Iwata v Manhattan & Bronx Surface Tr. Operating Auth.

2015 NY Slip Op 31198(U)

July 10, 2015

Supreme Court, New York County

Docket Number: 152771/13

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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MASAKO IWATA,

Plaintiff,

- against -

Index No. 152771/13

MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and "JOHN DOE",

Defendants.

---X

Decision and Order

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action, defendants Manhattan and Bronx Surface Transit Operating Authority (MABSTOA) and "John Doe" (Ramon Montanez) move for summary judgment. Plaintiff Masako Iwata opposes the motion.

BACKGROUND

In this action, plaintiff alleges that, on September 25, 2012, she was injured on a bus when the bus stopped short at East 23rd Street between Second Avenue and Third Avenue in Manhattan. During her deposition, plaintiff testified,

> "Yes, okay. [The bus] [v]ery, very, very suddenly, very, very violently stopped, so I couldn't hold my hands and, you know, force, force to the floor, that's why I fell.

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Q: Was there a sudden stop?

A: Very sudden stop, very violent.

Q: Can you describe how fast the bus was going before the alleged sudden stop?

A: I didn't feel that speeding. No, I didn't feel that way. I thought it was nothing unusual.

Q: Nothing unusual?

A: Right."

(Feinstein Affirm. Ex. J [Iwata EBT] at 22.)

During her statutory hearing, plaintiff testified,

"[The] [b]us stopped violently - - like not straight stop like a, you know, circling, like twisting like then violent.

Q: Okay. Do you know why it stopped suddenly?

A: No, I didn't see any."

(Feinstein Affirm. Ex. I [Iwata Statutory Hearing] at 13.)

Plaintiff also submits an affidavit describing the alleged incident. In her affidavit, plaintiff states,

"I am familiar with this bus route as I have taken it both before and since my accident. When I got off the train and went to the bus stop on 23rd Street, at Park Avenue, I had to wait until a bus came. While waiting, I noticed the traffic going past the bus stop in an east direction was traveling smoothly, and was not backed up, crowded or even slow. I got on the M23 bus stop at 9:45 a.m.

My accident happened at about 10:00 a.m. to 10:05 a.m. Once on the bus, I had to stand near the rear exit doors, located just after where the two parts of this double bus connects, as it was filled with passengers, including others who were also standing. I am short, only 5'3" in height and as such taller people standing between me and the front of the bus blocked my vision of the front of the bus.

From the Park Avenue stop, the next stops are Lexington Avenue, Third Avenue, and then Second Avenue, where I was going to get off. The bus moved from bus stop to bus stop without physically stopping in between (before intersections), as it traveled from the Park Avenue bus stop to the Third Avenue bus stop. It is my best estimate that the bus reached about 10-15 miles per hour, while traveling along 23rd Street, in between the bus stops. This was not unusual, based on my prior experiences. 23rd Street has two lanes for moving traffic in each direction, in addition to the curbside lane for parking, and also where the bus stops are located."

(Schwimmer Opp. Affirm. Ex. A [Iwata Aff.] ¶¶ 3-4.)

Defendants move for summary judgment on the ground that they are not negligent as a matter of law due to the emergency doctrine. In support of the motion, defendants submit the deposition testimony of bus operator Ramon Montanez. During his deposition, Montanez testified,

"I asked her if she was all right and if she needs assistance.

Q: What did she say to you, if anything, in response to that?

A: She said that she had to go because she has an appointment to go to, so she left.

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Q: Now you coming to that second stop up half way through the block because of – let me make it easier. Withdraw all of that. Sir, at any time between Third Avenue and Second Avenue, did any car cut directly in front of you while you were running?

A: Yes

***

Q: When you said [the vehicle,] it cut in front of you, was from the left to the right crossing in your path or something else?

A: From the left to the right.

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Q: Describe the vehicle?

A: A taxi.

Q: What was your speed when you first noticed [the taxi] moving into your lane?

A: I was going into the bus stop, so I was already slowing down.

Q: At what speed? What was your speed [where you] when you first noticed him?

A: Five. Maybe, like, five miles per hour, maybe.

Q: If that much?

A: If that much, nothing more.

(Feinstein Affirm. Ex. K [Montanez EBT] at 75, 79-81.)

DISCUSSION

"The proponents 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].) If the plaintiff fails to make such a showing, the motion must be denied. (*Id.*) "Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so." (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980].) The issue in a summary judgment motion is "not whether plaintiff[] can ultimate establish liability, but, rather, whether there exists a substantial issue of fact in the case on the issue of liability which requires a plenary trial." (*Barr v County of Albany*, 50 NY2d 247, 254 [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 Tr. Auth.*, 85 NY2d 828, 830 [1995].)

However, the common-law 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 reasonably and prudent in the emergency context, provided the actor has not created the emergency."

(*Caristo v Sanzone*, 96 NY2d 172, 726 [2001], quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991].) Courts have applied the emergency doctrine to preclude liability for personal injuries when a bus driver's only option was to stop short. (See *Edwards v New York City Tr. Auth.*, 37 AD3d 157, 158 [1st Dept 2007].)

Defendants have demonstrated entitlement to judgment as a matter of law. Defendants have presented evidence to show that the emergency doctrine is applicable here. During his deposition, Montanez testified that he stopped the bus because a taxi cab suddenly cut him off (*See* Montanez EBT at 79-80). Thus, Montanez was presented with an unexpected circumstance and he had little time for thought or deliberation. Moreover, Montanez "was entitled to anticipate that [the taxi cab] would obey traffic laws." (*Ward v Cox*, 38 AD3d 313, 314 [1st Dept 2007].)

Plaintiff fails to raise any triable question of fact. In her affidavit, plaintiff states that because of her height and the taller people standing between her and the front of the bus, she could not see why the bus stopped. (*See* Iwata

Aff. at ¶¶ 3, 5.) During her statutory hearing and deposition testimony, plaintiff testified that she did not know why the bus stopped. Despite plaintiff's contentions, this testimony is not sufficient to raise a triable question of fact. Plaintiff admitted that she could not see the front of the bus and she did not know why the bus stopped, therefore she is unable to raise a question of fact as to the reasonableness of the bus operator's actions. Plaintiff has also not provided any other evidence such as the testimony or affidavit of another witness that may have been present at the time of the alleged incident, to indicate that the bus operator's actions were not reasonable.

Plaintiff argues that the emergency doctrine does not apply because defendants failed to raise it as an affirmative defense. This argument is not persuasive. The emergency doctrine does not have to be pleaded as an affirmative defense. (*See Edwards*, 37 AD3d at 158 [rejecting plaintiff's contention that the emergency doctrine was unavailable, since it had not been alleged as an affirmative defense in a responsive pleading because even if there were some details unknown to plaintiff, the deposition of the bus operator provided a detailed description of an emergency stop, vitiating any later claim of surprise by plaintiff]; *Brooks v New York City Tr. Auth.*, 19 AD3d 162, 162-163 [holding that the motion court properly invoked the emergency doctrine in finding that no issues of fact existed because plaintiff

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"failed to adduce any evidence tending to show that the bus operator . . . could have avoided a collision with the cab by taking some other action other than [stopping the bus]".) Moreover, the assertion that the jury might disbelieve a defendant's testimony is not a basis for denying summary judgment. (*See Bachrach v Farbenfabriken Bayer AG*, 36 NY2d 696, 697 [1975]; *Folson v Marrero*, 308 AD2d 399 [1st Dept 2003].)

Therefore, defendants' motion for summary judgment is granted.

The Court need not reach any remaining contentions.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted, and the complaint is dismissed in its entirety as against defendants, with costs and disbursements to defendants as taxed by the Clerk of the Court, and all cross claims against defendants are dismissed, and the Clerk is directed to enter judgment accordingly in favor of defendants.

Dated: July 10, 2015
New York, New York

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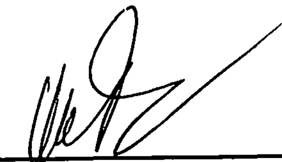

J.S.C.

HON. MICHAEL D. STALLMAN