Munns v MTA Bus Co.
2018 NY Slip Op 30616(U)
April 6, 2018
Supreme Court, New York County
Docket Number: 155451/2013
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART 2

Justice

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TERRENCE MUNNS INDEX NO. 155451/2013

Plaintiff,

- v -

MTA BUS COMPANY, MOTION SEQ. NO. 001

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this action by plaintiff Terrence Munns to recover damages for personal injuries sustained in a motor vehicle accident, defendant MTA Bus Company moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is **granted and the complaint is dismissed.**

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff commenced this action by filing a summons and verified complaint on June 13, 2013. Doc. 1.[1] In the complaint, plaintiff alleged that he was injured on November 25, 2012 when

[1] Unless otherwise noted, all references are to the documents filed with NYSCEF in connection with this case.

he was struck by a bus at the intersection of Beach Channel Drive and Beach 116th Street in Queens, New York. Doc. 1, at pars. 2-10. He claimed that the incident occurred due to the negligence of the defendant, which owned and operated the bus. Doc. 1, at pars. 9, 12. Defendant joined issue by service of its verified answer dated August 7, 2013, in which it denied all substantive allegations of wrongdoing and asserted affirmative defenses. Doc. 18.

In his verified bill of particulars dated February 14, 2014 plaintiff alleged, inter alia, that, on November 25, 2012, at approximately 2:50 a.m., he was injured at the intersection of Beach Channel Drive and Beach 116th Street by a bus owned by defendant. Doc. 19.

At his deposition, plaintiff testified that, at approximately 3:00 a.m. on November 25, 2012, he and two friends left The Wharf, a bar/restaurant on Beach 116th Street in the Rockaways. Doc. 21, at p. 8, 16, 18. Between 11:00 p.m. the prior evening and 3:00 a.m. that morning, plaintiff had 5-6 alcoholic drinks. Doc. 21, at p. 17. Approximately 2 minutes after leaving the Wharf, plaintiff saw an "MTA [b]us" at a red light on the corner of Beach Channel Drive and Beach 116th Street, ran over to it, and knocked on the window or side door to see whether the driver would let him enter. Doc. 21, at p. 19, 25. The driver was white, approximately 55 years of age, with short white hair and a short sleeve blue shirt. Doc. 21, at p. 22-23. He recognized that the vehicle was an MTA bus because it had a blue stripe, raised seats in the back, and it was a new electric hybrid model. Doc. 21, at p. 19-20. The driver looked at plaintiff, waved him away, and plaintiff took a few steps back. Doc. 21, at p. 27-28. When the light turned green, the bus began to pull away, travelling straight, while plaintiff ran after it for approximately 40 yards, banging on the side of the bus in an attempt to get the driver's attention. Doc. 21, at p. 29-31. As he ran, he lost his balance, the bus ran over his left leg, and it continued on its path. Doc. 21, at p. 30-32. The bus

did not make any sudden turns (Doc. 21, at p. 31) and plaintiff did not testify that it was speeding.[2] Plaintiff did not know whether the driver had seen him as he ran alongside the bus. Doc. 21, at p. 49. Both of the friends with whom plaintiff had left the Wharf told him that they did not witness the incident. Doc. 21, at p. 34.

The Q22 usually travelled down Rockaway Beach Boulevard, but because Hurricane Sandy deposited so much sand on that road, it been taking a detour down Beach Channel Drive. Doc. 21, at p. 25-26. However, plaintiff was not certain that the bus he tried to enter was a Q22. Doc. 21, at p. 20-21, 27.

Dennis Garcia, a bus driver employed by defendant, testified at his deposition that, as of the date of the alleged incident, he was assigned to the Q35 route. Doc. 22, at p. 6, 8. On the day of the alleged incident, he had no interaction with an individual who claimed to be hit by a bus. Doc. 22, at p. 13-14.

Owen Nelson, an employee of defendant, testified at his deposition that he drove the Q22 route on the morning of the alleged incident. Doc. 23, at p. 8, 16. He recalled that the route of the Q22 was changed from Rockaway Beach Boulevard to Beach Channel Drive due to damage from Hurricane Sandy. Doc. 23, at p. 20-21, 23. Nelson had no recollection of anyone banging on the side of his bus that morning. Doc. 23, at p. 22.

The note of issue was filed on December 6, 2016. Doc. 14.

Defendant now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In support of the motion, defendant submits, inter alia, the pleadings; transcripts of the deposition testimony; and affidavits of Garcia, Nelson, Maria Foglia, an Associate Staff Analyst

[2] At his 50-h hearing, plaintiff testified that, when the bus pulled away from the red light, it was travelling approximately 5 miles per hour. Doc. 36, at p. 29.

for defendant, as well as by Kevin Gray and Sean Hampton, also bus drivers for defendant. Docs. 15-27.

In her affidavit, Foglia states that defendant did not generate any incident or accident reports for the alleged occurrence. Doc. 25. She further states that her search of MTA records reflects that the only buses defendant operated at or near the time and place of the alleged incident were Q22s operated by Nelson and Hampton, and a Q35 operated by Gray, and that each of these drivers denies witnessing, being involved in, or having knowledge of, the incident. Doc. 25. Thus, asserts Foglia, "there is no evidence linking [defendant] or its employees to the alleged accident." Doc. 25.

Gray, Hampton, and Nelson each state in their affidavits that they are African-American and that they were not involved in an alleged incident on the date in question. Doc. 27.

In support of the motion, defendant argues that it is entitled to summary judgment dismissing the complaint because neither plaintiff's allegations nor the pleadings identify the bus, its owner or its operator. Indeed urges defendant, plaintiff claims that the driver of the bus was white when all three of its drivers in the area at that time were not. Defendant further asserts that each of the drivers in the area of the alleged occurrence stated under oath that they were neither involved in the incident nor had knowledge of the same. Defendant also insists that, even if an issue of fact exists regarding whether its bus was involved in the accident, it is entitled to summary judgment dismissing the complaint because its driver was not negligent.

Plaintiff argues that the motion must be denied because he identified the bus as belonging to defendant. Specifically, he relies on that portion of his 50-h hearing testimony during which he testified that the bus was a Q22. Doc. 36, at p. 25.[3] He further asserts that summary judgment is

[3] At his 50-h hearing, plaintiff initially stated that the bus was the Q22, and then said that "based on everything, it seemed like it was a Q22." Doc. 36, at p. 25.

granted only sparingly in cases involving motor vehicle accidents, and that it must be denied herein since "there is a genuine dispute of material fact regarding [p]laintiff's own culpability." Doc. 35, at p. 11.

In reply, defendant reiterates that, since there is no evidence positively identifying the bus involved in the alleged accident, summary judgment must be granted in its favor. It further asserts that, since none of the drivers who operated buses in the area of the incident knew anything about the occurrence, and since none of those drivers matched the description given by plaintiff, the complaint must be dismissed. In the alternative, defendant asserts that, since there is no proof of its negligence, the complaint must be dismissed.

LEGAL CONCLUSIONS:

The movant on a motion for summary judgment must satisfy its initial burden to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," after which the burden shifts to the opposing party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *see Schmidt v One N.Y. Plaza Co. LLC*, 153 AD3d 427, 428 (1st Dept 2017); *Bartolacci-Meir v Sassoon*, 149 AD3d 567, 570 (1st Dept 2017).

In her affidavit, Foglia represents that defendant did not generate an incident report for the alleged occurrence and that her search of MTA records reflects that the only buses defendant operated at or near the time and place of the alleged incident were Q22s operated by Nelson and Hampton, and a Q35 operated by Gray. Doc. 25. Gray, Hampton, and Nelson, the only three drivers employed by defendant who were on duty at or near the time and place of the occurrence,

each maintain in their respective affidavits that they were not involved in an accident. They further state that they are African-American and thus do not match the description of a caucasian driver given by plaintiff. Thus, defendant has established its prima facie entitlement to summary judgment on the ground that its bus was not involved in the incident.

In response, plaintiff attempts to raise an issue of fact by submitting his 50-h hearing testimony, in which he stated that the bus involved in the accident was a Q22. However, as noted previously, he also stated at that hearing that "based on everything, it seemed like it was a Q22." Doc. 36, at p. 25. Such speculation is insufficient to defeat summary judgment. *Leandry v City of New York*, 127 AD3d 520, 521 (1st Dept 2015); *Wiener v City of New York*, 60 AD3d 598 (1st Dept 2009). Further, plaintiff testified at his deposition that he did not know whether the bus was a Q22. Doc. 21, at p. 27.

Even assuming, arguendo, that an issue of fact exists regarding the identity of the owner or operator of the bus, such issue is not material herein, since plaintiff's own deposition testimony, submitted as an exhibit in support of the instant motion, establishes that, if defendant's bus was involved in the accident, it was not operated negligently. Plaintiff testified that, after having approximately 5-6 alcoholic drinks beginning at 11 p.m. the night before, he left a bar/restaurant with two friends at approximately 2:50 a.m. He then walked up to a bus stopped at a red light and knocked on the door or window. The driver waved him away and he took several steps backwards. When the light turned green, the bus proceeded straight ahead at approximately 5 miles per hour. Plaintiff began chasing the bus, knocking on the side of the vehicle as he ran. After about 40 yards, during which time the bus made no sudden turns, plaintiff lost his balance, fell, and his leg was run over by the bus. He did not know whether the driver saw him running alongside the bus and his friends did not witness the accident.

Defendant correctly asserts that the facts of this case are similar to those in *Ryan v New York City Tr. Auth.*, 89 AD3d 1005 (2d Dept 2011), a case tellingly ignored by plaintiff in his opposition papers.

In *Ryan*, plaintiff was allegedly injured when a bus owned by defendant New York City Transit Authority (NYCTA) and driven by its nonparty employee (the operator) ran over her legs. The operator testified at trial that, as he began to pull into a parking space that had just been vacated by another bus, plaintiff ran across the sidewalk towards the side of bus and slapped the side of the moving bus several times before slipping from the sidewalk to the street. The operator did not see plaintiff approach the bus and, although he stopped the bus when he heard a slap, the bus did not stop until it had already run over plaintiff's leg. NYCTA's dispatcher and a nonparty witness, both of whom witnessed the accident, testified that the incident occurred very quickly and that plaintiff fell to the ground as soon as she started to bang on the bus.

NYCTA moved for judgment as a matter of law on liability at the close of evidence, and upon a jury verdict finding it 100% at fault for the accident. The trial judge denied the motion and NYCTA appealed. The Appellate Division, Second Department reversed, finding that "there was no rational process by which the jury could find in favor of the plaintiff[ ] and against [NYCTA]. There was no evidence that [the operator] was driving at an excessive speed, and the incident unfolded so quickly that [the operator] could not be considered negligent in bringing the bus to a halt in the manner and time it took him to do so." 89 AD3d at 1007.

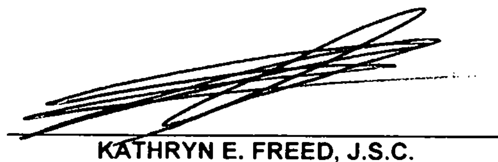
The facts on this motion for summary judgment warrant the same result as in *Ryan*. Plaintiff herein has adduced absolutely no evidence that the bus was driven at an unsafe speed or in an unsafe manner. Given the absence of negligence, the complaint is dismissed.

In light of the foregoing, it is hereby:

ORDERED that the motion by defendant MTA Bus Company for summary judgment dismissing the complaint pursuant to CPLR 3212 is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.



4/6/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT		REFERENCE