9

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

----------x

KATERINA GARCIA-SJORGRIM and
FERNANDO GARCIA

Index No.110717/2005
Mtn Seq.003

Plaintiff,

-against-

PORT IMPERIAL FERRY CORP. and PORT IMPERIAL FERRY CORP. d/b/a NEW YORK WATERWAY, AMTRAN CORP. and IC CORP.

Defendants.

----------x

PORT IMPERIAL FERRY CORP. and PORT IMPERIAL FERRY CORP. d/b/a NEW YORK WATERWAY,

Index No. 591188/06

Third Party Plaintiffs,

-against-

AMTRAN CORP. and IC CORP.,

Third Party Defendants

----------x

WALTER B. TOLUB, J.:

This is Port Imperial's motion for summary judgment dismissing the complaint and all cross-claims pursuant to CPLR §3212.

Facts

Port Imperial runs a ferry boat service between Manhattan and New Jersey. In connection with that ferry service, Port Imperial busses transport the public throughout midtown, to and from the Port Imperial ferry terminal on the west side of

Manhattan.

The bus at issue was manufactured by defendant Amtran (IC Corp) sometime between 1993 and 1998. The bus, a modified school bus, was purchased by Port Imperial. At the time of the purchase, Port Imperial requested that Amtran modify the rear handrail so that it would be installed at a forty five degree angle. Amtran agreed to honor Port Imperial's request.

Plaintiff Katerina Garcia-Sjogrim claims that on June 27, 2005, she was eight months pregnant and traveling with her 17 month old son on a Port Imperial bus. She claims that the bus arrived at her destination in a heavy rainstorm. Before moving down the back stairway of the bus Plaintiff called out to the bus driver to "bear with me" as she first carried her son's stroller down to the street and then returned to the bus to pick up her son and carry him down the stairs on her hip. Plaintiff claims that on her second trip down the stairs she attempted to stabilize herself using the privacy partition. As she descended, she attempted to transfer her hand from the privacy partition to the handrail which was too low for her to grasp. Her foot then slid from the outer edge of the second step and her ankle hit the step below. Plaintiff claims that her ankle was severely injured and that she continues to suffer ankle problems.

Plaintiff then commenced this action setting forth four causes of action against the Defendants: (1) negligence; (2)

breach of warranty; (3) strict product liability; and (4)product negligence and defective warning. By this motion Port Imperial seeks summary judgment dismissing the Complaint and any cross-claims asserted against it.

Discussion

As with any motion for summary judgment, success is wholly dependent on whether the proponent of either of the respective motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]. A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law. This means that none of the material elements of the claim or defense are in dispute (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:180).

On defendant's motion for summary judgment, defendant may demonstrate the lack of several prima facie elements of plaintiff's case, however, to prevail, defendant only needs to demonstrate the absence of a single element (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James

Publishing 2006] §37:182). Once defendant presents evidence showing the absence of facts necessary to establish a prima facie case, the burden shifts to the plaintiff (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing] §37:190).

Plaintiff's claims of breach of warranty, strict product liability, negligence and defective warning

Manufacturers of defective products may be held strictly liable for injuries caused by their products (Sukljian v. Charles Ross & Co., 69 NY2d 89 [1986]). Most often it is the manufacturer which can fairly be said to know and understand when an article is suitably designed and safely made for its intended purpose (Id.). Policy considerations have also been advanced for the imposition of strict liability on certain sellers, such as retailers and distributors of allegedly defective products (Id.).

Where products are sold in the normal course of business, sellers, by reason of their continuing relationship with manufacturers, are most often in a position to exert pressure for the improved safety of products and can recover increased costs within their commercial dealings (Id.). By marketing products as a regular part of their business, such sellers may be said to have assumed a special responsibility to the public, which has come to expect them to stand behind their goods (Id.).

As such, courts have consistently limited the applicability of strict products liability claims to those who, in some fashion, are within the manufacturing, selling or distribution chain of a particular product (New York State Urban Development Corp. v. UDC Ten Eyck Development Corp., 185 AD2d 562 [3d Dept 1992] *citing* Kane v. Cohen Distributors, 172 AD2d 720; Waterford v. Jack Laughlin Long Island, 151 AD2d 742; Smith v. City of New York, 133 AD2d 818). Defendants, such as Port Imperial, who have not manufactured, sold or distributed the product and whose only connection[1] is its purchase and subsequent incorporation into the business for use by members of the general public, do not fall within the ambit of strict products liability or breach of warranty (Waterford v. Jack LaLanne Long Island, 151 AD2d 742 [2nd Dept 1989]). It follows that all strict products liability claims and claims related to said cause of action are dismissed against Port Imperial.

Negligence

It is axiomatic that in order to prove a prima facie case of negligence, a plaintiff must establish the existence of a duty on the part of the defendant, a breach of that duty, and that the breach of said duty was a proximate cause of his or her injuries"

[1]Port Imperial's request that the handrail be set at a forty five degree angle is insufficient to impose strict liability under the stated standard.

(Lodico v City of New York, 15 Misc. 3d 1137(A) (NY Sup. 2007) *citing* Akins v. Geln Falls City School District, 53 NY2s 325 [1981]). Negligence is relative to the time, place and circumstance of each occurrence (Rotz v The City of N.Y., 143 A.D. 2d 301, 304 [1st Dept. 1988]).

Generally in negligence suits, the issue is whether the defendant or the plaintiff acted reasonably under the circumstances (Andre v Pomeroy, 35 N.Y.2d 361, 364 [1974]). The standard of care required of common carriers is the same as the standard required of any other potential tortfeasor, reasonable care under all of the circumstances (Bethel v. New York city Transit Authority, 92 NY2d 348 [1998]).

Here the issue is whether it was reasonable and safe to transport the public on a bus which was designed for children, had different step differentials and which was modified to have an exit handrail placed at a forty five degree angle. The individual facts and circumstances must be weighed. Whether a dangerous or defective condition existed on the bus, and whether Port Imperial can be held liable, is a question of fact for the jury (Trincere v. County of Suffolk, 90 NY2d 975 [1997]). As such, Port Imperial's motion to dismiss the negligence cause of action is denied.

Accordingly, it is

ORDERED that Port Imperial's summary judgment motion is granted to the extent that all claims and cross-claims are dismissed as against it except for negligence claims.

Counsel for the parties are directed to appear as scheduled for trial on March 23, 2009 at 9:30AM in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/12/09

HON. WALTER B. TOLUB, J.S.C.