

Witz v Maier

2011 NY Slip Op 30790(U)

March 22, 2011

Sup Ct, Nassau County

Docket Number: 7865/06

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

RUTH WITZ and BERNARD WITZ,

Plaintiffs,

- against -

THOMAS MAIER, INTER-COUNTY MOTOR
COACH, INC., CIRCUIT CITY STORES INC.,
BROADWAY DINER, RICMAC EQUITIES
CORPORATION, RICMAC EQUITIES, LLP,
BABYLON TRANSIT, INC. and BABYLON
TRANSIT, INC. d/b/a INTER-COUNTY MOTOR
COACH TRANSPORTATION,

Defendants.

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

RUTH WITZ and BERNARD WITZ,

Plaintiffs,

- against -

HORIZON COACH, INC., LJJ REALTY LTD.
and GROUND TRANSAMERICA, INC.,

Defendants.

TRIAL / IAS PART 30
NASSAU COUNTY

Action No. 1

Index No. 7865/06

Motion Sequence No. 00³, 006

Action No. 2

Index No. 11589/07 #3SEQ

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1, 2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u>4, 5</u>
Briefs: Plaintiff's / Petitioner's	<u> </u>
Defendant's / Respondent's	<u>6, 7</u>

The defendants Inter-County Motor Coach, Inc. and Babylon Transit, Inc. and Babylon Transit, Inc. d/b/a Inter-County Motor Coach Transportation move, in Motion Sequence 6 in action #1, index number 7865/06, pursuant to CPLR 3212 for summary judgment dismissing the verified complaint. This motion is supported by the October 6, 2010 affidavits by Fred Denton, the general manager of Inter-County Motor Coach, Inc. and Lola Lenzo Dibner, the office manager of Ground Transamerica, Inc. together with other papers. Both affiants are familiar with the facts and circumstances of this personal injury action involving the claims of both plaintiffs. The plaintiffs claim they were each struck by a sedan owned and operated by the defendant Thomas Maier while they crossed Bethpage Road on foot, in Hicksville, New York. The plaintiffs allege they just returned from a day bus trip to Atlantic City, New Jersey, and were dropped off a bus at Bethpage Road adjacent to Broadway Diner as they did approximately 20 times before December 28, 2005. The plaintiffs also allege they disembarking from the bus, and while attempting to cross Bethpage Road to go to a parking lot owned by the defendant Circuit City Stores, Inc., they were struck by Maier's vehicle.

Inter-County Motor Coach, Inc. and Babylon Transit, Inc. and Babylon Transit, Inc. d/b/a Inter-County Motor Coach Transportation provided proof they engaged in the operation of motor coaches to out-of-state destinations for a decade before 2005, but ceased operating that private line business approximately six months before this December 28, 2005 Hicksville motor vehicle accident. The defense claims the reason for

that change was excessive insurance costs to operate the motor coaches, and adds Ground Transamerica, Inc. Inter-County Motor Coach, Inc. and Babylon Transit, Inc. and Babylon Transit, Inc. d/b/a Inter-County Motor Coach Transportation also supplied evidence they did not own nor operate the private line bus which transported the plaintiffs. The defense points to the March 5, 2010 deposition testimony of Clemente D'Alessio, the owner and president of the defendant Horizon Coach, Inc., in the related personal injury action brought by the same plaintiffs which is directed to be jointly tried with the instant underlying action. D'Alessio testified the bus involved in the litigation was owned by Horizon Coach, Inc. and operated by its employee. Inter-County Motor Coach, Inc. and Babylon Transit, Inc. and Babylon Transit, Inc. d/b/a Inter-County Motor Coach Transportation provided proof their sole business was to contract with the County of Suffolk to provide fixed route public transportation services, and operate public buses along designated local routes for the Suffolk County Transit.

The defendant Ground Transamerica, Inc. moves, in Motion Sequence 3 in action #2, index number 11589/07, pursuant to CPLR 3212 for summary judgment dismissing the verified complaint. This motion is supported by the September 23, 2010 affidavit by Dibner, the January 8, 2010 deposition testimony of the plaintiff Ruth Witz and March 5, 2010 deposition testimony of D'Alessio. together with other papers. The plaintiffs claim Ground Transamerica, Inc. organized the trip, and chartered the private bus from Horizon Coach, Inc. which transported the plaintiffs.

Ground Transamerica, Inc. provided proof it does not own nor operate the bus from which the plaintiff disembarked immediately prior to the December 28, 2005 accident. Ground Transamerica, Inc. submitted evidence its only role was to organize the daily bus trips to Atlantic City, to wit advertising, ticket sales at certain Long Island businesses and telephone reservations from prospective passengers. Ground Transamerica, Inc. contends it owed no duty of care to either plaintiff, and if it did owe such a duty that duty terminated when the plaintiffs exited the bus safely to the sidewalk. Ground Transamerica, Inc. asserts, if the plaintiffs allege liability and damages against it as a principal for Horizon Coach, Inc., it is still not responsible because a principal is not liable for the acts of independent contractors.

The plaintiffs oppose both motions. The plaintiffs support opposition with an October 14, 2010 affirmation by plaintiff counsel together with other opposition papers, including the August 6, 2010 affidavit and January 8, 2010 deposition testimony by Ruth Witz, the January 8, 2010 deposition testimony by Bernard Witz, the July 29, 2010 affidavit by Douglas Rasmussen, an investigator retained by the plaintiff's law firm, the February 9, 2009 deposition testimony by the defendant Loukas Renieris, an employee of the defendant Broadway Diner and its former owner at the time of the December 28, 2005 accident, the July 1, 2010 deposition testimony by Robert Serina, a Hampton Jitney employee and former employee of Horizon Coach, Inc. at the time of the December 28, 2005 accident, the March 5, 2010 deposition testimony of D'Alessio, the February 22,

2010 deposition testimony of Maier and the March 5, 2010 deposition testimony by Dibner. The plaintiffs contends Babylon Transit, Inc. and Babylon Transit, Inc. d/b/a Inter-County Motor Coach Transportation fails to show when they ceased the bus round trip from Broadway Diner to Atlantic City, and when that trip came under the control of Ground Transamerica, Inc. The plaintiffs assert a “concerted action” doctrine or theory regarding the liability of Babylon Transit, Inc. and Babylon Transit, Inc. d/b/a Inter-County Motor Coach Transportation, to wit they acted in furtherance of their common commercial interests which put the plaintiffs in an unsafe location. The plaintiffs argues proximate causes for the accident and duties owed by a bus company apply to Babylon Transit, Inc. and Babylon Transit, Inc. d/b/a Inter-County Motor Coach Transportation and Ground Transamerica, Inc. The plaintiffs aver, while Horizon Coach, Inc. was an independent contractor on December 28, 2005, nonetheless Ground Transamerica, Inc. can be held vicariously liable here for the negligence of Horizon Coach, Inc. under an implied agency or agency by estoppel theory. The plaintiffs point out discharging the plaintiffs in that unsafe location relative their parked car was negligence. The plaintiffs insist Babylon Transit, Inc. and Babylon Transit, Inc. d/b/a Inter-County Motor Coach Transportation and Ground Transamerica, Inc. had significant control over the bus stop location. The plaintiffs contend whether the plaintiffs’ actions were superceding causes or whether their actions were a normal consequence of the circumstances on December 28, 2005 are generally questions for the trier of fact, however

it was foreseeable by the defendants the plaintiffs would cross the street where they did prior to the accident.

Inter-County Motor Coach, Inc. and Babylon Transit, Inc. and Babylon Transit, Inc. d/b/a Inter-County Motor Coach Transportation reply to the plaintiffs' opposition with a November 9, 2010 affirmation by defense counsel. Inter-County Motor Coach, Inc. and Babylon Transit, Inc. and Babylon Transit, Inc. d/b/a Inter-County Motor Coach Transportation note the plaintiffs do not dispute these defendants are entitled to summary judgment. These defendants reiterate their previous assertions, including the contention these defendants were not involved in the December 28, 2005 accident.

The defendant Broadway Diner opposes the plaintiffs' opposition to the motion by Ground Transamerica, Inc. in a November 23, 2010 affirmation by defense counsel. Broadway Diner contends the plaintiffs misstate the facts as there is no evidence showing it had any input in the designation of the pick up and drop off spot for passengers.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to both motions. The Second Department holds:

A common carrier owes a duty to an alighting passenger to stop at a place where the passenger may safely disembark and leave the area (*see e.g. Miller v Fernan*, 73 NY2d 844, 846 [1988]). Thus, a bus company may be held liable for a passenger's injuries where such passenger is struck by a car upon crossing the street after having alighted from the bus at an unscheduled stop (*see Miller v Fernan, supra*), or where a defect in the condition of the ground in the immediate vicinity where a passenger alighted from the bus caused the passenger to trip and fall (*see Dunham v City of New York*, 262 AD2d 444 [1999]; *Blye v Manhattan & Bronx Surface Tr. Operating Auth.*, 124 AD2d 106 [1987], *affd* 72 NY2d 888

[1988]; *Bundy v City of New York*, 18 AD2d 799 [1963]). However, once a passenger safely disembarks from a bus at a designated bus stop, the bus company's duty to the passenger has been completed, provided that the bus company exercises no control over the designation of the bus stop (*see Hanley v East Moriches Union Free School Dist. II*, 275 AD2d 389, 391 [2000]; *Rodriguez v Manhattan & Bronx Surface Tr. Operating Auth.*, 117 AD2d 541, 542 [1986]; *Sewar v Gagliardi Bros. Serv.*, 69 AD2d 281, 286 [1979]; *Squitire v Middle Country Cent. School Dist.*, 4 Misc 3d 1025 [A], 2004 NY Slip Op 51044[U] [2004])
Rios v. City of New York, 33 A.D.3d 780, 781-782, 822 N.Y.S.2d 638 [2nd Dept, 2006].

Here, the bus stop at issue was a designated stop, but none of these defendants retained the ultimate authority to designate and eliminate this bus stop. As such, once the plaintiffs safely disembarked at the designated bus stop, any alleged duties to these plaintiffs was complete. Moreover, Inter-County Motor Coach, Inc. and Babylon Transit, Inc. and Babylon Transit, Inc. d/b/a Inter-County Motor Coach Transportation provided proof in admissible form showing they ceased the bus round trip operations from Broadway Diner to Atlantic City before the December 28, 2005 accident. The Court finds Inter-County Motor Coach, Inc. and Babylon Transit, Inc. and Babylon Transit, Inc. d/b/a Inter-County Motor Coach Transportation and Ground Transamerica, Inc. establish *prima facie* showing of entitlement to summary judgment as a matter of law. In opposition, the plaintiffs fail to demonstrate any connection between the December 28, 2005 accident and Inter-County Motor Coach, Inc. and Babylon Transit, Inc. and Babylon Transit, Inc. d/b/a Inter-County Motor Coach Transportation. In opposition, the plaintiffs fail to demonstrate there are any material issues of fact to be resolved by a trier of fact. The plaintiffs' assertions of causation, "concerted action" doctrine or theory and

vicariously liability are based upon speculation and not showings of material issues of fact. The plaintiffs have not presented evidence showing the place where the plaintiffs disembarked was unsafe nor an unscheduled stop. The plaintiffs have not submitted evidence showing these defendants exercised control over the designation of the bus stop.

Accordingly, both motions are granted.

So ordered.

Dated: **March 22, 2011**

ENTER:

J. S.

ENTERED

FINAL DISPOSITION

NON FINAL DISPOSITION xxx MAR 25 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**