

Toro v New York City Tr. Auth.

2023 NY Slip Op 32932(U)

August 25, 2023

Supreme Court, New York County

Docket Number: Index No. 150680/2019

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 21

Justice

-----X INDEX NO. 150680/2019
 GOVANNY TORO, MIROSLAW ROMANOWSKI, MOTION SEQ. NO. 002

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN
 TRANSPORTATION AUTHORITY, MTA BUS COMPANY,
 CARL BAK, JOSEPH JOHN SIVICK,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98

were read on this motion to/for JUDGMENT - SUMMARY.

Upon review of the above listed documents, Defendants NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, MTA BUS COMPANY and CARL BAK’s (“TRANSIT”) motion for summary judgment, dismissing the Plaintiffs’ amended complaint and any cross-claims is granted.

This personal injury matter arises out of a February 15, 2018 incident that occurred while Plaintiff GOVANNY TORO was a passenger on the Defendants’ bus, bus #2694, which was being driven by Defendant CARL BAK (“BAK”) along 6th Avenue between West 57th Street, NYC.

Defendant now moves, pre note of issue, for summary judgment, dismissing the Plaintiffs’ complaint pursuant to CPLR 3212.

In support of the motion, the Defendant submits an affirmation in support with corresponding exhibits including the surveillance camera footage from the bus (NYSCEF Doc. #72, 76, 77, 78, 79, 80, 81, 82, 83), a statement of material facts (NYSCEF Doc. #73), and supporting affidavits (NYSCEF Doc. #75, 88, 97). Plaintiff and Defendant SIVICK oppose.

Upon review, TRANSIT has met its *prima facie* burden of establishing a right to judgment as a matter of law and no triable issue of fact has been raised in opposition.

Background

Plaintiffs asserts in the second amended complaint that TRANSIT was negligent because the bus operator, Defendant BAK, “suddenly stopped short, causing Plaintiff [TORO] to fall”. (NYSCEF Doc. #22).

At her August 20, 2019 50-h hearing, Plaintiff TORO testified that she had been riding on the bus for approximately two hours before the accident, but had been asleep during much of that time and had no complaints about the bus’ operation during that time. Plaintiff TORO was sitting in the middle of the bus along the passenger side in a seat adjacent to the window. Her bus stop was 57th Street and 6th Avenue. As the bus approached that stop, she rang the button for the stop. Plaintiff TORO then got out of her seat and stood in the aisle; she did not recall if the bus was moving when she got out of her seat. She was standing in the aisle and waiting for the bus to come to the stop. The accident occurred very shortly after she got out of her seat. Plaintiff TORO felt the bus driver slam on the brakes, she then went “flying” forward, toward the front of the bus. She ultimately fell/came into contact with the Metrocard farebox at the front of the bus. Plaintiff TORO did not see what caused the bus to stop. (NYSCEF Doc. #95).

TRANSIT argues that because Defendant BAK was faced with an unexpected situation of Defendant SIVICK’s vehicle improperly entering the bus’ lane of traffic, he was forced to come to a stop in order to avoid a collision. TRANSIT relies upon video surveillance footage from bus #2694 (NYSCEF Doc. #83) in support of the motion. The video surveillance footage is authenticated by a corresponding affidavit from Defendant BAK, the bus operator, (NYSCEF Doc. #75, 88¹) who reviewed the footage in preparation of his affidavit. Defendant BAK avers that as he was driving the subject bus along 6th Avenue, approaching West 57th Street, his rate of speed was approximately 14mph. As he was about to enter the intersection with West 57th Street, Defendant SIVICK’s vehicle, which had been in the lane to the left/driver’s side of the bus, unexpectedly began to move in front of the bus’ path. As a result, Defendant BAK applied the brakes to the bus to avoid colliding with Defendant SIVICK’s vehicle. TRANSIT also submits an affidavit from John Paul Laquindanum (“Laquindanum”) in its reply affirmation. Laquindanum, a

¹ Defendant CARL BAK’s affidavit appears to have been uploaded to the NYSCEF system twice. Upon review, the only difference is that NYSCEF Doc. #75 was did not contain a certificate of conformity, and NYSCEF Doc. #88 did not require one. As the affidavits are identical and were both efiled in time for the other parties to respond to same, the affidavit will be considered by this Court.

Video Data Manager for Safefleet, which contracts with TRANSIT regarding bus videos, attests that the bus video submitted is a true and accurate copy of the footage.

Upon review, the video surveillance from bus #2694 provides footage from seven different cameras depicting the interior and exterior of the bus, as well as the rate of the speed of the bus and its compass direction. At approximately 12:32:26, Plaintiff TORO begins to exit her seat. At this time, the bus is moving, traveling North on 6th Avenue. Plaintiff TORO takes several steps forward in the aisle (toward the front of the bus). She then stands in the aisle, approximately three seat rows from the front of the bus, from 12:32:34 to 12:32:44; the bus is moving. Plaintiff TORO then walks closer to the front of the bus as it is approaching the intersection with West 57th Street; the bus is still moving. As bus #2694 begins to enter the intersection, at 12:34:46, the light is green. There is another bus in the lane to the right/passenger side of bus #2694, which is making a right turn on to West 57th Street. At that same time, a vehicle apparently operated by Defendant SIVICK, which had been traveling in the lane to the left/driver's side of the bus, begins to move to its right, in front of the bus' path. As Defendant SIVICK's vehicle begins to move in front of the bus in the intersection, the bus' rate of speed is 14mph. No turning signal appears to be utilized by Defendant SIVICK's vehicle. At approximately 12:32:47, the bus' speed decreases and Plaintiff TORO is caused to move forward. At approximately 12:32:48 the bus has come to a stop and Plaintiff TORO has come into contact with the farebox area. From the time the Plaintiff gets out of her seat, until the time of the accident, the highest rate of speed of the bus appears to be 16 mph and the bus does not come to any other stops prior to the accident.

TRANSIT's Summary Judgment Motion

CPLR 3212 provides any party in any action, including in a negligence action, to move for summary judgment (CPLR 3212 [a], *Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853 [1974]). The party seeking summary judgment has the high burden of establishing entitlement to judgment as a matter of law with evidence in admissible form (*see* CPLR §3212 [b], *Voss v Netherlands Ins. Co.*, 22 N.Y.3d 728, 734, 8 N.E.3d 823 [2014], *Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81, 790 N.E.2d 772 [2003], *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324–25, 501 N.E.2d 572, 574 [1986], *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]).

“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 Transit Auth.*, 85 N.Y.2d 828, 829–30, 647 N.E.2d 1346 [1995] *internal citations omitted*). When alleging that a bus came to an unexpected or abrupt stop, objective evidence should be provided “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” *Id.*, *see Castillo v. New York City Transit Auth.*, 188 A.D.3d 484, 485, 133 N.Y.S.3d 576, 577 [1st Dept 2020]).

However, “[i]t is well settled that a defendant is not liable where he or she is faced with a sudden and unforeseen occurrence that was not of his or her own making and presents sufficient evidence to support the reasonableness of his or her actions.” (*Rodriguez v. New York City Transit Auth.*, 172 A.D.3d 508, 508–09, 99 N.Y.S.3d 314 [1st Dept 2019]). The emergency “... doctrine recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context.” (*Rivera v. New York City Transit Auth.*, 77 NY2d 322 [1991]).

“While it is often a jury question whether a person's reaction to an emergency was reasonable, summary resolution is possible when the individual presents sufficient evidence to support the reasonableness of his or her actions and there is no ‘opposing evidentiary showing sufficient to raise a legitimate issue of fact on the issue ...’.” (*Ward v. Cox*, 38 A.D.3d 313, 314, 831 N.Y.S.2d 406, 408 [1st Dept 2007], *quoting Smith v. Brennan*, 245 A.D.2d 596, 597, 664 N.Y.S.2d 687, 689 [3rd Dept 1997], *internal citations omitted*). Evidence that may be relied upon to establish the emergency doctrine includes video footage of the incident at issue (*see Rodriguez, supra.*, where it was found that the defendant’s summary judgment motion should have been granted as the video evidence showed the accident occurred due to a bicyclist suddenly falling to the ground in the path of a bus, causing the bus operator to completely stop suddenly).

Here, TRANSIT has met its *prima facie* burden as it has submitted evidence which demonstrates that TRANSIT has no liability for the subject accident because the bus did not come to an abrupt stop due to any negligence on the part of Defendant BAK. The video footage from the bus does not reflect any “unusual or violent” operation of the bus by Defendant BAK. Nor does the video show that the bus was clearly operating at an excessive speed or unreasonably under the

prevailing road conditions. Moreover, Plaintiff TORO's own 50-h hearing testimony shows that she was asleep for most of her 2hr bus ride and as such offered no complaints of the bus' operation prior to the accident. Plaintiff TORO's testimony also shows that she does not know why the bus came to a stop. TRANSIT has shown that the "emergency doctrine" applies because the bus came to an abrupt stop due to the sudden and unexpected movement by Defendant SIVICK's vehicle moving into the bus' path in the intersection without signaling.

In opposition, neither Plaintiffs nor Defendant SIVICK submitted an affidavit or other admissible evidence that raises a material question of fact. Instead, Defendant SIVICK argues, *in part*, in the attorney affirmation, that Defendant BAK overreacted when applying the brakes, but that he also should have been paying more attention. This is unavailing as it relies solely upon speculation, is not supported by the video footage and as the emergency doctrine recognizes that "[a] person in such an emergency situation 'cannot reasonably be held to the same accuracy of judgment or conduct as one who has had full opportunity to reflect, even though it later appears that the actor made the wrong decision'" (*Rivera* 77 N.Y.2d at 327).

Additionally, Plaintiffs and Defendant SIVICK argue that TRANSIT's motion is premature as no discovery has been conducted and as no party depositions have been held. However, there is no statutory provision dictating the specific discovery that must be exchanged prior to consideration of a dispositive motion, nor has caselaw developed any bright-line rule as to what discovery is required prior to a court's consideration of a dispositive motion. Rather, a summary judgment motion may be brought any time after issue has been joined (CPLR §3212[a]). The parties must simply have a reasonable opportunity to pursue discovery and "[t]he mere hope that additional discovery may lead to sufficient evidence to defeat a summary judgment motion is insufficient to deny such a motion." (*Singh v. New York City Hous. Auth.*, 177 A.D.3d 475, 476, 112 N.Y.S.3d 63, 65 [1st Dept 2019]). Those opposing a motion for summary judgment must "... demonstrate that discovery might lead to relevant evidence or that any facts essential to justify opposition to the motion were exclusively within the knowledge and control of defendants." (*Harman Agency, Inc. v. Wilhelmina Licensing LLC*, 211 A.D.3d 470, 471, 177 N.Y.S.3d 886 [1st Dept 2022]). No such showing has been made. Here, it is clear that the instant motion for summary judgment was made well after issue was joined and after the parties participated in discovery exchanges, including the video from the subject bus.

In opposition, Plaintiff and Defendant SIVICK assert that the video from the bus is not properly authenticated. Even if this Court does not consider the affidavit of Laquindanum, the video was reviewed by and authenticated by Defendant BAK. Accordingly, TRANSIT's motion for summary judgment is granted.

It is hereby,

ORDERED that the motion for summary judgment of Defendants TRANSIT is granted and the complaint and any and cross-claims are dismissed; and it is further

ORDERED that the action shall be severed; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for Defendants NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, MTA BUS COMPANY and CARL BAK shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office within 20 days; and it is further

ORDERED that since TRANSIT is no longer a party in the case and that the matter is transferred to the Automobile Part.

8/25/2023
DATE

DENISE M DOMINGUEZ, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER |
| | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> | GRANTED IN PART |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> | FIDUCIARY APPOINTMENT |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | REFERENCE | <input type="checkbox"/> | |