| **Ren Yao v World Wide Travel of Greater N.Y. Ltd.** |
| --- |
| 2018 NY Slip Op 32473(U) |
| October 8, 2018 |
| Supreme Court, Kings County |
| Docket Number: 10718/11 |
| Judge: Karen B. Rothenberg |
|  |
|  |

At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of December, 2017.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

----------X

REN YAO AND RUI JING YAO,
Plaintiffs,

- against - Index No. 10718/11

WORLD WIDE TRAVEL OF GREATER NEW YORK LTD., OPHADELL WILLIAMS, WORLD WIDE TOURS OF GREATER NEW YORK, LTD, SUNFLOWER EXPRESS,

Defendants.

----------X

AND ALL COORDINATED CASES

----------X

The following papers numbered 1 to 36 read on the motions herein:

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1-2, 3-5 |
| Opposing Affidavits (Affirmations) | 6-32 |
| Reply Affidavits (Affirmations) | 33, 34-35, 36 |
| Affidavit (Affirmation) | |
| Other Papers | |

Upon the foregoing papers, defendant Sunflower Express (Sunflower) moves pursuant to CPLR 3212, for summary judgment dismissing all of the plaintiffs' claims against it in the coordinated actions including *Yao* (Index No. 10718/11), *Yuke Chue Lo*

(Index No. 28853/11), *Lee* (Index No. 24432/12), *Mock* (Index No. 14132/11), *Duong* (Index No. 202/11), *Estate of Miguel Aquino* (Index No. 501227/13), *Wong* (Index No. 6545/12), *Lin* (Index No. 9473/12), *Yip* (Index No. 9152/12) and *Jean Marie* (Index No. 20038/13). Defendants Webster Trucking Corp. (Webster) and Joshua Alphonso Reid (Reid) move for summary judgment dismissing all of the plaintiffs' claims against them in the coordinated actions including *Yao* (Index No. 10718/11), *Lo* (Index No. 28853/11), *Yeh* (Index No. 4677/13), *Yang* (Index No. 6719/15), *Florence Wong* (Index No. 4244/13, *Mock* (Index No. 14132/11), *Salinas* (Index No. 501224/13), *Duong* (Index No. 202/12), *Eng* (Index No. 501206/13), *Sze Wan Wong* (Index No. 6545/12), *Yip* (Index No. 9152/12), *Lin* (Index No. 9473/12), *Ng* (Index No. 501189/13), *Lee* (Index No. 24432/12), *Aquino* (Index No. 501227/13), *Jean-Marie* (Index No. 945/14), and *Mei* (Index No. 4238/13).

***Background Facts and Procedural History***

The instant actions arise out of a horrific bus accident that occurred on March 12, 2011 on Interstate 95 in the Bronx, New York. At the time of the accident, the bus was returning from the Mohegan Sun Casino in Uncasville, Connecticut to Chinatown in Manhattan with 32 passengers along with the bus driver, defendant Ophadell Williams (Williams). The accident occurred at approximately 5:39 a.m. when the bus left the southbound lanes of the roadway, crossed over the rumble strip on the right-hand shoulder of the road, and collided with the guardrail. After hitting the guardrail, the bus

overturned on its side, slid along the guardrail for approximately 100 feet, and struck a vertical sign pole, which penetrated thirty-six feet into the cabin of the bus before the bus came to a stop. As a result of this accident, 15 passengers on the bus were killed and 17 passengers suffered injuries. Following the accident, comprehensive investigations were undertaken by both the New York State Police Collision Reconstruction Unit (the State Police) and the National Transportation Safety Board (NTSB). In addition, the Bronx County District Attorney's Office investigated the accident and ultimately prosecuted Williams for several crimes including criminally negligent homicide, manslaughter and assault. However, after a criminal trial, the jury acquitted Williams of these charges.

Following the accident, numerous negligence and wrongful death lawsuits were filed against various defendants in several different counties. Among those sued were Williams, defendants World Wide Travel of Greater New York LTD and World Wide Tours of Greater New York (World Wide), which owned the bus and employed Williams. In addition, several plaintiffs sued defendant Sunflower, which was contracted by Mohegan Sun to sell round trip bus tickets for travel between Chinatown and the casino for a nominal fare of $10. Although Sunflower sold the bus tickets, the bus companies that provided the buses, including World Wide, were hired by Mohegan Sun. As part of its contract with Mohegan Sun, Sunflower also provided a "tour guide" who rode on the bus with the passengers to and from the casino. Finally, various plaintiffs asserted claims against the City of New York. However, these claims were ultimately dismissed based

upon the fact that the City of New York did not own or maintain the roadway where the accident took place.[1]

On September 1, 2011, the New York Litigation Coordinating Panel ordered that any personal injury action arising out of the bus accident be consolidated for coordinated case handling before the instant court under the instant *Yao v World Wide Travel of Greater New York Ltd.* caption (Index No. 10718/11). Subsequently, defendants Webster Trucking Corp. (Webster) and Joshua Alphonso Reid (Reid) were sued by several plaintiffs. In this regard, the claims against Webster and Reid were based upon Williams' claim that a tractor trailer truck driven by Reid and owned by Webster cut off and/or struck the bus immediately prior to the accident, thereby causing the bus to leave the roadway and crash into the guardrail.[2] The instant motions are now before the court.

***Claims Against Sunflower***

Sunflower moves for summary judgment dismissing all claims against it. In support of its motion, Sunflower notes that it did not own the bus involved in the accident or employ the driver of the bus, Mr. Williams. Instead, Sunflower merely sold bus tickets for travel to and from the casino on behalf of Mohegan Sun. In further support of its motion, Sunflower points to case law holding that booking agents who package tours may

---

[1]In addition, there are a number of cases currently pending against New York State in the Court of Claims.

[2]Because Webster and Reid were not sued until after the cases were consolidated, they are not listed as defendants in the *Yao v World Wide Travel of Greater New York, Ltd.* caption.

not be held liable for accidents caused by the negligent conduct of independent contractors, such as hotels or bus companies, which are retained by the agent as part of the tour. Sunflower also contends that the plaintiffs' claims against it in the instant cases are even weaker than the claims dismissed against agents in the case law inasmuch as Sunflower played no role in the hiring of World Wide to transport customers to the casino. Rather, Mohegan Sun alone selected and hired World Wide to perform this service. Under the circumstances, Sunflower maintains that all claims against it must be dismissed since it may not be held liable for Williams' negligence in driving the bus.

Four plaintiffs have submitted substantive opposition to Sunflower's motion including Patrick Lee, As Administrator of the Estate of Hung Chi Lee, deceased (Index No. 24432/12), Yuke Chue Lo (Index No. 28853/11), Ren Yao (Index No 10718/11), and Sze Wan Wong, Individually and as Administrator of the Estates of May Lin Wong and Ock Thlin Wong. In addition, nine other plaintiffs, including Eng, Yip, Mock, Duong, Ng, Mei, Yeh, Lin, and Jean Marie have submitted opposition papers in which they rely entirely upon the substantive arguments raised by their co-plaintiffs. In their papers, these plaintiffs rely upon two main arguments in opposition to Sunflower's summary judgment motion. In particular, the plaintiffs contend that there is an issue of fact as to whether Sunflower assumed a duty to ensure the safe operation of the bus which would allow the trier of fact to find Sunflower liable for breaching this duty. In addition, the plaintiffs argue that there is an issue of fact as to whether Sunflower may be vicariously liable for

the negligence of Williams and World Wide inasmuch as Sunflower held itself out to the public as the operator of the bus, which estops it from disclaiming liability under the doctrine of agency by estoppel.

In support of their argument that Sunflower assumed a duty to ensure the safe operation of the bus, the plaintiffs rely upon the fact that Sunflower provided a tour guide for the bus ride to and from the casino. The plaintiffs further rely upon the testimony of Sunflower's owner, Matthew Yu. Mr. Yu testified that the tour guide had the authority to stop someone from getting on the bus if they were intoxicated or acting abnormally. Mr. Yu further testified that it was part of the guide's responsibilities to stop a bus if the driver was driving in a reckless manner. In particular, Mr. Yu testified that the guide should "call the police, call the company, call casino, stop the bus" in the event of such reckless driving. Here, as numerous eye witnesses testified that the bus was operating in an unsafe and erratic manner during the trip home from the casino right up until the time of the accident, the plaintiffs contend that there is an issue of fact as to whether Sunflower breached the duty it assumed to ensure the safe operation of the bus inasmuch as the tour guide failed to take any action to stop the bus during the trip home from the casino.

In support of their argument that Sunflower is estopped from disclaiming liability for the accident inasmuch as it held itself out as the bus operator, plaintiffs point to the fact that the bus tickets, bus schedules, and advertisements for the trips to the casino had

the name "Sunflower Express" printed on them but made no mention of World Wide or any other bus companies hired by Mohegan Sun. In addition, the plaintiffs again point to the fact that Sunflower provided a tour guide for every trip, who sold bus tickets and assigned seats to passengers on the bus. Plaintiffs also note that the passengers on the bus had no direct interaction with World Wide and all of their dealings were with Sunflower and its tour guide. Further, plaintiffs point out that there was a sign stating "Sunflower" at the bus stop where the Chinatown passengers boarded the buses to the casino and that there was a sign with the words "Sunflower Express" onboard the bus. Finally, plaintiff Yuke Chue Lo (Index No. 28853/11) submits her own affidavit in which she states that she was a passenger on the bus on the day of the accident as it traveled from the casino to Chinatown. Ms. Lo further states that it was her belief that the bus was operated by Sunflower based upon the fact that the word "Sunflower" was printed on her bus ticket and she purchased the ticket from a woman who she knew to be with Sunflower. Finally, Ms. Lo avers that she had never heard of World Wide prior to the instant litigation.

It is well-settled that independent travel or booking agents who package tours are not liable for accidents which occur on such tours as a result of the negligent conduct of hotels, bus companies or other independent contractors booked by the agent (*Aronov v Bruins Transp., Inc.*, 294 AD2d 522 [2002]; *Cohen v Heritage Motor Tours Inc.*, 205 AD2d 105, 107 [1994]). Here, it is undisputed that World Wide was an independent contractor, separate and apart from Sunflower. Moreover, World Wide was not even

selected or hired by Sunflower as Mohegan Sun directly retained the bus companies which transported patrons between its casino and Chinatown. Thus, Sunflower has made a prima facie showing of its entitlement to summary judgment dismissing plaintiffs' claims against it. Accordingly, the burden shifts to plaintiffs to raise a triable issue of fact regarding Sunflower's liability (*Aronov*, 294 AD2d at 523).

As noted above, plaintiffs rely upon two theories in attempting to raise a triable issue of fact regarding Sunflower's responsibility for the accident. Plaintiffs contend that there are issues of fact regarding whether Sunflower assumed and breached a duty toward passengers with respect to the safe operation of the bus and/or whether Sunflower is estopped from disclaiming liability for the accident inasmuch as it held itself out as the bus operator.

Turning first to the plaintiffs' argument that Sunflower assumed a duty, it is well-settled that "one who assumes a duty to act, even though gratuitously, may thereby become subject to the duty of acting carefully" (*Nallan v Helmsely-Spear, Inc.*, 50 NY2d 507, 522 [1980]). However, the application of this principle requires not only that defendant undertook and breached such a duty, but also that the defendant's conduct somehow placed the plaintiff in a more vulnerable position than he/she would have been in the defendant never undertook the duty in the first instance (*Nallan v Helmsely-Spear, Inc.*, 50 NY2d 507, 522 [1980]; *Essen v Narian*, 155 AD3d 612 [2017]; *Cohen*, 205 AD2d at 107). Assuming, for the sake of argument, that Mr. Yu's testimony regarding

the responsibilities of the tour guide in the event the bus was being driven in an unsafe manner is sufficient to raise an issue of fact regarding the assumption of a duty, plaintiffs have failed to raise a triable issue of fact as to whether this duty was breached as there is no evidence that the tour guide, who was killed in the accident, could have done anything to stop the bus prior to the accident. Moreover, it cannot be said that the failure to act by the tour guide placed the bus passengers in a more vulnerable position than they would have been in had Sunflower never undertaking a duty. Instead, the passengers were in exactly the same position that they would have been in had Sunflower never assumed the duty in the first place as there is no evidence that the passengers relied to their detriment on the tour guide to attempt to stop the bus prior to the accident. Under the circumstances, there is no merit to plaintiffs' argument that Sunflower may be held liable under the theory that it breached an assumed duty with respect to the safe operation of the bus.

With respect to plaintiffs' agency by estoppel argument, claims under this theory usually arise in a medical malpractice context where a hospital may be held vicariously liable for the malpractice of an independent contractor physician when the physician appears to possess the authority to act on behalf of a hospital (*see e.g.*, *Sullivan v Sirop*, 74 AD3d 1326 [2010]; *Contillo v Mount Vernon Hosp.*, 55 AD3d 588 [2008]. However, the doctrine has also been applied in cases involving non-hospital defendants including rental car companies (*Kikaldy v Hertz Corp.*, 221 AD2d 599 [1995]; *Fogel v Hertz Intl.*,

141 AD2d 375 [1988]), supermarkets (*Baldassarre v Morwil Supermarket*, Inc., 203 AD2d 221 [1994]; and tour companies (*Rovinsky v Hispanidad Holidays*, 180 AD2d 673 [1992]). In order for a principal to be held liable under an ostensible agency theory, there must be words or conduct on the part of the principal which are communicated to a third party and give rise to the appearance that the agent possesses the authority to act on behalf of the principal (*Sampson*, 55 AD3d at 590). Further, the plaintiff must reasonably rely on the appearance of authority and accept the services of the agent in reliance upon the perceived relationship between the agent and the principal (*Sullivan*, 74 AD3d at 1328; *Baldassarre*, 203 AD2d at 222; *Bank v Rebold*, 69 AD2d 481, 493 [1979]).

As an initial matter, the court notes that contrary to Sunflower's argument, it may consider Ms. Lo's affidavit in opposition to Sunflower's motion even though she does not speak or read English. In this regard, the affidavit was accompanied by an affidavit by Ms. Lo's son, Yuke Chue Lo, in which he states that he speaks and reads both English and Chinese and affirms that he correctly interpreted the affidavit for his mother before she signed it. Thus, the affidavit is in compliance with CPLR 2101 (b). Further, while it would have been preferable for Ms. Lo to use a professional translator who was not an immediate family member, nothing in the statute requires such qualifications. Rather, "fluency in the foreign language and English ought to be the minimum attested qualification" (Thomas F. Gleason, Practice Commentaries, McKinney's Cons Laws of

NY, Book 7B, CPLR C2101:2). Here, Mr. Lo's attesting affidavit satisfies this minimum requirement.

Turning to the merits of plaintiffs' agency by estoppel argument, the fact that Sunflower sold bus tickets and that the words "Sunflower Express" appeared on bus tickets and bus schedules is insufficient to raise a triable issue of fact that Sunflower held itself out to the public as being the operator of the bus. In particular, the same materials also bore the Mohegan Sun logo in large type. Further, these materials did not affirmatively represent that Sunflower owned or operated the buses used to transport passengers to the casino and the bus involved in the accident displayed World Wide's logo in large letters on the side of the vehicle (*compare Rovinsky*, 180 AD2d at 673-674).

Plaintiffs have also failed to raise a triable issue of fact that they reasonably relied upon the appearance that Sunflower operated the bus or that they rode on the bus in reliance upon the perceived relationship between Sunflower and Worldwide. Specifically, although Ms. Lo claims that she believed the bus was operated by Sunflower, at no point does she allege that she relied upon this belief when she decided to purchase a bus ticket to the casino. At the same time, although bus passenger Erold Jean-Marie testified that she believed that the bus was operated by Sunflower, she did not testify that she placed any reliance upon this belief when she purchased her bus ticket. In this regard, the court notes that, in those cases where courts have held that a principal may be held liable for the actions of an ostensible agent, the principal is typically a know entity such as a hospital or

well-know business. Thus, for example, in *Baldassarre*, the court noted that the principal, Met Food, was "a large supermarket chain" when it found that the plaintiff "relied on the Met Food name" in allowing a delivery man to enter her apartment who subsequently assaulted her (*Baldassarre*, 203 AD2d at 222). Similarly, Fogel involved the nationally known rental car company, Hertz (*Fogel*, 141 aD2d at 376). Here, in contrast, Sunflower was a small business that operated out of a second floor office and two kiosks and there is no evidence that plaintiffs relied upon the Sunflower name when they accepted the services of the bus operator, World Wide.

Accordingly, as the bus owner and operator World Wide was an independent contractor which was not hired by Sunflower, and plaintiffs have failed to raise a triable issue of fact that Sunflower assumed a duty for the safe operation of the bus upon which the plaintiffs detrimentally relied, or that World Wide was Sunflower's ostensible agent, Sunflower's motion for summary judgment dismissing all claims against it in the consolidated actions is granted.

***Claims Against Webster and Reid***

Webster and Reid move for summary judgment dismissing all claims against them. In support of their motion, these defendants initially note that the only evidence linking them to the accident is the bus driver Mr. Williams' testimony that he was caused to drive into the guardrail on the side of the road when a tractor trailer truck operated by Mr. Reid and owned by Webster cut off the bus. However, according to Webster and Reid, Mr.

Williams' testimony is not credible as a matter of law as his claim that the bus was cut off prior to the accident is contradicted by a mountain of evidence including eyewitness accounts of the accident, the detailed accident investigation reports generated by the NTSB and State Police, as well as irrefutable scientific evidence produced by the data recording devices on both the World Wide bus and the truck driven by Mr. Reid.

In support of their motion, Webster and Reid submit an expert affidavit by Ashley L. Dunn, who holds a PhD in mechanical engineering and has 30 years of experience in the field of vehicle dynamics and accident reconstruction. In his affidavit, Dr. Dunn notes that the bus was equipped with a "black box" event data recorder (EDR) which recorded the speed, braking, and throttle input of the bus in the minutes leading up to the accident. Dr. Dunn further notes that the tractor trailer driven by Mr. Reid was tracked by an Xatanet system which recorded the truck's minimum, maximum, and average speed of the truck in real time for each minute traveled. According to Dr. Dunn, the bus's EDR recorded that the average speed of the bus for the one minute and 36 seconds before the crash was 68 to 69 mph. Dr. Dunn further states that the maximum speed for the tractor trailer truck during the minutes prior to the accident as recorded by Xatanet system was 66 to 67 mph.[3] Based upon this data, Dr. Dunn opines that it was physically impossible

---

[3]The court notes that the data recording systems for the two vehicles differed. In particular, the EDR system on the bus, which was activated by a "Last Stop Record Event," recorded data from the bus on a second by second basis for one minute and 45 seconds before and 15 seconds after the last stop trigger. Thus, in the instant case, there is a second by second record of the bus's speed, throttle level, and brake application for the one minute and 45 second period prior to the bus coming to a stop. In contrast, the Xatanet system used by the truck

for the truck driven by Reid to catch up to, pass, and ultimately cut off the bus during the one minute and 36 seconds prior to the accident as claimed by Mr. Williams.

In addition to the speed data of the vehicles, Dr. Dunn states that the braking and throttle input data recorded by the EDR system on the bus definitively disproves Mr. Williams' claim that the bus was cut off immediately prior to the accident. Specifically, Dr. Dunn points out that the EDR system on the bus indicates that, during the entire one minute and 36 second period that preceded the bus making contact with the guard rail, the brakes on the bus were never applied. Further, the EDR recorded that the throttle input on the bus remained close to 100% for the four seconds leading up to the impact with the guardrail. According to Dr. Dunn, this disproves Mr. Williams claim that the bus was cut off by the truck prior to the accident and that the bus crashed into the guardrail in an attempt to avoid colliding with the truck since, had this actually occurred, Mr. Williams would have taken his foot off the gas peddle/throttle and applied the brakes before colliding with the guardrail.

In addition to the speed, braking, and throttle data set forth above, Dr. Dunn opines that other crash scene evidence demonstrates that the bus did not swerve into the guardrail after being cutoff by the truck driven by Reid. In particular, Dr. Dunn notes that the tire marks, made by the bus, leading toward the guardrail demonstrate that the roadway departure angle of the bus was approximately seven degrees. According to Dr. Dunn, this

---

provided "snap shots" of the minimum, maximum, and average speeds of the truck for each minute of driving time as opposed to a second by second record.

is a shallow departure angle that is inconsistent with William's claim that he swerved off the road to avoid a collision with the truck. Instead, Dr. Dunn opines that this departure angle is consistent with the bus drifting off the road as a result of a drowsy or distracted driver. As a final matter, Dr. Dunn notes that post accident photographs of the bus and truck demonstrate that neither vehicle bore any evidence which supports Mr. Williams' initial claim that the two vehicles made contact prior to the accident.

In addition to Dr. Dunn's expert affidavit, Webster and Reid contend that accident reports by both Federal and State authorities demonstrate that Williams' claim that he was cutoff by the Webster/Reid vehicle is not credible as a matter of law. Webster and Reid point to the 28 page accident report prepared by State Police Collision Reconstruction Unit, which concluded that the Webster/Reid vehicle was not involved in the accident. Specifically, Webster and Reid note that this report states that, "[a]n examination of [the bus] and additional examinations, revealed no evidence of contact between [the bus] and any other vehicle. No tire marks, or other evidence, indicated sudden braking or responsive steering input by the operator, were observed at the scene. No evidence was produced which indicated any evasive maneuvers by the operator of the bus." Webster and Reid further note that this report concluded that, "[b]ased on a totality of the investigation, it can be concluded that for one (1) minute and 44 seconds prior to and during the collision there was a lack of input, control and evasive action on the part of the operator, Ophadell E. Williams. The events which followed resulted in multiple injuries

and fatalities." In addition, Webster and Reid point out that the report makes note of Williams' claim that the bus was struck by a truck prior to the accident but concludes that "[t]here was no evidence of any contact between the two vehicles. Thus, Webster and Reid argue that the State Police accident report completely refutes Williams' claim that he was cutoff by the Webster/Reid truck. Webster and Reid also contend that the fact that they were not made parties to the NTSB report on the accident indicates that the NTSB did not consider the Webster/Reid truck to be a factor in the accident.

In further support of their motion, Reid and Webster also rely upon the deposition testimony of New York State Police Accident Investigator Shannon M. Alpert, who conducted the accident investigation and compiled the police accident report. Investigator Alpert testified that the police ruled out Williams' contention that a truck struck the bus prior to the accident since there was no physical damage on either vehicle supporting this claim. In addition Investigator Alpert testified that the bus driver "did not lose control of the vehicle. There was no input by the operator to stop the collision, there was no pre-impact evidence that he attempted to avoid anything in the roadway. The only physical evidence you have is the operator of the bus did not apply any driver input, whether it be steering and/or braking, to avoid leaving his lane and colliding with the guardrail."

In addition to Investigator Alpert's testimony, the accident reports and Dr. Dunn's expert affidavit, Webster and Reid also point to the testimony and statements of eye

witnesses to the accident which they argue proves that the truck operated by Reid played no part in the accident. Specifically, Webster and Reid point to the statement given by James Underhill to the NYSP shortly after the accident. Mr. Underhill stated that he was driving southbound on I-95 at 5:30 A.M. on the day of the accident and observed the bus accident through his rear view mirror. Mr. Underhill further stated: "I noticed the bus, which had no other vehicles around it at the time, swerve from the middle lane across to the right hand lane, the bus then swerved back towards the middle lane, and again toward the right hand lane, at this point, the bus was leaning on its passenger side wheels and fell onto the guide rail where it slid into a sign post until it came to a complete stop." Webster and Reid also point to a statement given by the police by a passenger in the Underhill vehicle, Michael Cadieux. Like Mr. Underhill, Mr. Cadieux stated that he witnessed the accident and noticed no other vehicles around the bus at the time of the crash. Mr. Cadieux also testified in a subsequent deposition that he did not see any other trucks or vehicles around or near the bus at the time of the accident.

In addition, Webster and Reid point to a signed statement given to the State Police by Luis Padilla. In this regard, Mr. Padilla's statement indicates that he was driving northbound on I-95 on the day of the accident at approximately 5:30 A.M. when he noticed a bus traveling south "on two wheels, in the right lane. There were no other vehicles around it and it was dark outside. I then saw the bus rollover on to the right side and started sliding along . . . A few seconds after the bus rolled over, a tractor trailer

drove past. The truck was in the middle lane. I did not see the two vehicles make any contact." Finally, Webster and Reid rely upon the deposition testimony of Mr. Reid himself. Reid testified that he was driving the truck southbound on I-95 on the date of the accident and the bus passed his vehicle. According to Mr. Reid, the bus was traveling at least 70-75 mph and was swerving back and forth from the right lane to the shoulder of the road. Mr. Reid testified that he lost sight of the bus for several minutes but saw the bus again as he came around a bend in the road. Mr. Reid further testified that he saw the bus on its passenger side wheels sliding along the guard rail.[4] Thus, according to Reid's testimony, he could not have cut off the bus since he did not pass it until after the accident occurred.

As a final matter, in support of their motion for summary judgment, Reid and Webster note that Williams himself has given conflicting accounts of the accident at various points in time. Specifically, in an initial statement given to the New York City Police Department at the hospital shortly after the accident, Williams stated that his bus was in the middle lane when the Reid/Webster truck passed him in the left lane at a high rate of speed. Williams further stated that the "metal lip" on the rear of the truck hit his bumper and he lost control of the bus. At a deposition given to the State Police on the day of the accident, Williams also testified that he lost control of the bus after it was hit

---

[4]Webster and Reid also point to the statements and testimony of several individuals who witnessed the bus driving in an erratic manner prior to the accident but did not witness the actual crash.

by the truck. Similarly, several days after the accident, Williams stated that there was physical contact between the two vehicles when he was interviewed by the NTSB. However, during his depositions in the instant lawsuits, Williams changed his story. Specifically, Williams testified that there was no contact between his bus and the truck and that the truck merely cut him off prior to the accident.

In short, Webster and Reid contend that there is an overwhelming amount of physical, scientific, and eyewitness evidence in this case which conclusively demonstrates that the truck driven by Reid played no role in the bus accident. Webster and Reid further contend that Williams' inconsistent statements and testimony regarding the bus colliding with or otherwise being cutoff by the truck are not credible as a matter of law and should be disregarded by the court. Accordingly, Webster and Reid maintain that all of the plaintiffs' claims against them must be dismissed.

Four plaintiffs including Lo, Lee, Wong and Yao have submitted substantive opposition to Webster and Reid's summary judgment motion. Defendants Williams and World Wide also submit substantive opposition to the motion. In addition, plaintiffs Yeh, Yip, Mock, Ng, Eng, and defendant Sunflower have submitted opposition papers in which they rely upon the above mentioned substantive opposition papers (collectively, the opposing parties). All of the parties opposing Webster and Reid's summary judgment note that Mr. Williams has consistently taken the position that the bus he was driving was cutoff by the Reid/Webster vehicle prior to the accident. These parties further note that

Williams' testified at his deposition in this case that the truck came up behind him and began to move into his lane and that "I'm trying to weave from him and next thing you know, the bus is on its side." According to plaintiffs and the defendants opposing the Reid/Webster motion, under well-established rules governing summary judgment motions, the court must credit this testimony and deny the Reid/Webster summary judgment motion.

In further opposition to the motion, the opposing parties argue that this is not one of the rare cases in which the court may dismiss Williams' testimony as being not credible as a matter of law. The opposing parties note that Williams' claim regarding the truck passing the bus immediately prior to the accident is supported by a disinterested eye witness to the accident, Luis Padilla. In particular, Mr. Padilla testified at his deposition that "as I was approaching, I seen a truck go by a bus. The bus flipped over a few seconds later." The opposing parties also note that Mr. Padilla's deposition testimony regarding the truck passing the bus immediately prior to the accident is consistent with his prior grand jury testimony which he gave in the criminal proceedings against Mr. Williams. In addition, during his deposition, Mr. Padilla testified that his statement in the police report that the truck passed the bus after the bus flipped over was not accurate. Under the circumstances, the parties opposing the Reid/Webster summary judgment motion maintain that it is for the jury to determine whether or not the truck overtook and cut off the bus prior to the accident.

In further opposition to Reid/Webster's summary judgment motion, the opposing parties contend that the eye witness testimony and statements of Mr. Underhill and Mr. Cadieux do not disprove that the bus was cutoff by the truck prior to the accident. The opposing parties note that both of these individuals first witnessed the accident after the bus had overturned and began to skid down the guardrail. Accordingly, the opposing parties contend that Mr. Underhill and Mr. Cadieux did not see what happened prior to the accident when the truck allegedly cutoff the truck.

The opposing parties also contend that Dr. Dunn's expert affidavit is insufficient to conclusively exclude the possibility that the bus was cutoff by the Reid/Webster vehicle. In this regard, plaintiff Yao submits an expert affidavit by David A. Stopper, an expert with over 40 years of experience in the field of accident reconstruction. According to Mr. Stopper, there are material questions regarding the accuracy of Dr. Dunn's claim that it was impossible for the truck to have passed the bus based upon the speed data from the EDR on the bus and the Xatanet system which recorded the speed of the maximum, minimum, and average speed of the truck every minute. In particular, Mr. Stopper opines that the accuracy of the Xatanet data is questionable inasmuch as the system recorded a maximum, minimum, and average speed of 66 mph at 5:38 A.M. on the accident date. The following minute (5:39 A.M.), the system recorded a maximum, minimum, and average speed of 66 mph, 28 mph, and 51 mph, while the system recorded a maximum, minimum, and average speed of 40 mph, 3 mph, and 25 mph at 5:40 A.M. According to

Mr. Stopper, "if these wide variations in recorded speeds are accurate, in my opinion to a reasonable degree of certainty a DDEC IV 'Hard Brake Report' would have been generated and would have been recorded on [truck]". However, no such report was generated.

In addition to plaintiff Yao, defendants World Wide and Williams have submitted an expert affidavit which challenges some of the contentions set forth in Dr. Dunn's affidavit. In particular, World Wide and Williams submit an affidavit by John Karpovich, who was previously employed as a team leader of the Fatal Accident Investigation Unit for the Bergen County Prosecutor's Office and was employed for 19 years by a traffic accident reconstruction and traffic engineering firm. Mr. Karpovich opines that the initial tire mark left by the bus to the first guardrail strike was approximately 20 feet at an angle of 10 degrees, which "could" be indicative of an evasive maneuver by the bus. In this regard, Mr. Karpovich notes that the EDR system on the bus did not record steering maneuvers. In addition, Mr. Karpovich maintains that the Xatanet data report fails to accurately reflect the speed of the truck for the moments leading up to the accident since it merely provided snap shot in one minute increments, "making it impossible to determine the driver's actions from one minute to the next with any degree of accuracy or the proximity of the Webster truck to the bus." Finally, Mr. Karpovich contends that Dr. Dunn's conclusion that Williams fell asleep immediately prior to the crash is contradicted by the fact that the bus negotiated a large rightward curve in the roadway just prior to

leaving the roadway and the data record indicates that he accelerated for several seconds just prior to striking the guardrail.

Under the circumstances, the opposing parties maintain that Webster and Reid's motion for summary judgment must be denied inasmuch as there are triable issues of fact as to whether or not the Webster/Reid vehicle played a role in the accident which can only be determined by the jury.

It is well-settled that "the proponent of a summary judgment motion 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*id.*). "In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (*Santiago v Joyce*, 127 AD3d 954 [2015]). Further, "[t]he court's function on a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist" (*Roth v Barreto*, 289 AD2d 557, 558 [2001]).

Webster and Reid have made a prima facie showing of their entitlement to summary judgment by submitting evidence including the State Police accident report, eyewitness statements and testimony, and the expert affidavit by Dr. Dunn which indicates that the underlying accident was a one vehicle crash that was not caused by the truck operated by Reid. Accordingly, the burden shifts to the opposing parties to submit admissible evidence which raises a triable issue of fact regarding the Reid/Webster vehicle's involvement in the accident.

Here, the opposing parties have failed to meet this burden. In particular, the opposition to Reid and Webster's motion primarily relies upon Mr. Williams' testimony that the Reid/Webster truck cut off the bus immediately prior to the accident, thereby causing the bus to veer off the roadway and crash into the guardrail. However, the court finds Mr. Williams' testimony to be not credible as a matter of law. In this regard, although as noted above, the court must view evidence in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party, this does not mean that courts must blindly accept a nonmoving party's testimony as being true in all instances. Specifically, where the subject testimony is conclusory, completely unsupported by other evidence, contradicted by prior testimony or statements, refuted by uncontroverted physical or scientific evidence, and otherwise requires the court to discard common sense and common knowledge, such testimony is insufficient to raise a triable issue of fact in a summary judgment motion (*Dorazio v Delebene*, 37 AD3d 645 [2007]; *Smith v New York Cent. Mut. Fire Ins. Co.*, 13 AD3d 686 [2004]; *Hardy v Lojan Realty Corp.*, 303

AD2d 457 [2003]; *Rodriguez v City of New York*, 295 AD2d 590 [2002]; 281 AD2d 410 [2001]; *Williams v Port Auth. of N.Y. & N.J.*, 247 AD2d 296 [1998]).

Thus, for example, in *Dorazio*, the Appellate Division, Second Department ruled that a plaintiff's version of a car accident was not credible as a matter of law when it was refuted by physical evidence at the scene and characteristics of the location and was contrary to eyewitness accounts of the accident, the findings of police investigators, and plaintiff's own admission following the accident (*Dorazio*, 37 AD3d at 646). Similarly, in *Hardy*, the Second Department ruled that a plaintiff's claim that an elevator in which she was riding "free-fell" was not credible as a matter of law when it was refuted by expert testimony indicating that plaintiff's allegations regarding the movement of the elevator were physically and mechanically impossible and plaintiff failed to submit expert testimony refuting this claim (*Hardy*, 303 AD2d at 457).

Here, Mr. Williams' claim that he was cut off by the Webster/Reid truck is unsupported by any other eyewitness testimony. Instead, Mr. Williams' claim is refuted by the eyewitness testimony of Mr. Reid as well as the statements and testimony of Mr. Underhill and Mr. Cadieux. Further, while plaintiffs make much of Mr. Padilla's testimony that he saw the truck pass the bus prior to the accident, Mr. Padilla's testimony also refutes Mr. Williams' claim that the truck cut off the bus prior to the accident. In particular, Mr. Padilla testified that the truck simply drove by the bus and was eight to ten car lengths ahead of the bus when the bus began to overturn. Mr. Padilla also testified

that the truck stayed in its lane at all times and that the truck did not cut off the bus and was not otherwise operated in an erratic manner. The court also notes that there are inconsistencies between the statements that Mr. Williams gave to the police shortly after the accident and his deposition testimony in this case. Specifically, although Mr. Williams was consistent in claiming that the bus was cut off by the truck, in his statements to the police, he claimed that the two vehicles actually came into contact. However, in his deposition testimony, Williams denied that there was any contact between the vehicles and that the truck simply cut off the bus.

In addition to being refuted by all other eye witnesses to the accident, Mr. Williams' claim that the bus was cut off prior to the accident is also refuted by the State Police accident report, physical evidence at the accident site, and most importantly, the data recorded by the bus's "black box" EDR recorder as well as the Xatanet system which tracked the speed of the truck during the minutes leading up to the accident. Given the extensive loss of life that occurred as a result of the accident, the New York State Police conducted a detailed accident investigation which concluded that the Webster/Reid vehicle was not involved in the accident. The State Police investigators based this finding upon uncontroverted proof in the form of the bus's EDR recording device, which demonstrated that the brakes of the bus were never applied during the 96 second period preceding the collision with the guardrail and the throttle input of the bus was between 95% and 100% during the four second period preceding the impact. The investigators

also based their finding upon the absence of any tire marks which would be indicative of sudden braking or responsive steering input by the bus operator, as well as the absence of any evidence of contact between the bus and the Webster/Reid truck. Notably, neither Mr. Stopper nor Mr. Karpovich's expert affidavits challenge the Police Report's findings regarding the fact that the brakes of the bus were never applied during this period before the crash while the throttle input remained at nearly 100% right up until the time of impact with the guardrail. Nor do these experts offer any explanation as to how the bus could have been cut off and forced to veer off the road into the guardrail without the brakes being applied and without the throttle input being reduced prior to the time of impact. Common sense dictates that, had the bus been forced off the roadway by the truck as Mr. Williams' claims, he would have taken his foot off the gas peddle/throttle and applied the brakes prior to colliding with the guardrail.[5]

Finally, the court turns its attention to the relative speeds of the truck and bus during the time period leading up to the crash. Specifically, the data recorder on the bus records the last stop event as taking place at 5:38:12 A.M., some eight seconds after the bus's initial impact with the guardrail and 15 seconds before the EDR stopped recording data.[6] For the 96 seconds preceding the impact with the guardrail, the data recorder on

---

[5]The court finds that Mr. Karpovich's claim that the approximate 10 degree angle from the tire mark to the first guardrail strike "could be indicative of an evasive maneuver" is too equivocal to support the opposing parties' claim that the bus was cut of by the bus, particularly in light of the fact that Mr. Karpovich does not even address the fact the bus's brakes were never applied and its throttle remained at or near 100% up until the time of impact.

[6]The time of impact with the guardrail could be determined based upon the fact that speed of the bus decreased from 64 mph to 53 mph in one second without any application of the brakes.

the bus indicated an average speed of 68 to 69 mph. During this same time period, the Xatanet system tracking the truck indicated a minimum/average/maximum speed of 63 mph/65 mph/66 mph at 5:37 A.M., 66 mph/66 mph/ 66 mph at 5:38 AM, and 28 mph/51 mph/66 mph at 5:39 A.M.[7] Based upon these relative speeds of the two vehicles, Dr. Dunn opines that it was physically impossible for the Webster/Reid truck to have overtaken and passed the bus during the 96 seconds preceding its impact with the guardrail since the average speed of the bus exceeded the maximum speed of the truck at all times. Notably, Mr. Stopper and Mr. Karpovich do not address this assertion, and instead attempt to challenge the accuracy of the vehicles' data recording systems. However as set forth below their claims are speculative at best.

In his affidavit, Mr. Stopper challenges Dr. Dunn's reliance on the EDR data inasmuch as he failed to provide data which validated the accuracy of the EDR's input data. However, Mr. Stopper has failed to provide any basis for challenging the accuracy of the data, which was relied upon by both the New York State Police and NTSB investigators. In any event, the NTSB report includes a full report of the calibration of the EDR. Also without merit is Mr. Stopper's claim that the truck's reduction in speed between 5:38 A.M. and 5:40 A.M. should have triggered a hard brake event and the fact that this did not occur calls into question the accuracy of the Xatanet system data. In particular, as Dr. Dunn's reply affidavit points out, given the fact that the Xatanet data

---

[7]The court notes that the reduction in the truck's speed from 66 mph to 28 mph during the minute between 5:38 A.M. and 5:39 AM supports Mr. Reid's testimony that he slowed down when he observed the bus tip over on its side in the shoulder of the road in front of his truck.

was only recorded once every minute, and a hard brake event was only triggered by a 7 mph reduction in speed in one seconds time, as a matter of basic math, there are many scenarios whereby the deceleration of the truck during this time period would not have triggered a hard brake event.[8] Finally, Mr. Stopper's claim that the times on the bus's EDR and truck's Xatanet system were not properly synchronized is clearly without merit. In this regard, the NTSB report specifically states that the device's onboard clock was found to be five minutes and 10 second behind an accurately synchronized time source and therefore, five minutes and 10 seconds was added to the recorded time stamps to reflect this offset. Moreover, inasmuch as the Xatanet system used by the truck tracks vehicles on a minute by minute basis in real time, there was no need to synchronize the Xatanet data with an accurately synchronized time source.

In his affidavit, Mr. Karpovich challenges Dr. Dunn's conclusion regarding the relative speed of the truck and bus in the minutes leading up to the crash by claiming his analysis has no foundation of a baseline for time. However, as noted above, the NTSB report established the exact time that the bus hit the guardrail and the Xatanet system tracked the speed of the bus at one minute intervals in real time. Thus, there was an accurate time baseline by which Dr. Dunn could compare the relative speeds of the truck and bus during the 96 seconds prior to the impact with the guardrail. Finally, there is no

---

[8]The truck's speed fell from 66 mph to 28 mph during the 60 seconds between 5:38 A.M. and 5:39 A.M, a difference of 38 mph. A 38 mph speed reduction over the course of 60 seconds averages out to approximately 1.57 mph reduction per second, far below the 7 mph reduction in one second needed to trigger a hard brake event.

merit to Mr. Karpovich's claim that the Xatanet data report fails to accurately reflect the speed of the truck for the moments leading up to the accident since the report merely provides snapshots at one minute increments. In particular, the data includes the maximum speed traveled by the truck for each minute, thereby making it possible to compare the maximum speed of the truck to the average speed of the bus for the moments prior to the impact with the guardrail. As previously noted, Dr. Dunn opines that it was physically impossible for the truck to have passed the bus in the moments before the crash because its maximum speed was below the bus's average speed. Notably, neither Mr. Karpovich nor Mr. Stopper dispute this point.

Under the circumstances, Webster and Reid's motions for summary judgment dismissing all claims against them in the consolidated actions are granted.

***Summary***

In summary, Sunflower's motions to dismiss all claims against it in the consolidated actions is granted. Webster and Reid's motions for summary judgment dismissing all claims against them in the consolidated actions is granted.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

Karen B. Rothenberg
Justice, Supreme Court

KINGS COUNTY CLERK
FILED
2018 JAN 19 AM 10:25