

Butler v New York City Tr. Auth.

2019 NY Slip Op 30686(U)

March 19, 2019

Supreme Court, New York County

Docket Number: 156723/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED

PART

IAS MOTION 2EFM

Justice

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INDEX NO.

156723/2016

PATRICIA BUTLER,

Plaintiff,

MOTION SEQ. NO.

002

- v -

THE NEW YORK CITY TRANSIT AUTHORITY, EMPIRE
PARATRANSIT, JACK KENVILLE, SONYA RAYSON, and
ABIGAIL BACCHUS,

DECISION AND ORDER

Defendants.

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The following documents, filed with NYSCEF in this matter, were reviewed in deciding the instant motion: 40-51.

In this personal injury action arising from a motor vehicle accident, defendants New York City Transit Authority, Empire Paratransit and Jack Kenville move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against them. After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from a motor vehicle accident on May 2, 2016. On that date, plaintiff Patricia Butler, a passenger in an Access-A-Ride bus (the bus), was injured when another vehicle, owned by defendant Sonya Rayson (Rayson) and driven by defendant Abigail Bacchus (Bacchus), went through a stop sign at a high rate of speed and broadsided the bus. The bus was leased by

defendant New York City Transit Authority (NYCTA) to defendant Empire Paratransit (Empire) and was operated by defendant Jack Kenville (Kenville).

Plaintiff commenced the captioned action by filing a summons and verified complaint on August 11, 2016. Doc. 44. Rayson and Bacchus joined issue by service of their verified answer filed October 7, 2016, in which they denied all substantive allegations of wrongdoing, asserted various affirmative defenses, and asserted cross claims against NYCTA, Empire and Kenville for contribution and common law indemnification. Doc. 46. NYCTA, Empire and Kenville joined issue by their verified answer filed December 1, 2016. Doc. 45.

Plaintiff appeared for a 50-h hearing on July 20, 2016. Doc. 47. At the hearing, plaintiff testified that she was involved in a motor vehicle accident on May 2, 2016 at the intersection of Kings Highway and 82nd Street in Brooklyn. Doc. 47 at 34. When the accident occurred, plaintiff was a passenger in the bus and it was a clear, sunny day. Doc. 47 at 34-35. The bus was bringing plaintiff home from an eye doctor appointment. Doc. 47 at 43, 48. Plaintiff was accompanied by an aide. Doc. 47 at 39. Plaintiff sat on the right side of the bus and the aide sat on the left side, behind the driver. Doc. 47 at 45-46.

The accident occurred approximately 10 minutes after the bus picked up plaintiff and her aide. Doc. 47 at 50. During those 10 minutes, the driver of the bus drove safely. Doc. 47 at 50-51, 54-55. Plaintiff recalled that the bus travelled in the middle lane on Kings Highway, a two-way road with three lanes in each direction, and that traffic was moving slowly. Doc. 47 at 51-53. As the bus reached 82nd Street, with Foster Avenue the next street ahead, she saw a black car traveling on 82nd Street go through a stop sign traveling "too fast" and drive into the intersection, where it "T-bone[d]" the bus with a heavy impact. Doc. 47 at 55-62.

At her deposition on April 19, 2018, plaintiff substantially reiterated the testimony which she gave at the 50-h hearing. Doc. 48. She added that the driver of the bus, which was marked "Empire Paratransit", was attempting to change from the center lane to the left lane when the impact occurred. Doc. 48 at 27-30, 33, 43-44. Again, plaintiff testified that a black car drove "very fast" through a stop sign on 82nd Street and drove into the passenger (right) side of the bus, which was travelling on Kings Highway. Doc. 48 at 34-36, 40, 45, 98. Contrary to her 50-h testimony, plaintiff believed that Kings Highway was a one-way road. Doc. 48 at 98. Plaintiff did not know the compass direction in which the bus was travelling, whether the driver of the bus saw the car coming down 82nd Street before the impact, or whether there was anything the driver could have done to prevent the collision. Doc. 48 at 36, 98. However, she recalled that there was no traffic signal on Kings Highway in the direction the bus was driving. Doc. 48 at 100-101. She further stated that the black car which went through the stop sign "T-bone[d]" the bus with a heavy impact. Doc. 48 at 37-38. The bus did not come into contact with any vehicle other than the black car. Doc. 48 at 100.

NYCTA, Empire and Kenville now move, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross claims against them. Docs. 40-51. In support of the motion, they argue that the claims against them must be dismissed based on the emergency doctrine since Kenville encountered a situation he neither created nor could have avoided. Alternatively, they assert that the claims against them must be dismissed since Kenville did not cause or contribute to the happening of the occurrence.

LEGAL CONCLUSIONS:

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law on the undisputed facts. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). The movant must produce sufficient evidence to eliminate any issues of material fact. *Id.* If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact. *See Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

NYCTA, Empire and Kenville have established their prima facie entitlement to summary judgment as a matter of law by submitting the 50-h hearing and deposition testimony of plaintiff establishing that plaintiff was injured in an intersection collision between the bus, which was travelling on Kings Highway, a road which did not have a traffic signal affecting the movement of the bus at that intersection, and the black car owned by Rayson and driven by Bacchus, which went through a stop sign on 82nd Street at a high rate of speed and entered the intersection. Since the bus driven by Kenville had the right-of-way (*see Vehicle and Traffic Law* § 1142), Kenville was “entitled to anticipate that other vehicles would obey the traffic laws that require them to yield.” *Martinez v Cofer*, 128 AD3d 421, 422 (1st Dept 2015) (citations omitted). Additionally, “[a] ‘presumption of negligence arises from the failure of a driver at a stop sign ‘to yield the right of way’ to the vehicle on the highway.” *Martinez*, 128 AD3d at 422 (citation omitted).

The evidentiary showing by NYCTA, Empire and Kenville shifted the burden to plaintiff and defendants Rayson and Bacchus to raise an issue of fact sufficient to prevent the granting of summary judgment dismissing their complaint and cross claims, respectively. However, since the

motion is unopposed, such an issue of fact was not raised and movants are entitled to dismissal of all claims against them. Given this result, this Court need not address movants' remaining contentions.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion for summary judgment by defendants New York City Transit Authority, Empire Paratransit and Jack Kenville seeking dismissal of the complaint and all cross claims asserted against them is granted, without opposition, and the Clerk is directed to enter judgment accordingly; and it is further

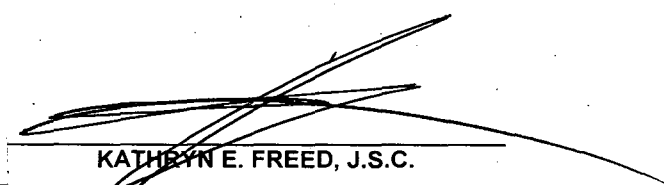
ORDERED that the said claims and cross claims against defendants New York City Transit Authority, Empire Paratransit and Jack Kenville are severed and the balance of the action shall continue as against defendants Sonya Rayson and Abigail Bacchus; and it is further

ORDERED that the caption be amended to reflect the dismissal of defendants New York City Transit Authority, Empire Paratransit and Jack Kenville and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that, within twenty days of the entry of this order, counsel for defendants New York City Transit Authority, Empire Paratransit and Jack Kenville shall serve a copy of this order, with notice of entry, upon all parties, upon the Clerk of the Court (60 Centre Street, Room 141B), and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supetmanh); and it is further

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

<u>3/19/2019</u>			
DATE			KATHRYN E. FREED, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE