing anything to hurt himself, and the absence of light, his death, and particularly one occasioned by trains who defendant knew would pass through the depot, was foreseeable and such death against which, defendant should have guarded.

Accordingly, as illustrated by *Fagan*, whether a location is safe enough to allow a passenger to alight, turns on whether there is an appreciable and foreseeable risk of harm which precludes a discharge thereat.

Here, a review of the evidence submitted by third-party defendants - namely, plaintiff's deposition transcript - establishes the following: On June 11, 2016, plaintiff was struck by defendant/third-party plaintiff's vehicle immediately upon

exiting the 39 bus at near the intersection of White Plains Road and Gun Hill Road. The area where the accident occurred had two lanes of moving traffic and a parking lane in each direction. Immediately prior to her accident, the bus came to stop "in the middle, where supposed to be the stop [sic]." The instant location is where the bus had always stopped and where plaintiff routinely disembarked when she rode the 39 bus. Immediately after stepping off the bus and onto the ground, plaintiff took one step and was impacted by defendant/third-party plaintiff's vehicle.

Based on the foregoing, third-party defendants fail to establish - as urged - that they discharged plaintiff at a safe location. Significantly, the thrust of third-party defendants' argument is that they discharged plaintiff at a bus stop, the location of which is determined by nonparty the City of New York, and that, thus, third-party defendants breached no duty to plaintiff so as to make them negligent. This argument is unavailing.

As just discussed, a common-carrier's obligation is not merely to discharge a passenger at a bus stop. Instead, a common carrier owes a duty to an alighting passenger to stop at a place where the passenger may safely disembark and leave the area (*Miller* at 846 ; *Smith* at 133; *Fagan* at 306; *Kasper* at 999). While the duty owed by a common carrier to its passengers generally ends upon that

passenger's exit from the common carrier's vehicle (*Wisoff* at 402; *Sigmond* at 387), the duty owed by a common carrier with respect to its passengers also requires it to exercise reasonable and commensurate care in view of the dangers to be apprehended (*Shahzaman* at 723; Fagan at 306; *Blye* at 109). In other words, the fact that a passenger makes it off bus without immediate incident does not obviate the duty to ensure that the location where passenger is discharged is safe enough to discharge the passenger in the first place. Accordingly, while third-party defendants' assertion that plaintiff was discharged from their bus at a stop, such fact does not absolve them of any negligence since the law requires not only that a passenger be discharged at a bus stop, but that they be discharged where, under all appreciable circumstances, their safety is reasonably certain. Here, given that the instant accident occurred immediately upon plaintiff's exit from the bus, a reasonable jury could conclude that plaintiff was discharged into the path of defendant's vehicle, whose presence third-party defendants' should have apprehended. Thus, third-party defendants fail to establish prima facie entitlement to summary judgment.

To the extent that third-party defendants submit additional evidence on reply, such evidence cannot be considered by the court inasmuch as generally arguments proffered for the first time within reply papers shall not be considered by the court (*Wal-Mart Stores, Inc., v United States Fidelity and Guaranty Company*, 11 AD3d 300,

301 [1st Dept 2004]; *Johnston v Continental Broker-Dealer Corp.*, 287 AD2d 546, 546 [2d Dept 2001]; *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]. Specifically, the prohibition is meant to proscribe the practice of using reply papers to introduce new evidence in order to cure deficiencies in the moving papers (*Migdol v City of New York*, 291 AD2d 201, 201 [1st Dept 2002] [Court rejected affidavit submitted with reply papers since it sought to remedy deficiencies in initial moving papers rather than respond to arguments made by opponent in opposition.]; *Lumbermens Mutual Casualty Company v Morse Shoe Company*, 218 AD2d 624, 625-526 [1st Dept 1995] [Court rejected defendant's reply papers which included two new documents provided to support a new assertion not previously made in initial motion]; *cf Sanford v 27-29 W. 181st Street Association Inc.*, 300 AD2d 250, 251 [1st Dept 2002] [Court held that an affidavit submitted with movant's reply mandated consideration because it was not meant to cure a deficiency in the initial motion]). Thus, the Court cannot and will not consider the evidence submitted by third-party defendants on reply since it is evidence submitted to establish prima facie entitlement to summary judgment and thus, to cure a deficiency in the moving papers.

Because third-party defendants fail to establish prima facie entitlement to summary judgment, the Court need not consider the sufficiency of plaintiff's opposition (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]).

To the extent that third-party defendants also seek dismissal of this action on grounds that defendant/third-party plaintiff lacks standing to bring the third-party action, such motion must also be denied. It is exceedingly well settled that a party sued can implead another on grounds the latter is liable to the former in contribution (*Nassau Roofing & Sheet Metal Co., Inc. v Facilities Dev. Corp.*, 71 NY2d 599, 602-03 [1988] ["The applicable rules governing contribution under Dole v. Dow Chem. Co. 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288, may be quickly summarized. The basic requirement for contribution under Dole, now codified in CPLR 1401, is that the culpable parties must be subject to liability for damages for the same personal injury, injury to property or wrongful death" (internal quotation marks omitte).]; *Gonzalez v Jacoby & Meyers*, 258 AD2d 560, 561 [2d Dept 1999] ["Pursuant to CPLR 1401, two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them. Thus, contribution may be obtained if the breach of duty by a third-party defendant had a part in causing the same injury for which contribution is sought" (internal quotation marks omitted)]). Thus, here, where it is alleged that third-party defendants are liable to plaintiff for the accident alleged and for which defendant has been sued, defendant's standing is obvious. It is hereby

ORDERED that defendant serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : January 20, 2017
Bronx, New York

BEN BARBATO, JSC