| **McGrory-Buckley v Delta Air Lines, Inc.** |
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| 2021 NY Slip Op 33127(U) |
| November 24, 2021 |
| Supreme Court, Queens County |
| Docket Number: Index No. 713584 2019 |
| Judge: David Elliot |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS Part 14
Justice

SHARON MCGRORY-BUCKLEY, ano
Plaintiff(s),

-against-

DELTA AIR LINES, INC.,
Defendant(s).

Index No. 713584 2019

Motion Date September 7, 2021

Motion Cal. No. 12

Motion Seq. No. 1

The following papers were read on this motion by defendants seeking summary judgment dismissing plaintiffs' complaint, pursuant to CPLR 3212.

| | Papers Numbered |
|---|---|
| Notice of Motion - Affirmation - Exhibits ........................................ | E27-E49 |
| Answering Affirmation .......................................................... | E52-E53 |
| Reply Affirmation .................................................................. | E55 |

Plaintiff, Sharon McGrory-Buckley, seeks damages for personal injuries sustained when she was allegedly caused to lacerate her shin while boarding a shuttle bus, owned by defendant, Golden Touch Transportation of NY, Inc. (Golden Touch), after arriving on a Delta Air Lines flight, at LaGuardia Airport, on January 16, 2019. Plaintiff alleges that her injury was caused by a defective step on the bus.

Defendant moves for summary judgment, dismissing plaintiff's complaint, on the ground that no triable issue of fact exists as to its liability for the accident, as defendant asserts there was no defective condition, and, if there was, it neither created the defective condition, nor did it have constructive notice of any such condition in time to have corrected it prior to the accident. Plaintiff opposes.

"[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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). On defendants' motion for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving plaintiffs (*see Monroy v Lexington Operating Partners*, LLC, 179 AD3d 1053 [2d Dept 2020]; *Rivera v Town of Wappinger*, 164 AD3d 932 [2d Dept 2018]: *Boulos v Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]). Credibility issues regarding the circumstances of the subject action requires resolution by the trier of fact (*see Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]; *Martin v Cartledge*, 102 AD3d 841 [2d Dept 2013]), and the denial of summary judgment.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp*., 3 NY2d 395, 404 [1957]; *see also, Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Charlery v Allied Transit Corp.*, 163 AD3 914 [2d Dept 2018]; *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

A defendant property owner who moves for summary judgment has the initial burden of establishing that it neither created the alleged hazardous, defective condition, nor had actual or constructive prior notice of its existence (*Taliana v Hines REIT Three Huntington Quadrangle, LLC*, 197 AD3d 1349, 1351 [2d Dept 2021]; *Griffin v PMV Realty, LLC*, 181 AD3d 912 [2d Dept 2020]; *Steele v Samaritan Found., Inc.*, 176 AD3d 998 [2d Dept 2019]). Since "[a] finding of negligence may be based only upon the breach of a duty. If, in connection with the acts complained of, the defendant owes no duty, the action must fall"

(*Darby v Compagnie Nat'l. Air France*, 96 NY2d 343, 347 [2001]; *see Plainview Props. SPE, LLC v County of Nassau*, 181 AD3d 731 [2d Dept 2020]; *Pinto v Walt Whitman Mall, LLC*, 175 AD3d 541 [2d Dept 2019]; *Federico v Defoe Corp.*, 138 AD3d 682 [2d Dept 2016]*; Abrams v Bute*, 138 AD3d 179 [2d Dept. 2016]). The existence of a duty is a threshold question of law for the court to determine (*see Espinal v Melville Snow Contractors*, 98 NY2d 136 [2002]; *Abbott v Johnson*, 152 AD3d 730 [2d Dept 2017]).

Defendants contend that the submitted evidence established that no defect existed, and, therefore, no duty to plaintiff existed. Further, defendants contend that even if a defect did exist, they neither caused nor created the alleged defect, nor were they on actual or constructive notice of any alleged defect (*see Kelly v Roy C. Ketcham High Sch.*, 179 AD3d 653 [2d Dept 2020]). While defendants can establish prima facie "entitlement to judgment as a matter of law by submitting evidence that no dangerous or defective condition existed" (*Han Bin Hu v Bravo Food, Inc.*, 170 AD3d 818, 819 [2d Dept 2019]; *see Fuentes v Theodore*, 165 AD3d 560 [2d Dept 2018]), they have failed to do so, as they have failed to demonstrate "the absence of any material issues of fact" as to the accident having occurred on "Bus #8122."

The evidence propounded on that issue rested in large part on the unsworn Fixed Route Vehicular Incident/Accident Report, dated January 18, 2019, allegedly signed by Alassane Sow, the alleged employee/driver of the subject vehicle involved in this incident. Mr. Sow has not been presented for deposition, as defendants claim he has returned to Africa. The proffered Report does not contain his "employee number,' nor was it signed by any "safety manager or GM signature," as required by the Report. Further, according to the testimony of Derrick McCollum, an employee of Golden Touch, and "the account manager for their Delta contract," the Report was filled out by McCollum, pursuant to information gleaned from a telephone conversation with Dhanraj Ragbir, a Supervisor for Golden Touch, who was on the scene that day, and told McCollum what Sow allegedly told him. Without proof that Sow actually signed, and acknowledged the truth to the facts included in, such Report, it consists of inadmissible hearsay. This is especially so as Ragbir, at his deposition on December 23, 2020, testified that the first time he learned the number of the bus allegedly involved in the incident was at that deposition.

Similarly, defendants' expert opinions were based upon examinations of photographs of "Bus # 8122," which may not have been the bus involved in the accident. As this question of fact survives defendants' arguments, such expert opinions are unfounded at this time.

Plaintiff claims that she was injured when she was attempting to step onto the second step of the shuttle bus. Contrary to defendants' claim that they "met their prima facie entitlement to summary judgment with evidence that this (bus) was a single-step riser which, standing alone, is not hazardous as a matter of law," defendants have failed to offer any records, writings, or testimony that would evidence Sow's assignment to "Bus # 8122" on

the subject date, or that the entire fleet of shuttle buses at Delta, on that date, were of the same model, and similarly designed and constructed as was "Bus # 8122." As such, defendants' "own submissions" demonstrate "that there are triable issues of fact" in this regard (*Yao Zong Wu v Zhen Jia Yang*, 161 AD3d 813, 814 [2d Dept 2018]; *see Lozado v St. Patrick's RC Church*, 174 AD3d 879 [2d Dept 2019]; *Karwowski v Grolier Club of City of N.Y.*, 144 AD3d 865 [2d Dept 2016]), warranting denial of their motion for summary judgment.

Defendants also offer the Port Authority "Patron Accident or Property Damage Report" prepared by P. O. Anthony Espinal, a Port Authority employee, who responded to the scene of the incident. Officer Espinal was deposed on March 25, 2021, and revealed that he received information about the incident from one Cristina Pidhoeky, a "Delta supervisor," and interviewed plaintiff at the scene. At the deposition, Officer Espinal stated that he had no independent recollection of the investigation he conducted, and was unable to locate his "memo book" to refresh his memory of the incident. Reviewing a copy of the report he prepared, he stated that he received information on the incident from one Cristina Pidhoeky, a "Delta supervisor," who "reported the accident" and gave him "all the information to fill out the report," and, also, spoke to plaintiff at the scene. While Officer Espinal could not specifically remember who gave him which information he used for the Report, he believed that the bus number was told to him by plaintiff. However, plaintiff, at her deposition, testified that she "can't describe the bus," raising a question of fact as to who referenced the bus number "8122." "A court may not weigh the credibility of witnesses on a motion for summary judgment, unless it clearly appears that the issues are not genuine, but feigned" (*Conciatori v Port Auth. of N.Y. & N.J.*, 46 AD3d 501, 503 [2d Dept 2007] quoting *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). No such claim is made herein.

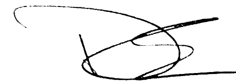
Irrespective of whether defendants were able to produce admissible evidence that Bus # 8122 was the correct shuttle bus, they have failed to proffer evidence of a lack of constructive notice herein. "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599 [2008]; *see Bruni v Macy's Corporate Servs., Inc.*,134 AD3d 870 [2015]; *Bergin v Golshani,* 130 AD3d 767 [2015]; *Santiago v HMS Host Corp.*, 125 AD3d 838 [2015]). In this regard, defendants contend that the proffered testimony of the general practice of daily inspections of their buses serves to rule out constructive notice of any hazard thereon, citing several cases which turned on testimony that a "clean" inspection was carried out "minutes before" the accident (*see Steisel v Golden Reef Diner*, 67 AD3d 670 [2d Dept 2009]*; Sloane v Costco Wholesale Corp.*, 49 AD3d 522 [2d Dept 2008]). While a recent inspection can result in a finding of a lack of constructive notice (*see Skerrett v LIC Site B2 Owner, LLC*, – AD3d –, 2021 NY Slip Op. 06386 [2d Dept 2021]), the instant testimony of Mr. Ragbir, *i.e.*, that it was his practice to inspect the buses each morning to "make sure everything works," does not equate to the limited factual

showings in those cited cases, and is not sufficient to be considered the requisite unquestionable evidence that no constructive notice of a defect was had in this matter. Here, there remains a question of fact as to whether Ragbir actually made such an inspection that day on the allegedly offending vehicle, in light of Ragbir's admission that he wasn't aware of which bus was involved in the incident until eleven months after the accident date.

Consequently, defendants have failed to tender sufficient evidence to show the absence of any material issue of fact herein, thereby failing to establish their prima facie entitlement to judgment as a matter of law, and, thus, warranting the denial of their motion for summary judgment (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Rokach v Taback*, 148 AD3d 1195 [2d Dept 2017]; *Pineda v Elias*, 125 AD3d 738 [2d Dept 2015]).

Accordingly, defendants' motion for summary judgment, dismissing plaintiffs' complaint, is denied.

Dated: November 24, 2021



J.S.C.