

Yuk Sui Chan v New York City Tr. Auth.

2020 NY Slip Op 30570(U)

January 28, 2020

Supreme Court, Richmond County

Docket Number: 150505/2018

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART TR-2

-----X
YUK SUI CHAN,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 150505/2018

NEW YORK CITY TRANSIT AUTHORITY,
and "JOHN DOE", said name being fictitious
and Unknown,

Motion No. 4090 – 002

Defendants.

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Recitation of the following papers in accordance with CPLR 2219[a] numbered "1" through "4" were marked fully submitted on November 20, 2019.

	<u>Papers Numbered</u>
Notice of Motion for Summary Judgment by Defendants THE NEW YORK CITY TRANSIT AUTHORITY and JOHN DOE with Supporting Papers and Exhibits	1, 2
Affirmation in Opposition by Plaintiff YUK SUI CHAN with Exhibits	3
Reply Affirmation by Defendants NEW YORK CITY TRANSIT AUTHORITY and JOHN DOE	4

Upon the foregoing papers, the motion (No. 002) for summary judgment by defendants NEW YORK CITY TRANSIT AUTHORITY and JOHN DOE is granted.

Plaintiff YUK SUI CHAN (hereinafter "plaintiff") commenced this action to recover damages for injuries she sustained when she fell on a bus operated by defendant NEW YORK CITY TRANSIT AUTHORITY (hereinafter "defendant").

On September 9, 2017, the 85-year old plaintiff boarded the S78 bus at Hylan Boulevard near Reynolds Street in Staten Island using both a cane and the assistance of an aide. Plaintiff contends that while her aide was paying the bus fare for her, she began to look for a seat and walked to the back of the bus. According to plaintiff, the bus suddenly moved forward, causing her to fall to the floor of the bus.

As a result of said fall, plaintiff alleges to have sustained, *inter alia*, serious injury to her left shoulder; left lateral 7th and 8th rib fracture; posterior disc bulges at L1/2, L2/3, L3/4 and L5/S1; disc herniation at L4/5; bilateral L4-L5 radiculopathy; medial meniscal tear of the left knee; and joint effusion of the left shoulder. Plaintiff further contends that her injuries are accompanied by severe pain, swelling, tenderness, discomfort and distress. In addition, plaintiff suffers severe pain and difficulty with prolonged sitting, standing, walking, bending and lifting objects. According to plaintiff, the foregoing injuries to her body joints will result in traumatic arthritis and are considered permanent in nature and duration.

Plaintiff subsequently commenced this action against defendant alleging, *inter alia*, negligence in its ownership, operation, management, maintenance and control of said bus, all of which caused the bus to abruptly move forward which, in turn, caused plaintiff to fall to the floor of the bus.

Following the completion of discovery and the filing of the Note of Issue, defendant now moves for summary judgment dismissing the complaint against it. In support, defendant alleges there are no triable issues of fact regarding its operation of the said bus when plaintiff fell. According to defendant, the proof demonstrates that the bus operator merely lifted his foot off the brake whereupon the bus moved only a few feet when plaintiff fell, and that there is no proof that there was any unusual or violent jerk or jolt different from those commonly experienced in

city bus travel. In addition, defendant argues that after plaintiff entered the bus, she walked beyond the empty seats to the back of the bus without holding onto any railings when the bus began to move, and that the bus operator had no duty to wait for her to be seated before moving forward.

In support, defendant submits a copy of a video tape¹ taken from a surveillance camera located inside the bus which it claims corroborates both the testimony of the bus operator, Carlos Sonera, and the accident report prepared by him, regarding the happening of the accident. During his deposition (and as documented in his accident report), Mr. Sonera explained that after plaintiff boarded the bus, she walked beyond the handicapped seats to the rear of the bus. After he released the brake, the passenger allegedly fell. Another passenger alerted him that someone had fallen in the rear of the bus.

In opposition, plaintiff contends that summary judgment must be denied since defendant has failed to establish its *prima facie* right to judgment as a matter of law. According to plaintiff, defendant failed to provide proof establishing the nature of the movement of the bus. Instead, it merely offers the deposition testimony of the bus driver and the attending accident report in which he indicated that when he released the brake, he was alerted by another passenger that plaintiff had fallen. According to plaintiff, however, she testified at her deposition that she was caused to tumble and violently fall as a passenger on the subject bus. In particular, she testified that she was standing still when the bus started to move and that is when she fell (*see* Defendant's Exhibit E; Plaintiff's deposition, pgs. 7-8). In further support, plaintiff submits the affidavit of a witness, Xiuping Hu, who is employed as a Home Health Worker, and who assisted

¹ The videotape was authenticated through an affidavit prepared by an employee of SafeFleet, the contractor which maintains bus security camera videos from New York City Transit Authority buses.

plaintiff on the day of the accident. According to Ms. Hu's affidavit, she assisted plaintiff as she boarded the S78 bus. When she stopped to pay the fare, plaintiff continued toward the rear of the bus to find a seat. Ms. Hu said she felt the bus move abruptly forward and was surprised since it was unusual for a driver to move a bus before a disabled passenger was seated. Although Ms. Hu did not fall, the sudden movement caused plaintiff to be violently propelled to the floor of the bus. According to plaintiff, such proof also raises triable issues of fact requiring the denial of defendant's summary judgment motion.

Upon consideration of a motion for summary judgment, the Court's sole function is to identify the existence of material issues of fact [or point to the lack thereof] rather than making determinations regarding the credibility of the physical evidence (*Vega v. Restani Construction Corp.*, 18 NY3d 499, 505 [2012]) or the movant's version of events (see *Xiang Fu He v. Troon Management, Inc.*, 34 NY3d 167, 175 [2019] [internal citations omitted]). Therefore, "the moving party 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" (*Id.*). Once the movant produces such evidence, the burden of proof shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action" (*Id.*). The non-movant must also do so by evidentiary proof in admissible form (*Ayers v. City of Mount Vernon*, 176 AD3d 766 [2d Dept. 2019]). Since summary judgment is the equivalent of trial, any significant doubt as to the existence of a material fact mandates a denial of the motion (*Matter of New York City Asbestos Litigation*, 33 NY3d 20, 26 [2019] and *Phillips v. Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). However, "only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment" (*Gilson v. Metropolitan Opera*, 5 NY3d 574, 578 [2005]).

In order to establish 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, a plaintiff must establish that the movement consisted of a jerk or lurch that was “unusual and violent” (see Urquhart v. New York City Tr. Auth., 85 NY2d 828, 830 [1995], quoting Trudell v. New York R.T. Corp., 281 NY82, 85 [1939]). More particularly, there must be proof demonstrating that the movement of the bus was of a “different class than the jerks and jolts commonly experienced in city bus travel” (Urquhart v. New York City Tr. Auth., *supra* at 830). In seeking summary judgment, however, the common carrier has the burden of establishing, *prima facie*, that the stop was not unusual and violent (see Burke v. MTA Bus Co., 95 AD3d 813 [2nd Dept. 2012]).

Here, in the opinion of this Court, defendant has sustained its burden by demonstrating the absence of material issues of fact as to defendant’s negligence. In this case, defendant has satisfied its burden by submitting the transcript of the bus operator’s deposition testimony which demonstrated that the movement of the bus was not unusual or violent, but that he merely removed his foot from the brake and the bus began to move forward. Such actions cannot be viewed to demonstrate that the bus moved unusually or violently. Similarly, the bus operator’s accident report is consistent with defendant’s claim that the movement alleged is no different than the jerks and jolts commonly experienced in city bus travel. This proof is consistent with the videotape capturing the happening of the incident. The videotape depicts, *inter alia*, that the bus did not move any significant distance, and that plaintiff was not propelled any distance since it appears that she fell where she was standing, and is sufficient to establish that the movement of the bus was neither unusual or violent.

In opposition, plaintiff has failed to raise any material issues regarding defendant's negligence. Plaintiff's proof consists only of her own characterization of the bus's movement, along with the affidavit of her aide, Ms. Hu describing the nature of the movement of the bus as sudden and abrupt. In accordance with well-established precedent, such proof is insufficient to raise a triable issue of fact (*see Taylor v. Westchester St. Transport Co., Inc.*, 276 AD 874 [2nd Dept. 1949]).

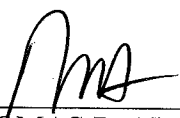
Finally, Ms. Hu's statement that the bus moved before plaintiff was seated is of no significance since the bus operator was "not required to wait until the plaintiff found a seat before proceeding," (*see McLeod v. County of Westchester*, 38 AD3d 624, 625 [2nd Dept. 2007]).

Accordingly, it is hereby:

ORDERED that the motion (No. 002) by defendants NEW YORK CITY TRANSIT AUTHORITY and JOHN DOE is granted and the complaint against them is dismissed; and it is further

ORDERED that the Clerk enter judgment accordingly.

ENTER,



HON. THOMAS P. ALIOTTA, J.S.C.

DATED: January 28, 2020