SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE BLUTH** **PART** **14**

Justice

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LUIZA OTTONI

Plaintiff,

- v -

SEASTREAK, LLC,

Defendant.

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INDEX NO. 152135/2018

MOTION DATE 04/29/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152

were read on this motion to/for SUMMARY JUDGMENT.

The motion by defendant for summary judgment is denied.

Background

In this personal injury action, plaintiff contends that she attended a Halloween party on October 27, 2017 in Brooklyn. She and other partygoers took defendant's ferry back to Manhattan. She claims that as the ferry was returning partygoers back to Manhattan, she fell off a box on the top deck of the ferry when the boat jerked as it approached the dock. Plaintiff insists that she broke her ankle. Plaintiff testified that "First we were standing against the railing and then we're like oh, let go up on this thing, it will look nicer. So then we go up this thing, me and my sister and Eduardo, Alfredo stands against the railing talking to us. And we're all three talking looking at the view and then the boat stopped and that's when we fell" (NYSCEF Doc. No. 117 at 72). She emphasized that the ride, prior to her fall, was not rough (*id*. at 73).

Defendant insists that the record shows that plaintiff's injury did not occur while the ferry was docking in Manhattan. It points to hospital records that allegedly prove that plaintiff's fall happened while at the Halloween party in Brooklyn, before she got on the ferry, and that she fell off of speakers. It also argues that there is no evidence that the purported injury happened on a vessel owned and operated by defendant, even assuming plaintiff was hurt while on a ship. Defendant maintains that plaintiff could not identify any of the vessels operated by defendant at her deposition.

In opposition, plaintiff emphasizes that she was attending a Halloween party in the Brooklyn Navy Yard and took a ferry to and from the venue. She insists that the party was at the Duggal Greenhouse and that she was hurt on the way back to Manhattan. Plaintiff maintains that there is no question that defendant operated the vessel that took passengers from Pier 11 in Manhattan to and from the party in Brooklyn. She insists she had a ticket in her name although she acknowledges that there was confusion at her deposition, including that she claimed (at one point) that the party was on Randall's Island. With respect to the hospital records, plaintiff insists that these are inadmissible but, even if they were admissible, they are merely inconsistencies that need to be evaluated at trial. Plaintiff argues that defendant's witness admitted that defendant's vessels have life jacket boxes on the top deck, where plaintiff claims she fell.

In reply, defendant maintains that plaintiff cannot establish the accident, if one occurred on a vessel, happened on a vessel owned or operated by defendant. It points out that plaintiff contends that the vessel she was on had two decks while defendant's ferries have three decks. Defendant argues there is no evidence that it provided ferry service for the party at issue here.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must 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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"To establish a prima facie case of negligence against a common carrier for injuries sustained by a passenger when the vehicle comes to a halt, the plaintiff must establish that the stop caused a jerk or lurch that was unusual and violent. Proof that the stop was unusual or violent must consist of more than a mere characterization of the stop in those terms by the

plaintiff" (*Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 829-30, 623 NYS2d 838 [1995] [internal quotations and citations omitted]).

The Court denies the motion. Plaintiff's deposition testimony establishes her prima facie burden that defendant was negligent in its operation of the ferry as it docked in Manhattan. She claimed it stopped so suddenly that it forced her off of the box upon which she was standing and she broke her ankle due to the fall.

The Court recognizes that there are numerous inconsistencies with plaintiff's version of events, but none of these compel the Court to grant the motion. And while there are a lot of contradictions in plaintiff's account, these are all issues that must be sorted by the fact finder. Undoubtedly, plaintiff's initial testimony that the party was on Randall's Island, her apparent inability to identify a vessel operated by defendant as the one she took that night and the statements contained in the medical records about falling off of speakers instead of on the boat are all areas counsel for defendant will likely probe at trial.

However, they do not justify granting summary judgment to defendant. It may be that the jury finds it believable that someone could not identify a vessel while taking it at night after a party, they could side with defendant's arguments, or make another finding altogether. As the Court noted in connection with defendant's previous motion to strike the errata sheet, it may be that plaintiff was confused or, as defendant contends in its counterclaim, plaintiff is making up the whole thing.

But this Court cannot make credibility determinations on a motion for summary judgment. It does not matter how likely or unlikely plaintiff's current account of what happened is or even how this Court views her various versions. The fact is that plaintiff and the group that attended the party with her claim she was hurt on the ferry when it stopped short. Defendant's

attempt to turn plaintiff's confusion into proof that the accident could not have occurred aboard a vessel operated by defendant is without merit. Plaintiff attached a copy of the ticket from the party showing the party was in the Brooklyn Navy Yard (NYSCEF Doc. No. 146) and Mr. Heath (a captain for defendant) admitted as his deposition that defendant had records indicating it operated a ferry that night from the Brooklyn Navy Yard to Pier 11 and the records mentioned the Duggal Warehouse (NYSCEF Doc. No 139 at 14). The aforementioned ticket identifies the Duggal Greenhouse in the Brooklyn Navy Yard as the location of the party and specifically mentioned a round trip ferry ticket (NYSCEF Doc. No. 146). Clearly, a plausible interpretation of this evidence is that defendant operated a ferry to and from the party that night. That raises an issue of fact.

That plaintiff thought, at some point, that the route ended on the West side of Manhattan (instead of Pier 11) is yet another issue of credibility for a fact finder. It is not a basis to grant the instant motion. A similar analysis applies to the medical records where plaintiff allegedly said her ankle injury happened when she fell off of a speaker while at the party. These are admissible as an admission against interest (*Quispe v Lemle & Wolff, Inc.*, 266 AD2d 95, 96, 698 NYS2d 652 [1st Dept 1999]). But they do not justify dismissing plaintiff's claims. Plaintiff claimed she had no idea why the medical records mentioned a fall from a speaker instead of a fall on the ferry (NYSCEF Doc. No. 117 at 116-19). In fact, plaintiff recalled that she did not do much dancing at the party itself (*id*. at 37).

That plaintiff apparently is confused about how many decks the ship had (two versus here) is not a dispositive mistake. A fact finder could easily conclude that someone leaving a party, after admittedly consuming four alcoholic drinks, and taking a ferry at night could mistake

how many decks the ship has or be unable to identify it later. There is no evidence plaintiff is a ship builder.

Summary

The Court recognizes that plaintiff's story is all over the place. Needless to say, there are many topic areas on which counsel for defendant will likely explore on cross-examination at trial. But that defendant thinks little of plaintiff's story or, more likely, does not believe plaintiff is not a reason to grant defendant summary judgment. Plaintiff, along with her fellow partygoers[1], claims the accident happened on a ferry and defendant apparently operated the ferry from the party back to Manhattan. On a motion for summary judgment, the Court must only look for issues of fact and there are multiple issues of fact present here. It cannot contemplate likelihoods or probabilities. And that is, essentially, what defendant is asking the Court to do.

Accordingly, it is hereby

ORDERED that the motion by defendant for summary judgment is denied.

5/20/2022
DATE

ARLENE BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[1] The fact that the affidavits (attached by defendant) of plaintiff's companions are notarized but do not contain certificates of conformity is not a fatal defect (*Wager Estate of Cordaro v Rao*, 178 AD3d 434, 113 NYS3d 63 [1st Dept 2019]). In any event, these affidavits are not central to the Court's holding. Plaintiff's deposition testimony and her ticket raise material issues of fact.