Lewis v ALL Tr., LLC
2020 NY Slip Op 31166(U)
April 20, 2020
Supreme Court, Kings County
Docket Number: 514128/2017
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

LINDA LEWIS,

Plaintiff,

-against-

ALL TRANSIT, LLC and JOHN DOE, True Name Unknown, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

DECISION / ORDER

Index No. 514128/2017
Motion Seq. No. 2
Date Submitted: 2/6/20
Cal No. 29

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed....................	26-36
Affirmation in Opposition and Exhibits Annexed..........................	40-46
Reply Affirmation..	47

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is an action for personal injuries which allegedly occurred on October 11, 2016, when plaintiff was a passenger in an Access-A-Ride van. Plaintiff claims the van "stopped short," which caused her neck, back and shoulders to move forward and then back, and that she made "forceful" contact with her seat. Plaintiff alleges in her Bill of Particulars that as a result, she sustained injuries to her cervical and lumbar spine, her left shoulder and to both of her knees. Paragraph 9 further states "[p]laintiff's injuries to her lumbar spine and cervical spine aggravated and exasperated pre-existing degenerative disease."

Defendants move for summary judgment dismissing the complaint for failing to state a cause of action. Defendants, all represented by the same law firm, contend that the plaintiff's claim, as described in her 50-h hearing transcript and in her EBT transcript, is not actionable, as plaintiff does not assert a claim which qualifies as negligent conduct by a common carrier in the State of New York. Specifically, defendants aver that the plaintiff, as is fully explained in Pattern Jury Instruction 2:165 and the cases cited therein, does not assert that defendant driver made "an unusual and violent stop" as is required for a claim against a common carrier. In the alternative, defendants contend that plaintiff's injuries do not meet the definition of a "serious" injury as defined in Insurance Law §5102(d), and that the complaint must be dismissed on that ground as well.

Plaintiff opposes the motion and contends that defendants have failed to meet their prima facie burden in moving for summary judgment. However, plaintiff's counsel only addresses the branch of the defendants' motion addressed to the issue of whether plaintiff sustained a serious injury. He does not oppose the branch of the motion for summary judgment dismissing the complaint for failing to state a cause of action.

The court first addresses the branch of defendants' motion which seeks summary judgment dismissing the complaint on the ground that plaintiff has failed to state a cause of action. First, it is not a disputed issue that an Access-A-Ride van is a common carrier (*see Houston v NY City Tr. Auth.*, 143 AD3d 860 [2d Dept 2016]).

To prevail at trial on a cause of action which alleges that a common carrier was negligent in the manner in which he or she stopped the vehicle, a plaintiff must prove that the stop was "unusual and violent", rather than merely "the sort of jerks and jolts

commonly experienced in city bus travel" (*Urquhart v New York City Tr. Auth*., 85 NY2d 828, 830 [1995]; *see also Black v County of Dutchess*, 87 AD3d 1097, 1098 [2d Dept 2011]). A plaintiff may not satisfy the burden of proof merely by characterizing the stop as unusual and violent (*see Urquhart v New York City Tr. Auth*., 85 NY2d at 829-830; *Burke v MTA Bus Co*., 95 AD3d 813 [2d Dept 2012]; *Gioulis v MTA Bus Co*., 94 AD3d 811, 812 [2d Dept 2012]). There must be "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" (see *Mastrantonakis v Metro. Transp. Auth*., 170 AD3d 823, 824-825 [2d Dept 2019]).

In seeking summary judgment dismissing such a cause of action, the common carrier has the burden of establishing, prima facie, that the stop was not unusual and violent as a matter of law, thereby not requiring a trial (*Gani v New York City Tr. Auth*., 159 AD3d 673, 673 [2d Dept 2018]). "That burden may be satisfied by the plaintiff's deposition testimony as to how the accident occurred" (*see Gani v New York City Tr. Auth., 159 AD3d 673, 673 [2d Dept 2018]; Alandette v New York City Tr. Auth*., 127 AD3d 896, 897 [2d Dept 2015]; *Burke v MTA Bus Co*., 95 AD3d 813 at 813; *Guadalupe v New York City Tr. Auth*., 91 AD3d 716, 717 [2d Dept 2012]; *Black v County of Dutchess*, 87 AD3d 1097 at 1098-1099 [2d Dept 2011). As the driver has not been identified, he has not been deposed.

In *Gani*, *supra,* the plaintiff testified at her deposition that she was propelled [from her seat] to the floor and from the front to the middle of the bus. The court affirmed the lower court's denial of summary judgment to the defendants and concluded that "[t]his

testimony raised a triable issue of fact as to whether the stop at issue was unusual and violent, as opposed to whether the stop involved only the normal jerks and jolts commonly associated with city bus travel" (*Gani v NY City Tr. Auth.*, 159 AD3d 673, 674 [2d Dept 2018]). In *Alandette*, *supra,* by comparison, the plaintiff testified that while she was walking to the rear of the bus to find a seat, she fell backwards when the driver applied the brakes. The Appellate Division affirmed the trial court's dismissal of the action, concluding that "[t]he defendants established their prima facie entitlement to judgment as a matter of law by submitting a transcript of the plaintiff's deposition testimony, which demonstrated that the stop of the bus was not 'unusual or violent' or of a 'different class than the jerks and jolts commonly experienced in city bus travel.'" In *Guadalupe, supra,* the plaintiff testified she was standing on the bus, as there were no vacant seats. According to the plaintiff, the bus driver applied the brakes suddenly, and she was propelled forward into a pole. The Appellate Division states that "the plaintiff also testified that, immediately prior to the incident, the bus was traveling at a 'moderate' speed, that, as a result of the accident, she did not fall to the floor but rather remained standing, and that she did not see anyone else on the bus move as a result of the bus stopping." They held that, "[v]iewing the evidence in the light most favorable to the plaintiff (*see e.g. Pearson v Dix McBride, LLC*, 63 AD3d 895, 895, 883 NYS2d 53 [2009]), we find that the defendants, in support of that branch of their motion which was for summary judgment dismissing the complaint, established, prima facie, that the incident described was not 'unusual and violent,' and of a 'different class than the jerks and jolts commonly experienced in city bus travel'" [citations omitted]. In *Golub, supra* the Appellate Division reversed the trial court, finding that the complaint should have

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been dismissed. They state" [t]he nature of the incident, in which the plaintiff, according to the testimony she gave at a hearing pursuant to General Municipal Law § 50-h, was merely caused to land on the floor in front of her seat, is not, in itself, sufficient to provide the objective support necessary to demonstrate that the movement of the bus was 'unusual and violent,' and of a 'different class than the jerks and jolts commonly experienced in city bus travel.'"

Here, the court finds that defendants have met their burden of proof for summary judgment. Plaintiff testified at her General Municipal Law §50(h) hearing that she was not thrown to the floor but was merely jostled in her seat (*see Mastrantonakis v Metro. Transportation Auth.,* 170 AD3d 823, 825–26 [2d Dept 2019] [plaintiff's 50(h) and deposition testimony "that she was merely caused to land on the floor within one foot of where she was seated. This is not, in itself, sufficient to provide the objective support necessary to demonstrate that the movement of the bus was unusual and violent, and of a different class than the jerks and jolts commonly experienced in city bus travel"]; *Bethune v MTA Long Island Bus*, 138 AD3d 1052, 1053 [2d Dept 2016] ["defendant established its prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging negligence by submitting transcripts of the plaintiff's Public Authorities Law hearing testimony and her deposition testimony [that the driver applied the brakes, causing the plaintiff to lose her balance and hurt her foot], which demonstrated that the stop of the bus was not unusual or violent or of a different class than the jerks and jolts commonly experienced in city bus travel"]; *Rayford v. County of Westchester*, 59 AD3d 508, 509 [2d Dept 2009] ["The nature of the incident, in which the plaintiff, according to her deposition testimony, was merely caused to land on the

steps next to where she had been standing, was not, in itself, sufficient to provide the objective support necessary to demonstrate that the movement of the bus was "unusual or violent," and of a "different class than the jerks and jolts commonly experienced in city bus travel"]). Further, plaintiff told the EMS worker (eFile doc. 36) that the van "hit a bump which flew her forward." As is explained below, none of the plaintiff's versions of the events of that day constitute negligent conduct on the driver's part, even viewing the evidence in the light most favorable to plaintiff.

Plaintiff attended a 50-h examination on January 24, 2017, less than four months after the incident. She testified that she is a retired home attendant. She retired in 1990 when she was forty years old, due to arthritis in her knees. She has had a total knee replacement surgery in both of her knees. Her application for Access-A-Ride annexed by defendants to the motion indicates that since the surgery to the right knee, she is unable to bend it. She was 67 years old on the date of the examination. On the date of the incident, she said she was seated in the rear of the van. She was picked up and 9:00 a.m. and was the only passenger in the van. She was going to visit her daughter in Valley Stream, NY. She boarded the van on her own and sat down [50-h Page 27]. Plaintiff testified that she asked the driver to help her to put her seatbelt on about 15 minutes into the trip, but he did not hear her and did not respond [Pages 29,32]. She seems to be saying that he was on a call with someone at first, on speakerphone, and then she tried to speak to him, but he did not hear her from the rear seat. She did not try to speak to him about it again [Page 42]. She also said she was afraid to speak to him because he had seemed upset that he could not find her in front of her apartment. Apparently, there was construction in front of her building, so she called on the phone

and told the company she would be at the corner, but he did not get the message. Traffic was light. It was a Tuesday morning. It was sunny and clear and dry. She expected to arrive at her destination at 11:00 a.m. The incident took place on Parkside Avenue near Rogers Avenue, about a half hour after she had been picked up. She testified that prior to the incident, there was nothing unusual about the ride-- it was a typical ride. She said she made this trip often, to visit her daughter and grandchildren. She has used Access-A-Ride for twenty years.

Plaintiff testified that she was sitting in the middle of a three-person "bench" seat at the rear of the van. The "accident" was that the van "jerked" left [Page 44]. This caused her body to "jerk." She could not say why this happened. The driver stopped the van and a man came toward the van and told the driver that "everything is ok" [Page 48]. Plaintiff said she could not see anything from where she was seated. She could not see whether the man was a pedestrian or a driver of a car or a motorcycle. She testified that the van driver was not speeding, and when he stopped, it was a "slow stop" [Page 49]. There was no screeching of tires and no horns honking [Page 50]. She did not fall out of her seat [Page 55]. He body moved forward and then back, hitting her seat. She told the driver she was hurt. He called for an ambulance. The ambulance took her to Kings County Hospital, to the emergency room.

Plaintiff's EBT was held on October 17, 2018, almost two years after the 50-h hearing. She clarified that she retired in 1998, not 1990, and then received Social Security Disability. On Page 34, plaintiff was asked "Just prior to the Access-A-Ride jerking, how fast was it going?" She responded "normal" then, when asked to further clarify, she said "never speeding." On Page 37 plaintiff was asked if she knew why the

Access-A-Ride van "jerked" and she said she did not know. She stated that a man came toward the van, told the driver that his car was not hit, then went back to his beige car and drove off.

Plaintiff explained that when the van "jerked" she screamed, and the driver pulled the van into the parking lane and parked, went outside and made a phone call. He then asked her if she wanted to continue to her destination and she said no, please call an ambulance. He did so, and the ambulance arrived quickly. The main difference between her testimony at the EBT and at her 50-h examination is that at the 50-h exam, plaintiff was asked at Page 55 "Did any portion of your body come in contact with the floor of the van?" and she answered "No." She elaborated that her body moved forward and then back, hard, into the seat. She said her head hit the back of the seat. She was again asked at Page 56 "But you did not come in contact with the floor; is that correct? She answered "Yes." At her EBT, however, on Page 39, plaintiff testified that after the van jerked, she fell to the floor. Specifically, plaintiff testified that she fell out of her seat, landed on her knees, twisted her foot and hit her face and shoulders on the floor of the van [Page 43]. The court finds that the plaintiff's EBT testimony is a belated attempt to avoid the consequences of her earlier 50-h examination by raising a feigned issue of fact, and is insufficient to raise a triable issue of fact. (see *Twarog v Ortiz-Deviteri*, 137 AD3d 777 [2d Dept 2016]). It clearly contradicts her earlier testimony, which was much closer in time to the incident (*see Tejada v Jonas*, 17 AD3d 448 [2d Dept 2005]; *Novoni v La Parma Corp.*, 278 AD2d 393 [2d Dept 2000]).

There are many reported appellate decisions where a passenger fell to the floor of a vehicle determined to be a common carrier, and the court determined that the

movement (or stop) of the vehicle was proven by defendant to not have been "unusual and violent." Here, the defendants make a prima facie case that the driver was not negligent, as the stop was not "unusual and violent."

The burden then shifts to the plaintiff to overcome the motion and raise a triable issue of fact. Plaintiff has failed to oppose this branch of the motion and has only provided documents which relate to her medical care, addressed to the other branch of the motion.

A word is required with regard to plaintiff's claim that the driver did not put her seatbelt on for her. She was asked at her EBT if it was operable, and she said it was, but because of her arthritis, or carpal tunnel syndrome, as her testimony was not clear, she was unable to put it on. With respect to a passenger with a disability, "a common carrier has a duty to use such care or to give such assistance for his or her safety and welfare as is reasonably required by the passenger's disability and the existing circumstances, provided that the carrier's employee knew or should reasonably have known of the passenger's disability" (*see Houston v NY City Tr. Auth.*, 143 AD3d 860, 861-862 [2d Dept 2016]); *Raines v Manhattan & Bronx Surface Tr. Operating Auth.*, 116 AD3d 606, 606 [1st Dept 2014]; *Lewis v New York City Tr. Auth.*, 100 AD3d 554, 555 [1st Dept 2012]; *Kasper v Metropolitan Transp. Auth. Long Is. Bus*, 90 AD3d 998, 999 [2d Dept 2011]; *see also* PJI 2:162).

Here, while plaintiff walked with a cane, she boarded the van and seated herself. She admitted at her 50-h exam that she did not ask the driver to help her with her seatbelt until they had been underway for about fifteen minutes. Then, as he was driving and there was some distance between then, he did not respond. She testified

that she did not think he heard her, but she did not repeat her request. She also testified at her EBT that she had been riding with Access-A-Ride for twenty years and had not seen this driver before. Defendants' provide plaintiff's most recent paperwork from her Access-A-Ride renewal (e-file doc. 36). The papers indicate that plaintiff's disability is that she cannot bend her right knee. There is no indication that she needs assistance with seatbelts. Further, there is no legal requirement that backseat passengers wear a seatbelt. If there is a requirement that Access-A-Ride drivers check that passengers are seat-belted before driving off, plaintiff has not provided anything to back up such a claim, that the driver was negligent in failing to put her seatbelt on, which was made by plaintiff's counsel at oral argument but is not mentioned in the papers in opposition.

In light of the foregoing, it is unnecessary to address the other branch of defendants' motion, whether plaintiff meets the serious injury threshold of Insurance Law 5102(d).

Accordingly, it is

ORDERED that the defendants' motion for summary judgment dismissing the complaint for failing to state a cause of action is granted, and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: April 20, 2020

ENTER:

Debra Silber

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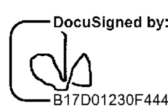

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Hon. Debra Silber, J.S.C.