

<b>Fishman v MTA Bus Co.</b>
2020 NY Slip Op 31983(U)
June 18, 2020
Supreme Court, New York County
Docket Number: 150952/2015
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 21

-----X  
RHONDA FISHMAN,

Plaintiff,

Index No. 150952/2015

-against-

Mot. Seq. Nos. 1 & 3

MTA BUS COMPANY, MANHATTAN AND BRONX  
SURFACE TRANSIT OPERATING AUTHORITY,  
NEW YORK CITY TRANSIT AUTHORITY, MTA  
BRODGES AND TUNNELS, AND JOHN DOE,

Decision and Order

Defendants.

-----X  
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>	<u>NYSCEF #</u>
Plaintiff's Motion/Affirmation/Supporting Papers (Motion 1)	1	32-42
Transit Defendants' Affirmation in Opposition (Motion 1)	2	68-70
Affirmation in Opposition (Defendant City of New York) (Motion 1)	3	106-108
Transit Defendants' Motion/Affirmation/Supporting Papers (Motion 3)	4	71-83
Affirmation in Opposition (Defendant City of New York) (Motion 3)	5	100-104
Affirmation in Opposition (Plaintiff) (Motion 3)	6	111
Reply Affirmation (Transit Defendants) (Motion 3)	7	115
Decision and Order (Motion Sequence Number 4)	8	124
Decision and Order (Motion Sequence Number 2)	9	125
Order with Notice of Entry (Motion Sequence Number 4)	10	126

**SOKOLOFF, J.:**

Plaintiff commenced this action against defendants for personal injury sustained while she was attempting to alight from a southbound bus adjacent to the bus stop on the southwest corner of Houston and Allen Streets at approximately 8:30 A.M. on January 30, 2014. The plaintiff contends that she sustained serious injuries (a fractured left ankle) as a result of the defendants' failure to provide a safe place to alight from the bus.

Before the court for decision are Motion Sequence Number 1, plaintiff's motion for partial summary judgment on the issue of liability and Motion Sequence Number 3, the motion (more properly, "cross-motion") of defendants MTA Bus Company, Manhattan and Bronx Surface Transit Authority, New York City Transit Authority, and MTA Bridges and Tunnels (collectively, the "Transit Defendants") for summary judgment and to dismiss the claims against

defendants MTA Bus Company, Manhattan and Bronx Surface Transit Authority because they are improper parties.

For the reasons set forth below plaintiff's motion (Motion Sequence Number 1) is DENIED and Transit Defendants' motion (Motion Sequence Number 3) is GRANTED IN PART with respect to the motion seeking dismissal of the claims against defendants MTA Bus Company, Manhattan and Bronx Surface Transit Authority, and MTA Bridges and Tunnels, as improper parties and DENIED with respect to the portion seeking summary judgment in favor of defendant New York City Transit Authority.

Plaintiff, relying on, among other things, bus surveillance videos from the incident and an expert affidavit, contends that defendants breached a duty of care owed to the plaintiff – to stop at a location where plaintiff passenger could safely alight from the bus – when the bus did not pull all the way into the bus stop, thereby leaving the rear door of the bus 2-3 feet away from the bus stop curb and creating a “dangerous height differential” between the floor of the rear door of the bus and the roadway below it that caused the plaintiff to fall while attempting to alight from the bus to the roadway below the door. Defendants' opposition contends that there are triable issues of fact as to whether the defendants breached a duty of care to the plaintiff and if so, whether such negligence was a proximate cause of the plaintiff's injury.

Defendants' motion (cross-motion) for summary judgment, contends that any negligence by defendants was not a proximate cause of the plaintiff's accident, that the bus operator acted with reasonable care in determining that safest location to discharge passengers, that the bus operator's duty of care to provide a safe place to alight from the bus was completed when the bus stopped with the front door of the bus in the bus stop, that plaintiff independently and voluntarily decided to attempt to exit the bus from the rear door, instead of attempting to alight from the front or middle doors of the bus. The defendants' motion (cross-motion) also seeks dismissal of

the claims against MTA Bus Company, Manhattan and Bronx Surface Transit Authority and MTA Bridges and Tunnels as improper parties.

Plaintiff's attorney affirmation in opposition to the cross-motion contends that "defendants fail to raise any argument that warrants judgment as a matter of law," and also states, "when taken together the competing summary judgment motions of all the parties confirm the existence of triable issue [*sic*] of fact." Plaintiff's opposition does not address that portion of the defendants' motion (cross-motion) seeking dismissal of the claims against MTA Bus Company, Manhattan and Bronx Surface Transit Authority and MTA Bridges and Tunnels as improper parties.

On June 27, 2019, the court heard oral argument on Motion Sequence Numbers 1, 2, 3, and 4. At oral argument [the transcript of which is annexed and incorporated herein], plaintiff conceded that the videos from the bus clearly show the roadway was clear, unblemished and level and withdrew any claims of a pothole. Plaintiff still contends that the bus operator was negligent in pulling into the stop too far from the curb thus making it unsafe to alight from the bus.

On February 10, 2020, the court issued separate Decisions and Orders on Motion Sequence Numbers 2 (Transit Defendants' Motion to Vacate Note of Issue) and 4 (Defendant City of New York's Motion for Summary Judgment). Motion Sequence Number 2 was withdrawn. Motion Sequence Number 4 was granted and the court dismissed all claims and cross claims against Defendant City of New York.

As seen in the bus surveillance video attached to the parties' submissions, and conceded by the parties during oral argument, there is no dispute that (1) the bus operator did not pull all the way into the stop aligning all three bus doors within one foot of the bus stop curb; (2) that the front door of the bus is within one-foot of the curb, that the middle door is 1-2 feet from the bus stop curb and that the rear door, through which the plaintiff attempted to alight from the bus, is

2-3 feet from the bus stop curb; (3) that the plaintiff did not seek the assistance of the bus operator or attempt to alight from the front or middle doors of the bus before she attempted to alight from the rear door; (4) that there were no defective conditions, such as a protruding piece of rubber, in or near the rear door of the bus; (5) and that there were no defective conditions such as snow, ice, or a pot hole or other depression in the roadway in the vicinity of the rear door of the bus.

Accordingly, the sole defective condition or “hazard” alleged by the plaintiff in this matter is that the placement of the bus in the stop resulted in the rear door being 2-3 feet away from the curb and an unspecified height (distance) between the floor of the rear door of the bus to the roadway below that was too high for the plaintiff to safely alight from the bus, causing her to fall and sustain injuries.

When presented with a motion for summary judgment, the court’s function is issue finding, not issue determination. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). If triable issues of fact exist, summary judgment is not warranted. *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 (1986). Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].)

The burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Id.*). The burden is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Authority*, 27 N.Y.3d 1019 [2016] [internal quotation marks omitted]). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez*, at 324). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Because summary judgment deprives a litigant of the party's

day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Sherman v New York State Thruway Authority*, 27 NY3d 1019 [2016]).

A common carrier owes a duty to its passengers to stop at a place where they may safely disembark and leave the area (*Malawer v New York City Transit Authority*, 18AD3d 293, 294-95 [1st Dept 2005], citing *Miller v Fernan*, 73 NY2d 844, 846 [1988]). Liability for negligence rests on a finding that the placement of the bus dictates that the passenger, in order to exit the bus, must negotiate a dangerous or defective path (*Gross v New York Transit Authority*, 256 AD2d 128, 129 1998]). Whether a common carrier has breached its duty in this regard is generally a question of fact to be determined by the jury (*id.*). Once a safe alighting point is provided, the operator's duty is completed (*Rodriguez v MABSTOA*, 117 AD2d 541, 543 [1st Dept 1986]). Courts will not impose liability on the common carrier when a passenger makes an independent and voluntary choice of departing from a safe alighting point onto a hazardous road condition caused by the improper placement of the bus, even when the operator is in violation of a traffic regulation (*id.*).

Here, plaintiff alleges that she sustained her injuries while attempting to alight from the bus because the bus was not properly curbed, resulting in the rear door being 2-3 feet away from the bus stop curb and an unspecified distance above the roadway which was too high for the plaintiff to safely exit. Defendants contend that the front door of the bus was properly curbed and that, even if the placement of the bus was a breach of the defendants' duty of care to plaintiff to provide a safe place to alight from the bus, the placement of the bus was not a proximate cause of the defendant's injuries because she could have alighted from the front door of the bus without incident.

Neither party has established entitlement to summary judgment as a matter of law. Plaintiff's expert affidavit, wherein the expert opines that unspecified "MTA regulations and the

standard in the industry requires bus drivers to pull within 6” to 12” of a sidewalk when able to do so,” and that the bus operator’s failure to properly curb the entire bus... resulted in causing the Plaintiff to have to navigate a steep drop directly from the bus into the street thus resulting in a Preventable Accident,” is conclusory and insufficient to establish entitlement to summary judgment on liability as a matter of law (*see Salas v Adirondack Transit Lines*, 172 AD3d 775 [2d Dept 2019] [affidavit of plaintiff’s expert failed to raise a triable issue of fact where expert failed to set forth any foundation to support the conclusion that an industry standard or practice existed and expert did not identify any specific statute or regulation that the defendant violated that proximately caused the plaintiff’s injuries]). Defendants’ motion fails to establish as a matter of law that defendants did not violate its duty to provide defendant with a safe place to alight from the bus and does not establish as a matter of law that placement of the bus, if it was in breach of a duty was not a proximate cause of the plaintiff’s alleged injury.

A triable issue of fact exists as to whether the bus operator, by placing the rear door of the bus 2-3 feet away from the bus stop curb, breached defendants’ duty to plaintiff to stop at a place from which the plaintiff could safely disembark (*see Toolsie v New York City Transit Authority*, 55 AD3d 476, 477 [1 Dept 2008] [finding triable issue of fact exists regarding whether, by stopping the bus several feet from the curb, defendant breached its duty to plaintiff to stop the bus at a place from which she could safely disembark]; *see also, Sanchez v New York City Transit Authority*, 2011 WL 11538595 [Sup Ct New York County 2011] [same]). The circumstances of the instant case are similar to *Toolsie* and *Sanchez*, because all three cases involve plaintiffs who claim to have sustained injuries while alighting from a bus door that is allegedly too high from the roadway as a result of a bus operator failing to properly curb the bus where there is no evidence of a non-Transit Authority vehicle blocking the bus stop. Here, as in *Toolsie* and *Sanchez*, triable issues of fact exist as to whether the bus operator breached a duty to

provide a safe place to alight the bus by placing the rear door of the bus 2-3 feet away from the bus stop curb, and, if so, whether that breach caused the plaintiff to sustain a serious injury.

Defendants' unopposed motion to dismiss the claims and cross-claims against the defendants MTA Bus Company, Manhattan and Bronx Surface Transit Operating Authority, and MTA Bridges and Tunnels as improper parties because those defendants are separate entities from the New York City Transit Authority is granted (*see Delacruz v MTA*, 45 AD3d 482, 483 [2007], *Mayayev v MTA Bus*, 74 AD3d 910, 911 [2d Dept 2010], *Samuelson v NYCTA*, 101 AD3d 537, 538 [1st Dept 2012], *Rosas v MABSTOA*, 109 AD2d 647 [1 Dept 1985], Public Authorities Law 1203-a [3] [b]).

Accordingly, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on liability (Motion Sequence Number 1) is DENIED, and it is further

ORDERED that the unopposed portion of the defendants' motion to dismiss the claims against defendants MTA BUS COMPANY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and MTA BRIDGES AND TUNNELS as improper parties (Motion Sequence Number 3), is GRANTED IN PART and all claims against those defendants are dismissed; it is further

ORDERED that the portion of the defendants' motion for summary judgment in favor of defendant NEW YORK CITY TRANSIT AUTHORITY (Motion Sequence Number 3) is DENIED;

ORDERED that defendants MTA BUS COMPANY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, and MTA BRIDGES AND TUNNELS are hereby removed from the caption of the action; it is further

ORDERED that counsel for movant(s) shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and 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 dismissal of the MTA BUS COMPANY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, and MTA BRIDGES AND TUNNELS from the action and their removal from the caption, and it is further:

ORDERED that such service upon the County Clerk 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/supct/nanb]); and it is further

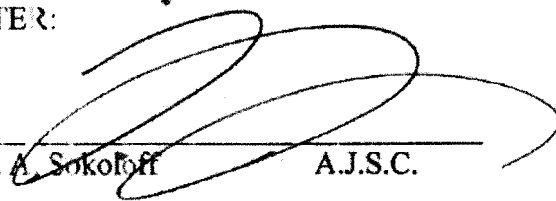
ORDERED that the Clerk of the Court shall enter judgment in favor of the defendants MTA BUS COMPANY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, and MTA BRIDGES AND TUNNELS dismissing the claims and cross-claims made against them in this action, without any costs and disbursements, and it is further

ORDERED that counsel for movant(s) shall serve a copy of this order with notice of entry upon the Trial Support Office (60 Centre Street, Room 158M); and it is further

ORDERED that upon such service the Trial Support Office shall transfer this matter back to the appropriate Part.

Dated: June 18, 2020

ENTER:

  
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Lisa A. Sokoloff A.J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE