

Flores v Westchester County Bee Line
2017 NY Slip Op 33506(U)
May 17, 2017
Supreme Court, Westchester County
Docket Number: Index No. 63593/15
Judge: Mary H. Smith
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DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

-----X
LAURA FLORES,

Plaintiff,

MOTION DATE: 5/12/17
INDEX NO.: 63593/15

-against-

WESTCHESTER COUNTY BEE LINE, COUNTY OF
WESTCHESTER and HERBERT PORTORREAL,

Defendants.
-----X

The following papers numbered 1 to 7 were read on this motion by defendants for summary judgment dismissing the complaint.

Papers Numbered

Notice of Motion - Affirmation (Phelan) - Affidavits (Meyer, Hermance) - Exhs. (A-J) ...	1-4
Answering Affirmation (Rosenthal) - Exhs. (A-B)	5-6
Replying Affirmation (Phelan)	7

Upon the foregoing papers, it is Ordered and adjudged that this motion by defendants for summary judgment dismissing the complaint is disposed of as follows:

This is a negligence action in which plaintiff seeks to recover for personal injuries she allegedly had sustained, on October 30, 2014, at approximately 1:10 p.m., at which

time she had been a passenger on a bus owned by defendant Westchester County Bee Line, leased by defendant County of Westchester, and driven by defendant Portorreal. At the time of the accident, the bus had been traveling eastbound, in the right most lane on Main Street, near its intersection with Court Street, in downtown White Plains. Each lane of Main Street in this area is separated by solid white lines, and the roadway is straight. Weather conditions at the time had been clear and dry. After the bus has stopped to pick up plaintiff as a passenger, the bus had begun to drive away when the incident causing plaintiff's injuries allegedly had occurred.

Plaintiff had testified at the 50-H hearing that she had boarded the bus at Main Street and Court Street, that she had paid her fare, and that she had begun walking towards the rear of the bus, intending to sit in the first row of forward facing seats behind the driver. Plaintiff had testified that approximately two seconds later, during which time she had taken approximately 3 steps, the bus "took off, it braked suddenly, and stopped." Plaintiff had not been holding on to any pole at that time. Plaintiff had grabbed onto a poll attached to a seat but she nevertheless had fallen in the aisle, although not all the way onto the floor, striking various parts of her body. Plaintiff had heard the driver, defendant Portorreal, tell someone else that he had been cut off, but plaintiff herself had not observed traffic conditions either before or at that the time of her fall. Plaintiff's deposition testimony had been consistent with her 50-H hearing testimony.

Defendant Portorreal had testified at his deposition that he had stopped the bus at the Main Street/Court Street bus stop for approximately 30 seconds to allow plaintiff, apparently the only passenger at the stop, to board. Defendant Portorreal had closed the bus' doors, had checked his left side view mirror, and had proceeded to drive at the speed

of approximately 2 to 3 miles per hours; Portorreal had testified that he had intended to continue driving straight down Main Street in the right most lane. Within 2 to 3 seconds of his starting to move the bus, having traveled a distance of approximately 10 feet, defendant Portorreal had observed to his front left a Lincoln Town car (the "car"), traveling at a speed of approximately 20 to 25 miles per hour, suddenly cross over the lane's white line directly into the path of the bus. Defendant Portorreal had testified that the car had side-swiped the bus, perhaps a door from the car's right side having struck the bus' left front bumper, and that the car then, without ever having stopped, had continued to make its right turn, directly in front of the bus, onto Court Street. According to defendant Portorreal, he first had observed in his left side view mirror the allegedly offending Town car in the lane alongside of the bus at the time that he had started to drive away from the bus stop and that the car had been traveling straight at that time. Defendant Portorreal had testified that, when he first saw the Town car begin to cross over, he immediately had hit the bus' brakes and the bus had come to a complete stop. Defendant Portorreal did not testify that he had experienced any actual impact between the bus and the Town car, but he had testified that, after he had stopped the bus and had inspected the outside of the bus he had observed a scratch on the bumper. Defendant Portorreal had not observed plaintiff's fall in the bus aisle.

The Court has reviewed the submitted surveillance CD capturing the five video cameras filming on board the bus. It appears that this black Town car, which had been traveling in the lane immediately to the left of the bus' lane, at a speed faster than the bus, had crossed over the white solid line, and had turned approximately 45 degrees to the right immediately in front of the moving bus. No actual physical impact between the two

vehicles is apparent on the video. This black car had not stopped, having continued to make its right turn onto Court Street. The video also depicts plaintiff's walking down the bus aisle while the bus begins to move forward and, within a moment's time, plaintiff's body lurching, causing plaintiff to grab for a pole and her being caused to collapse before she recovers and is able to take a bus seat. Photographs submitted at bar depict a visible white scratch mark on the bus' left front bumper.

Defendants presently are moving for summary judgment dismissing the action. Contrary to plaintiff's assertion that defendant Portorreal had been negligent in the operation of the bus, defendants argue that the evidence at bar, including Portorreal's testimony, plaintiff's testimony, study of the interior surveillance footage from the bus and inspection of the accident site, establish that the sole cause of the accident had been the failure to yield and the unsafe lane change that had been made by the operator of the unidentified car that suddenly had crossed over into the bus' lane of traffic just as the bus had begun to move forward. Defendants claim that plaintiff's fall in the bus aisle had occurred as a result of the impact from the Town car and her not having held on to anything at the time of impact, and not as a result of Portorreal's having applied the brakes of the bus or his otherwise having driven in a negligent manner.

In support of their motion, defendants offer the expert affidavit of Richard Hermance, an accident reconstructionist certified by the National Accreditation Commission of Traffic Accident Reconstruction. Mr. Hermance has reviewed the police report, photographs of the bus, the interior surveillance footage from the bus, and the parties' testimony, and he had conducted his own on sight investigation. Mr. Hermance states that the video, played on 1/8 speed, shows that plaintiff "lost balance and fell as this

minimal contact was made" between the bus and the Town car. Mr. Hermance, using two distinct scientific methods to calculate Portorreal's speed of reaction time and the acceleration rate, has determined that plaintiff had begun to fall just as the car had made contact with the bus, that the time from when the Town car entered the right lane up until impact had been less than one second, and that there was nothing defendant Portorreal could have done to have avoided the crash. It is Mr. Hermance's opinion with a reasonable degree of scientific and professional probability that the cause of this accident had been the failure to yield and unsafe lane change by the car's operator, and that plaintiff had fallen down on the bus as a result of the car's impact with the bus and plaintiff's failure to have held on to anything at the time that the bus had been struck. According to Mr. Hermance, defendant Portorreal had not been negligent in the operation of the bus and his actions had not contributed to the happening of the accident.

Based upon the foregoing, and additionally given that defendant Portorreal had the right of way and had been entitled to have presumed that the Town car's driver would obey all traffic laws, defendants argue that defendant Portorreal as a matter of law had exercised reasonable care in the operation of the bus, that his actions in no way had contributed to the accident and plaintiff's alleged injuries, and that defendants thus are entitled to summary judgment dismissing the complaint.

Plaintiff opposes defendants' dispositive motion, claiming that defendant Portorreal's negligent operation of the bus had caused her "to be violently precipitated to the ground," as a result of which she has sustained multiple serious injuries. Plaintiff submits that defendants are not entitled to summary judgment because they have not demonstrated that there ever had been actual physical contact between the bus and the Town car.

Plaintiff notes that defendant Portorreal had testified that, after the alleged impact, which Portorreal had testified he had not felt, he had exited the bus and had observed only a white colored "scratch" on the bus' bumper, which scratch, plaintiff submits, should have been dark in color if said scratch in fact had occurred as a result of the black Town car having struck the bus. Plaintiff notes that defendant Portorreal himself also had testified that he had not felt the bus shake or move side to side at the time of the alleged impact, which testimony plaintiff argues is consistent with the bus not actually having been struck by the Town car.

Additionally, plaintiff argues that defendants have failed to establish that Portorreal had used reasonable care in the operation of the bus given his own admission that he had failed to timely see the Town car in the adjacent lane until one second before impact, notwithstanding that Portorreal's view had been clear and unobstructed, and the surveillance video establishes that the Town car had been moving and visible in defendant Portorreal's rear view mirror at the time that Portorreal had started to drive the bus. Plaintiff submits that if Portorreal properly had observed the Town car before moving his bus and had recognized the potential hazard the car had presented "before accelerating his bus he could have avoided this incident completely."

Moreover, plaintiff argues that defendant Portorreal had acted contrary to his training and the Operator's Handbook which instructs and requires drivers to do everything they can to avoid sudden stops, to anticipate situations and to never compete with other vehicles for the right of way. Additionally, plaintiff argues that defendant Portorreal also negligently had begun to move the bus before plaintiff had crossed the yellow striping on the floor behind the bus driver's seat and that he had failed to wait until she had been

safely seated.

Plaintiff supports her opposition with an affidavit from Robert D. Klingen, an expert certified in accident reconstruction. Mr. Klingen, in formulating his expert opinion, has reviewed the Police Accident Report, the Incident Report, the Supervisor's Report, Liberty Lines Condition Report, videos from the on-bus cameras, copies of photographs taken at the accident scene, plaintiff's 50-h hearing testimony, the bill of particulars, Liberty Lines Safety Alerts, the Liberty Lines Transit, Inc. Bus Operator Training Program material, including the Operator's Handbook, the parties' deposition testimony and the affidavit of defendants' expert, Mr. Hermance. Additionally, Mr. Klingen personally had inspected the accident location.

Mr. Klingen opines that the white scratch on the bus' bumper does not correlate to the type of damage that would have been caused by an impact from the black Town car, that the video recording does not reveal any damage to the right side of the Town car, and that there is no physical evidence supporting the finding that the two vehicles in fact had collided. Further, Mr. Klingen notes that the Town car had been clearly visible to defendant Portorreal when he had closed the bus' doors and proceeded to drive, and that, as stated in the Participant Manual for the Instructors' Course in Bus Maneuvering and Defensive Driving published by the Transportation Safety Institute, bus operators must be able to recognize hazards and they should "Expect the car alongside you to cross your path and make a right turn." Had defendant Portorreal properly recognized that the Town car presented a potential hazard, Mr. Klingen opines that "he could have used proper caution before pulling away from the curb."

Additionally, having reviewed the on-board video, Mr. Klingen also states that

defendant Portorreal had started to move the bus within one second after plaintiff had paid her fare and before plaintiff had walked across the yellow standee line and had a reasonable opportunity to have taken a seat. He maintains that, because the bus had not been equipped with handrails for plaintiff to have braced herself, defendant Portorreal should have been "more diligent about the safety of his passengers" and have waited to move the bus until after plaintiff had been safely seated.

In sum, it is Mr. Klingen's opinion that defendant Portorreal, by failing to wait until plaintiff had taken a seat before his continuing to drive the bus, had failed to follow the guidelines of the Commercial Driver License Manual and the Instructors Course in Bus Maneuvering and Defensive Driving that had been provided to him as part of his training, that had he simply waited 3 to 4 seconds plaintiff's injuries "would have been avoided," and that the "improper, unsafe and unreasonable manner in which Mr. Portorreal operate the bus was the significant causal factor that led to Ms. Flores' injuries."

Based upon the foregoing, plaintiff maintains that there necessarily exists a triable issues of fact regarding whether any such contact in fact had occurred, and that there further exists triable issues of fact as to whether defendant Portorreal reasonably could have avoided making the sudden stop and whether he had operated the bus in a reasonably safe manner.

Initially, the Court notes that defendants, for reason(s) not readily apparent to this Court, have not pleaded the emergency doctrine defense in their answer, nor have they argued its application at bar. See Bello v. Transit Authority of New York City, 12 A.D.3d 58, 61 (2nd Dept. 2004). Pursuant to the emergency doctrine, "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 Tr. Auth., 77 N.Y.2d 322, 327 (1991); see Evans v. Bosl, 75 A.D.3d 491 (2nd Dept. 2010). The doctrine routinely is applied in circumstances akin to that presenting at bar where passengers on buses allege that they had been caused to fall as a result of a sudden stop owing to the bus having been cut off by another vehicle, and defendants routinely are granted summary judgment dismissing complaints based thereon. See Tarnavska v. Manhattan and Bronx Surface Transit Operating Authority, 106 A.D.3d 1079 (2nd Dept. 2013); Marri v. New York City Transit Authority, 106 A.D.3d 699 (2nd Dept. 2013); Eng v. MTA Bus Co., 124 A.D.3d 833 (2nd Dept. 2015); Miloscia v. New York City Bd. of Educ., 70 A.D.3d 904 (2nd Dept. 2010).

Had defendants argued the emergency doctrine, this Court would have granted them summary judgment thereon dismissing the complaint, finding that they prima facie had established their entitlement to judgment as a matter of law by demonstrating that the action of defendant Portorreal in braking abruptly to avoid a collision with a car that had suddenly pulled out in front of him had been reasonably prudent in an emergency situation not of his own making.

As a second initial matter, the Court notes that defendants vigorously argue and they have submitted evidence supporting the finding that there had been physical contact between the bus and the Town car, whereas plaintiff equally vigorously argues and submits evidence supporting the finding that there had not been any actual contact between the two vehicles. As a corollary to each party’s respective position, the parties also dispute

whether plaintiff had sustained her alleged injuries as a result of the actual impact between the vehicles or as a result of the sudden and hard braking of the bus. On the facts presenting, and for purposes of this negligence determination, this Court fails to discern why the issue of physical contact is relevant or why the actual cause of plaintiff's falling is decisive on the issue of defendants' negligence.

Resorting to a regular negligence analysis, a defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he was not at fault in the happening of the subject accident. See Estate of Cook v. Gomez, 138 A.D.3d 675, 676 (2nd Dept. 2016); Fitzsimmons v. Long, 136 A.D.3d 738, 738-739 (2nd Dept. 2016). While an operator of a motor vehicle traveling with the right-of-way is entitled to assume that other drivers will obey the traffic laws, the operator traveling with the right-of-way nevertheless has a duty to use reasonable care to avoid colliding with other vehicles. See Twizer v. Lavi, 140 A.D.3d 736 (2nd Dept. 2016); Chen v. Cardenia, 138 A.D.3d 1126, 1129 (2nd Dept. 2016); Arias v. Tiao, 123 A.D.3d 857, 858 (2nd Dept. 2014).

Based upon the foregoing, the Court finds that defendants prima facie have demonstrated their entitlement to judgment by submitting proof that defendant Portorreal had been obeying the traffic laws at the time of the incident, that he non-negligently had been driving the bus within his traffic lane at a speed of only 2 to 3 miles per hour when he had been forced to brake in an attempt to avoid colliding with a town car that suddenly and unlawfully had crossed over the lane and turned right directly in front of his bus, and that the sole cause of the accident had been the failure to yield and the unsafe lane change that had been made by the operator of the unidentified Town car that suddenly had crossed over into the bus' lane of traffic just as the bus had begun to move forward.

The burden then had shifted to plaintiff to raise a triable issue of fact with respect to defendant Portorreal's having failed to operate the bus in a non-negligent manner. See, e.g., Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1990); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). This she has failed to do.

Plaintiff does not present any evidence that at the time of the accident defendant Portorreal had been traveling in excess of 3 miles per hour, let alone that he had been speeding, or that he in any other way had been driving carelessly, unsafely or recklessly. While it appears from the video that Portorreal may have started to drive the bus before plaintiff had walked past the yellow striping on the floor, said circumstance is irrelevant given that the incident causing plaintiff's alleged injuries did not occur while plaintiff had been standing in front of that passenger line. Therefore, said negligence, if any, had not been the proximate cause of plaintiff's injuries.

Moreover, contrary to plaintiff's characterization of Portorreal's testimony, the Court finds based upon a fair reading of same that Portorreal had testified that he had looked in his left side mirror before moving the bus from plaintiff's bus stop, that he had observed the offending Town car traveling alongside of the bus, and that said vehicle had been proceeding straight in its lane. This had not been an instance where the driver of the bus simply had failed to observe that which had been present to be observed. Plaintiff points to nothing in the record which otherwise reasonably should have alerted Portorreal that the Town car he had observed in the adjacent lane had intended to cut the bus off and turn right at Court Street.

Further, it is well established that in order to demonstrate a prima facie case of negligence against a common carrier for injuries sustained by a passenger as a result of

the movement of the vehicle, which is plaintiff's position herein, a plaintiff must present objective evidence of the force of the stop sufficient to establish an inference that the offending stop had been 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. See Urquhart v. New York City Tr. Auth., 85 N.Y.2d 828, 829–830 (1995); Gioulis v. MTA Bus Co., 94 A.D.3d 811, 812-813 (2nd Dept. 2012); Rayford v. County of Westchester, 59 A.D.3d 508, 508–509 (2nd Dept. 2009); Golub v. New York City Tr. Auth., 40 A.D.3d 581, 582 (2nd Dept. 2007). A plaintiff's claim, as here, that the bus driver had taken off fast and suddenly had stopped, by itself, does not raise any issue of fact regarding the bus driver's failure to exercise reasonable care. See Urquhart v. New York City Transit Authority, *supra*, 85 N.Y.2d at 830; Guadalupe v. New York City Transit Authority, 91 A.D.3d 716, 717 (2nd Dept. 2012).

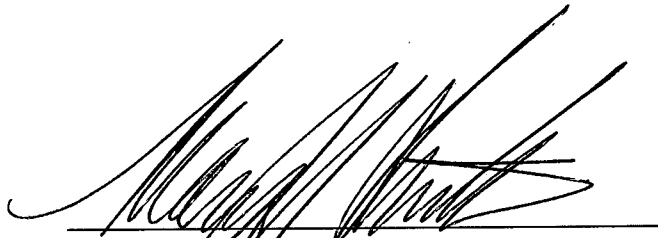
Plaintiff has failed to offer any evidence demonstrating that the bus driver had made an "unusual or violent stopping" of the bus that had been traveling 2 to 3 miles per hour, or that his stop had been of a different class than commonly experienced in city bus travel; consequently, this Court must agree that defendant bears no liability therefore. PJI §2:165; Bethel v. New York City Transit Auth., 92 N.Y.2d 348 (1998); Rayford v. County of Westchester, 59 A.D.3d 508, 509 (2nd Dept. 2009); *see, also* Banfield v. New York City Transit Authority, 36 A.D.3d 732 (2nd Dept. 2007); Taylor v. Westchester Street Transportation Co., Inc., 276 A.D. 874 (2nd Dept. 1949); *cf.* Harris v. Manhattan and Bronx Surface Transit Operating Authority, 138 A.D.2d 56 (1st Dept. 1988). Further supporting this finding is the fact that, although plaintiff, the only standing passenger at the time, had been caused to fall at the time that Portorreal had applied the bus' brake, there is no

evidence that any other seated passengers on the bus had fallen out of their seats, or had been caused to move abruptly in their seats, or had sustained injuries as a result of the bus having been brought to a stop.

Notwithstanding plaintiff's contention to the contrary, plaintiff had been afforded a reasonable opportunity to safely board the bus. Defendant Portorreal had not been required to wait until the plaintiff had found a seat before proceeding, and absent evidence that the operation of the bus had been extraordinary and violent and of a different class than the jerks and jolts commonly experienced in city bus travel, plaintiff failed to raise a triable issue of fact in opposition to the motion. See Garcia v. Sunny Transp. Services, 99 A.D.3d 967 (2nd Dept. 2012); McLeod v. County of Westchester, 38 A.D.3d 624 (2nd Dept. 2007).

This action is hereby dismissed.

Dated: May, 17 2017
White Plains, New York



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