Dayan v MTA Bus Co.
2020 NY Slip Op 31715(U)
May 29, 2020
Supreme Court, New York County
Docket Number: 156765/2016
Judge: Lisa A. Sokoloff

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

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ISAAC DAYAN,

Plaintiff — Index No.: 156765/2016

-against- — Mot. Seq. 1

MTA BUS COMPANY,

Defendant.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Defendant's Motion / Affirmation	15-25
Plaintiff 's Opposition / Affirmation	26
Defendant's Affirmation in Reply	27

J. Sokoloff:

In this motor vehicle action, defendant, MTA Bus Company (MTA) moves for an order, pursuant to CPLR 3212, for summary judgment dismissal of the complaint.

Background

On March 25, 2016, at approximately 5:30 p.m., plaintiff was a passenger on the QM4 bus, owned and operated by MTA. While traveling on the bus, he alleges to have fallen and injured himself as a result of movement on the bus.

Plaintiff's Municipal Hearing Transcript

Pursuant to General Municipal Law § 50-h, on October 19, 2016, plaintiff testified at a hearing (10/19/16 hearing tr, defendant exhibit D). Specifically, plaintiff testified that he boarded the bus at approximately 5:30 p.m., at 45th Street & 6th Avenue, put his Metrocard in the card box to pay for the ride, and started walking towards a seat (*id.* at 31, 39-40). As plaintiff proceeded to a seat, the bus stopped, and he fell backwards injuring himself (*id.* at 33). Plaintiff

testified "I remember I took a few steps towards the seat. All of sudden the bus just came to, like, a sudden stop. It was a very, very hard stop" ". . . I fell backwards. And my head slammed into the fare box. And I fell down toward the step" (*id.* at 33). Plaintiff took no more than two or three steps before the accident occurred (*id.* at 35). Plaintiff was "bleeding profusely" from the back of his head (*id.* at 44). The bus operator claimed that a vehicle had cut the bus off, though plaintiff did not observe the car (*id.* at 37-38). The bus operator and someone else said that a car cut off the bus (*id.* at 45).

On June 27, 2018, plaintiff appeared for an examination before trial (EBT) in this case (6/27/18 EBT tr) (defendant exhibit E). During the deposition, plaintiff testified that he "got on the bus, . . . put the Metrocard in the machine (indicating) and . . . just started walking towards the seats" (6/27/18 EBT tr at 36). When asked what happened next, plaintiff testified, "[t]he bus pulled out of the, um, stop and all of a sudden I had like a sharp stop. And I remember I flew backwards (indicating) and my head smashed into the fare box and I was almost like mangled on the top of the steps" (*id.* at 37). Plaintiff testified that his "whole body felt twisted and . . . [the] back of head was bleeding heavily bleeding. [His] arm was full of blood, [his] head was full of blood" (*id*). The EBT transcript continues:

Q. Was the bus moving at all, when you hit the fare box?

* * *

A. Um, it must have been - - I mean just when the brake, when the bus stopped that is when I flew backwards. So it must have been moving.

Q. Did you see anything besides the interior of the bus when the bus made a sharp stop . . .?

A. No.

Q. Did you ever learn why the bus made a sharp stop?

A. Yes.

Q. What was the reason?

A. The driver claimed that somebody cut him off.

Q. Another vehicle?

A. Yes.

(*id.* at 38). Plaintiff further testified that he did not know how fast the bus operator was traveling during that short period of time (*id.* at 43).

Testimony of William Royston

On March 25, 2016, William Royster[1] testified on behalf of MTA (3/25/16 Royston dep, defendant exhibit F). Royster testified that at the time of the accident, he was employed by MTA as a bus operator and was operating the bus QM4 bus on the day in question (*id.* at 5-7). Royster testified that the incident occurred between 45th and 46th Streets on 6th Avenue (*id.* at 9). According to Royster, when plaintiff boarded the bus, he was the only person at that bus stop, and five other people already on board (*id.*).

Royster further testified that he had a brief conversation with plaintiff as he entered the bus, and then plaintiff proceeded to his seat (*id.* at 10-11). After traveling four or five car lengths, in the right lane of moving traffic, Royster testified that he brought the bus to a stop at a red light (*id.* at 11-12). When the light turned green, Royster began to proceed when a car came from the left and cut in front of the bus (*id.* at 12-13). Royster made a quick decision within "seconds" to stop the bus (*id.* at 13-14). Royster testified that at that time, he was traveling approximately five miles per hour, but he did not know if he applied the brakes gradually, hard or soft (*id.* at 14).

[1] While defendant submits the deposition of William Royster, it appears defendant inadvertently refers to Royster as William Royston in its moving papers.

Immediately after stopping the bus, he saw plaintiff had hit his head and fell in the stairway by the fare box (*id.* at 14-15).

Supervisor's Accident Report

A "Supervisor's Accident/Crime Investigation Report" was filed after the incident (Report) (3/25/16 Report, defendant exhibit G). According to the Report, upon the supervisor's arrival, the bus was found midblock on 6th Avenue between 45th and 46th Streets. Other than plaintiff, no other customers, pedestrian or bus operator claimed injury. There was no debris found on the roadway. Blood was found on the floor of the bus. In describing the incident the Report states that the injured customer was walking towards the front of the bus to ask the bus operator a question, then turned and was walking back when the bus stopped, causing him to fall backwards. Royster states that a car came from his left side causing him to press the brakes.

Verified Bill of Particulars

According to the verified bill of particulars dated March 9, 2017, as a result of the accident, plaintiff sustained a laceration on the back of the scalp, a head contusion with loss of consciousness with post-concussion syndrome (3/9/17 verified bill of particulars, ¶ 9 & b, defendant exhibit C). Plaintiff suffered headaches, dizziness and poor concentration. The eye examination reveals vision problems resulting in blurry vision in the right eye (*id.*). Plaintiff sustained a fracture to the fourth finger on his left hand, as well as a lumbosacral sprain resulting in partial permanent disability of the lumbar spine, a cervical sprain resulting in partial permanent disability of the cervical spine, as well as sprains to both the right and left knees (verified bill of particulars dated March 9, ¶ 9a & b). As a result of the accident, plaintiff claims he sustained a permanent consequential limitation of the use of his neck, back, left knee and eye and sustained a significant limitation of use of his neck, back, left knee and eye (*id.* at ¶ 14).

Discussion

In order to grant summary judgment, there must be no material or triable issues of fact presented. It is well established that "'[t]he 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 eliminate any material issues of fact'" (*Wolff v New York City Tr. Auth.*, 21 AD3d 956, 956 [2d Dept 2005], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The party opposing the motion must then come forward with sufficient evidence to create an issue of fact for the consideration of the jury (*Pinto v Pinto*, 308 AD2d 571, 572 [2d Dept 2003]). When there is any doubt as to the existence of triable issues, summary judgment should not be granted (*McCummings v New York City Tr. Auth.*, 81 NY2d 923 [1993]).

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, the plaintiff must establish that the movement consisted of a jerk or lurch that was unusual and violent" (*Dowdy v MTA-Long Is. Bus*, 123 AD3d 655, 655 [2d Dept 2014], quoting *Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 830 [1995]). Simply "characterizing the stop as unusual and violent" is not enough (*Mastrantonakis v Metropolitan Trans. Auth.*, 170 AD3d 823, 824 [2d Dept 2019]; *see also Atterbury v Metropolitan Trans. Auth.*, 180 AD3d 433 [1st Dept 2020]). "There must be 'objective evidence of the force of the stop sufficient to establish an inference that the stop was 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'" (*Mastrantonakis,* 170 AD3d at 824-825, quoting *Urquhart*, 85 NY2d at 829-830).

Defendant argues that plaintiff was unable to estimate the rate of speed that the bus was going at the time of the accident; and further, that the only evidence as to the nature of the stop

was plaintiff's description that it was "a very, very hard stop" or a "sharp" stop. Based on this limited evidence, which is merely plaintiff's characterization, defendant contends that it has made a prima facie showing that the stop which caused the plaintiff to fall was nothing more than a jerk or jolt commonly experienced in city bus travel.

"In seeking summary judgment dismissing the complaint, however, common carriers have the burden of establishing, prima facie, that the movement of the vehicle was not unusual and violent" (*id.* at 825, citing *Burke v MTA Bus Co.*, 95 AD3d 813, 813 [2d Dept 2012]; *Guadalupe v New York City Tr. Auth.*, 91 AD3d 716, 717 [2d Dept 2012 [citation omitted]). "While sudden jerks and jolts in the movement of public conveyances are among the normal incidents of travel, there is a point at which such movements are so unusually forceful that they give rise to a presumption of negligence, which defendant must rebut" (*Rountree v Manhattan & Bronx Surface Tr. Operating Auth.*, 261 AD2d 324, 326 [1st Dept 1999]). "At precisely what point such violent movements lose their character as incidents reasonably to be expected during the course of travel and assume the status of actionable negligence is a question of fact to be determined in the light of the surrounding circumstances" (*Harris v Manhattan & Bronx Surface Tr. Operating Auth.*, 138 AD2d 56, 58 [1st Dept 1988]).

Testimony that provides objective evidence of the force of the stop may be sufficient to establish and inference that the stop was extraordinary and violent, which can be attributed to the negligence of defendant (*see e.g.*, *Brown v New York City Tr. Auth.*, 174 AD3d 775 [2d Dept 2019]; *Branda v MV Pub. Transp., Inc.*, 139 AD3d 636 [1st Dept 2016] [testimony describing the force of the bump raised a question of fact as to whether the movement of a van was unusual and violent]; *Weston v Castro*, 138 AD3d 517 [1st Dept 2016] [the parties' conflicting testimony

regarding the force of the stop, created an issue of fact regarding whether the rapid change in speed was unusual or violent as opposed to the common jolts and jerks of city travel]).

Plaintiff counters that his testimony provides objective evidence that the force of the jolt was extraordinary and violent and of a class other than those jerks and jolts commonly experienced in city bus travel, particularly, where as here, his body was propelled backwards several feet causing him to strike and lacerate his head on the fare box, and suffer a number of permanent injuries, all of which is attributable to the negligence of defendant (*Fonesca v Manhattan & Bronx Surface Trans. Operating Auth.*, 14 AD3d 397, 397 [1st Dept 2005] [81-year old plaintiff testified he suffered a fracture hip and femur as well as cerebral trauma as a result of a sudden stop when a bus "stopped hard"]).

Defendant also argues that it has established that the bus operator was faced with an emergency situation and is precluded from liability under these circumstances. "It is well settled that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, the actor may not be found negligent if the actions are reasonably prudent under the emergency circumstances with which he or she is confronted" (*Edwards v New York City Tr. Auth.*, 37 AD3d 157, 158 [1st Dept 2007]).

In "emergency doctrine" cases that have been appealed to the Court of Appeals, first they examine whether there is a qualifying emergency and if so, the question is left for a jury. Green v MTA Bus, 26 NY3d 1061 [2015](summary judgment found inappropriate where emergency doctrine presents question of fact for jury); *Caristo v Sanzone*, 96 NY2d 172, 175[2001]; *Kuci v MABSTOA*, 88 NY2d 923, 924[1996] (the reasonableness of conduct in face of emergency is for the jury).

"[E]xcept in the most egregious of circumstances, an evaluation of the reasonableness of a defendant driver's reaction to an emergency is normally left to the trier of fact" (*Maisonet v Roman*, 139 AD3d 121, 125 [1st Dept 2016]).

Royster testified that when the light had turned green, he had begun to proceed when a vehicle travelled across two lanes, and cut the bus off forcing Royster to stop the bus abruptly. Plaintiff does not rebut this testimony, but recalled the bus driver and another person telling him that a car had cut the bus off. It has been held that "[t]he sudden unexpected swerving of the car into the bus's path requir[ing a] bus driver to take immediate action, … [including] pressing the brake with enough force to prevent a collision" with that vehicle may be considered "a reasonable response to the emergency, which was not of [the bus operator's] own making" (*Santana v Metropolitan Transp. Corp.*, 170 AD3d 551, 552 [1st Dept 2019]; *Hotkins v New York City Tr. Auth.*, 7 AD3d 474 [1st Dept 2004] [finding driver who stepped hard on his brakes to avoid a vehicle that cut in front of him reasonably acted in an emergency situation not of his making] *cf. Tallant v Grey Line N.Y. Tours Inc.*, 67 AD3d 497, 497 [1st Dept 2009]). However, "speculation concerning the possible accident-avoidance measures of a defendant faced with an emergency" is insufficient to defeat summary judgment (*Cruz v MTLR Corp.*, 111 AD3d 568, 568 [1st Dept 2013]).

The court finds that considering the facts in the light most favorable to the nonmoving party, it is clear that the defense claims an emergency situation. Nonetheless, there remains questions of fact which warrant denial of the summary judgment motion. Specifically, the bus driver did not recall what level of pressure he applied to the brakes when stopping the bus (*see Weston v Castro*, 138 AD3d 517, 519 [1st Dept 2016] [question of fact exists "where the parties gave conflicting accounts of the force of the stop"]). Further, plaintiff has done more than

merely characterize the stopping of the bus as sharp or very hard. The force of the stop caused plaintiff to: fall back into the fare box, lacerating the back of his head; permanently impair his vision; and suffer spinal and knee damage (*see Harris*, 138 AD3d at 61 [finding question of fact where the "force of propulsion" was great enough to crush plaintiff's ribs, among others]). Additionally, a question remains as to whether the bus operator was, in fact, faced with an emergency when the bus was cut off by another vehicle. Plaintiff testified that he did not see the other vehicle that allegedly cut off the bus. Thus, "whether the driver was confronted with a 'sudden and unforeseen occurrence' to which the emergency doctrine is applicable is a question of fact for the factfinder" (*Gutierrez v Hoyt Transp. Corp.*, 117 AD3d 420, 421 [1st Dept 2014]; *Weston*, 138 AD3d at 518-519). Therefore, the motion to dismiss the motion for summary judgment is denied.

Conclusion

Accordingly, it is

ORDERED that the motion by defendant Metropolitan Transit Authority for summary judgment dismissing the complaint is denied.

Dated: May 29, 2020

ENTER:

Hon. Lisa A. Sokoloff A.J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION		
	☐	GRANTED	☒ DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE