

Wade v Reliant Transp., Inc.
2021 NY Slip Op 33065(U)
December 13, 2021
Supreme Court, Bronx County
Docket Number: Index No. 33876/2018e
Judge: Veronica G. Hummel
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31**

-----X
RENA WADE,

Plaintiffs

**Index No. 33876/2018e
DECISION/ORDER
Motion Seq. 2**

-against -

RELIANT TRANSPORTATION, INC., JEAN FRANCOIS
and RAMONA ROMERO,

Defendants.

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VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF regarding the motion of defendants RELIANT TRANSPORTATION, INC., JEAN FRANCOIS and RAMONA ROMERO [Mot. Seq. 2] (defendants), made pursuant to CPLR 3212, for an order dismissing the complaint on the ground that plaintiff RENA WADE has not sustained a “serious injury” as defined by Insurance Law 5102(d).

This action arises out of an incident that occurred on a bus on December 15, 2015. At the time, plaintiff was working as a personal aid to a special needs child riding on a bus, owned and operated by defendants, that was transporting a number of such students.

In the summons and complaint, filed December 10, 2018, plaintiff sets forth two causes of action. The first cause of action alleges that at the time of the Accident, at 3:40 pm. the defendant driver “operated the ... bus in such a manner that caused the ... bus to come to and/or experience on or more sudden, unusual, violent, unnecessary stops, jerks and or lurches”. Such “stops, jerks, and lurches were not the result of an emergency or were the result of an emergency created” by defendants. As a result of these movements, plaintiff’s body was “violently and unnaturally contorted, twisted, jerked and severely injured”, causing plaintiff

injury. As a result, plaintiff sustained a serious injury and is covered person under section 5102(d) of the Insurance Law.

In the second cause of action, plaintiff alleges that the defendant driver and defendant bus monitor, in the scope of their employment, "had a duty to ensure that their actions, activities, and behavior conformed to a certain standard of conduct established by law for the protection of students and student aides, including [plaintiff] against risk of harm". Defendants were careless and negligent in their duties as a school bus driver and school bus monitor and defendant Reliant was negligent and careless in hiring and retaining the defendants. The occurrence was caused solely by the conduct of the defendants and without any provocation or unlawful act on the part of the plaintiff, and as the result of the negligent acts of defendants, plaintiff sustained severe and permanent personal injuries. Plaintiff then alleges:

[Defendants] were negligent in hiring ... training...negligently ...causing...plaintiff to be injured [and]... failing to follow safety protocols and procedure...failing to have in place safety protocols and procedures... failing to supervise and monitor passengers on the bus... failing to take heed of a dangerous condition on the bus... failing to stop the bus ...and plaintiff will rely on the doctrine of res ipsa loquitur.

On January 31, 2019, defendants served an answer with a demand for a bill of particulars. A Preliminary Conference/Case Management Order was issued on June 11, 2019.

On July 10, 2019, plaintiff served a bill of particulars in which plaintiff alleges:

"Plaintiff was a lawful passenger on the bus...which was operated in such a manner that caused the ...bus to come to and/or experience one or more sudden, unusual, violent, unnecessary stops, jerks, and or lurches.. [defendants] were [negligent] in the ownership, operation, maintenance, management, supervision, repair and/or control of the ...bus... causing the bus to experience one or more sudden, unusual, violent, unnecessary stops, jerks and/or lurches...and in failing to take such other and further evasive actions..."

Plaintiff further alleges negligence in failing to: stop; keep the vehicle under control, causing the bus to jerk; properly hire and retain the driver and monitors; warn plaintiff of the dangerous condition; and to take evasive actions. Plaintiff alleges actual and constructive notice of the "dangerous a defective condition".

Plaintiff's deposition was taken on November 18, 2019. Plaintiff testified that she was on the relevant bus as a personal aid to one particular special needs student. At some point, a fight broke out between two other students, and plaintiff intervened. She stated that the bus driver and bus monitor were aware of the situation and did not assist her in any manner. She separated the two fighting students and sat in the seat next to one said student to prevent his reentering the aisle. She stated that she squeezed herself into the seat next to the angry student. He was hitting her and her leg was braced against the opposite seat to keep him in the seat. The student was hitting her on her back, shoulder, and lower back, and the bus was bouncing, hitting pot holes. After the students disembarked, plaintiff returned home and began to feel leg and back pain.

One year after the deposition, on November 4, 2020, plaintiff underwent an IME examination.

On May 13, 2021, defendants filed the present motion [Mot. Seq. 2] for an order granting summary judgment in favor of defendants on the grounds that plaintiff did not sustain a "serious injury" as defined by the New York State Insurance Law.

On July 12, 2021, plaintiff served opposition papers and a one paragraph Amended Verified Bill of Particulars. In the amended pleading, plaintiff alleges that:

5.&6. Plaintiff ...claims that defendant bus company ... and their driver... were negligent in that they did not use reasonable care to protect plaintiff ... who was a passenger working on that bus. Both defendants, including bus matron defendant ... failed to protect plaintiff..., a passenger on the bus; in that they did not do anything to stop the attack on plaintiff ... by fellow bus passengers; that defendants failed to stop the bus; that defendant... negligently trained both individual defendants in how to use reasonable care to protect passengers; failed to properly supervise passengers on the bus; failed to have adequate personnel upon the bus; failed to adequately keep plaintiff safe from aggressive passengers with a known propensity of violence; as a result of the aforementioned conduct plaintiff was seriously injured as a result of the negligence of all defendants. Plaintiff further alleges that such conduct was foreseeable in that defendants did not adequately prepare for such event.

In opposition to the motion, plaintiff acknowledges that this personal injury action does not satisfy the Insurance Law and is not based on a motor vehicle injury. Instead plaintiff argues that “plaintiff was not injured out of the use or operation of a motor vehicle”. Plaintiff was injured due to the unruly behavior between student passengers and the failure of the defendant bus driver and bus monitor to adequately protect plaintiff. Plaintiff was injured “by way of the aggressive conduct of” the student bus passenger.

On reply, defendants point out that the only opposition to the motion for summary judgment by plaintiff is that this case is not covered by no-fault law and plaintiff does not therefore have to establish that she sustained a “serious injury”. Defendants argue that the court should not consider the merits of plaintiff’s argument as it is based on a new theory of liability, raised for the time in opposition to the motion and “was not pleaded in the complaint or the bill of particulars”.

On November 15, 2021, a conditional preclusion order was issued directing defendant driver to appear for deposition by February 1, 2022.

Discussion

When deciding a summary judgment motion, the Court’s role is solely to determine if any triable issues exist, not to determine the merits of any such issues. (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). In making this determination, the court must view the evidence in the light most favorable to the party opposing the motion, and must give that party the benefit of every inference which can be drawn from the evidence (*Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]; *Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). Every available inference must be drawn in the non-moving party’s favor (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

It is undisputed that the first cause of action alleged in the complaint and the original bill of particulars are solely based on a personal injury claim founded in a motor vehicle accident as covered under the Insurance Law. Plaintiff concedes in the opposition that said law is inapplicable and therefore the first cause of action is dismissed on consent.

As for the second cause of action, it does allege grounds other than Insurance Law and can be interpreted as founded on a “failure to supervision” negligence action. The amended bill of particulars which expands on this theory is properly served in view of the pre-note of issue posture of the case and the rule that a party may amend a bill of particulars once as of course prior to the filing of the note of issue (CPLR 3042[b]; see *Vargas v Villa Josefa Realty, Corp.*, 28 AD3d 389 [1st Dept 2006]; *Leach v. North Shore Univ. Hosp. at Forest Hills*, 13 A.D.3d 415, 416, 787 N.Y.S.2d 65 [2004]). Furthermore, plaintiff testified at deposition extensively as to the alleged assault by a student on the bus and the lack of response or assistance by the defendants’ employees and therefore defendants were on notice of the facts underlying this second claim. Nor is there prejudice in considering the second cause of action as defendant has yet to be deposed and no note of issue is filed in the action. As such, the motion to dismiss the second cause of action is denied.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the part of the motion of defendants RELIANT TRANSPORTATION, INC., JEAN FRANCOIS and RAMONA ROMERO [Mot. Seq. 2], made pursuant to CPLR 3212, that seeks an order dismissing the first cause of action in the complaint on the ground that plaintiff RENA WADE has not sustained a “serious injury” as defined by Insurance Law 5102(d) is granted on consent of plaintiff; and it is further

ORDERED that the part of the motion of defendants [Mot. Seq. 2], made pursuant to CPLR 3212, that seeks an order dismissing the second cause of action in the complaint is denied, with leave to renew, after the completion of discovery; and it is further

ORDERED that, as this action does not arise out of a motor vehicle accident, the action is referred to the Clerk for reassignment to another Part.

The foregoing constitutes the decision and order of the court.

Dated: December 13, 2021

ENT E R,

s/Hon. Veronica G. Hummel/signed 12/13/2021
Hon. Veronica G. Hummel, A.J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

CASE TO BE ASSIGNED TO A NON-MOTOR VEHICLE PART