

Aleria v Port Auth. of N.Y. & N.J.

2014 NY Slip Op 30272(U)

January 27, 2014

Supreme Court, New York County

Docket Number: 103117/11

Judge: Louis B. York

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131/2014

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: **LOUIS B. YORK**
J.S.C. Justice

PART 2

Index Number : 103117/2011
ALERIA, GAYLE
vs.
PORT AUTHORITY NEW YORK
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is *denied in accordance with the accompanying decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JAN 31 2014
NEW YORK
COUNTY CLERKS OFFICE

Dated: 1/27/14

Fly
_____, J.S.C.

LOUIS B. YORK
 NON-FINAL DISPOSITION

1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
GAYLE ALERIA,

Index No. 103117/11

Plaintiff,

- against -

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY and PETER PAN BUS LINES, INC.,
and T.U.C.S. CLEANING SERVICE, INC.,

Defendants.

-----X
THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY,

Index No. 509516/12

Third-Party Plaintiff,

FILED

- against -

JAN 31 2014

T.U.C.S. CLEANING SERVICE, INC.,

Third-Party Defendant.

**NEW YORK
COUNTY CLERK'S OFFICE**

-----X
YORK, LOUIS, J.:

Motion sequence numbers 004, 005, and 007 are consolidated for disposition.

Plaintiff Gayle Aleria alleges that she sustained a fractured kneecap and other injuries when she fell in the bus terminal at defendant/third-party plaintiff the Port Authority of New York and New Jersey (Port Authority). Plaintiff traveled to Port Authority on a bus belonging to defendant Peter Pan Bus Lines, Inc. (Peter Pan). Defendant/third-party defendant T.U.C.S. Cleaning Service, Inc. (TUCS) had the job of cleaning the entire Port Authority.

Peter Pan moves for summary judgment dismissing the complaint, cross claims, and counterclaims (motion sequence number 004). Port Authority moves for summary judgment dismissing the complaint and cross claims, on its claim for indemnification against Peter Pan and

TUCS, and on its claim that Peter Pan and TUCS breached their respective contracts with Port Authority by not buying insurance for Port Authority (motion sequence number 005). TUCS moves for summary judgment dismissing the complaint, cross claims, counterclaims, and the third-party complaint (motion sequence number 007).

On April 18, 2010, plaintiff and her daughter traveled on a Peter Pan bus from Farmingdale, Connecticut, to Port Authority in New York City. The bus stopped at gate 13 at the bus terminal and plaintiff, in a line with other passengers in front of and behind her, walked down the bus steps out of the bus and turned to the right to retrieve her suitcase from the bus's baggage compartment. As she was walking, her left ankle rolled, her foot went off the curb, and she fell, landing on her right knee and striking other parts of her body. An ambulance took plaintiff to a hospital.

An officer of the Port Authority spoke to plaintiff at the accident site and filled out an accident report form. The form recites that plaintiff said that she went to get her "bag out from under the bus and did not see the one step. I twisted my left ankle on the curb and landed on my right knee and left hand" (Port Authority exhibit A). The officer wrote that the area was "dry and clear of debris, not well illuminated. The curb/step is covered in safety/warning yellow rubber material and the street level is covered in safety/warning red rubber material" (*id.*).

The officer's report is attached to plaintiff's amended notice of claim, served on Port Authority. Plaintiff's amended notice of claim states that while she was "walking in line with other passengers on the loading/unloading platform to retrieve her baggage from under the bus, she was caused to trip and fall on the step from the loading/unloading platform to the roadway" (Port Authority exhibit A at 1). "As a result of walking in line behind other passengers, claimant was unable to see and appreciate the step and [Port Authority] failed to provide any warnings of the impending step that could be appreciated by a passenger following another passenger in line . . ." (*id.*). "Any warnings on the floor were inadequate and so ill maintained and cleaned that they failed to provide any warning at all . . ." (*id.*). The notice of claim further claims that Port

Authority did not properly design, install, construct, inspect, maintain, clean, and repair the platform and provide a safe means for passengers to exit the bus and retrieve their luggage.

The amended complaint and the first bill of particulars make the same allegations as in the amended notice of claim. The supplemental bill of particulars adds that defendants did not clean and maintain the colored flooring on and about the step, thereby reducing or eliminating any safety benefit that the floor could provide, and that they allowed passengers to walk to the baggage compartment in such close proximity to each other so as to obscure the step.

During her deposition, plaintiff testified that she was "comfortable" getting off the bus (Port Authority exhibit J at 36). "It was dark, but I was okay with walking down the steps onto the pavement" to get the suitcase (*id.*). She said that the curb was dark and that she did not recall its color. Plaintiff testified that there were people in front of her and that she was looking at their backs as she walked towards the baggage compartment before the fall. She was looking straight ahead at a person in front of her. She was "just walking and I was on the ground" (*id.* at 40).

After she fell, plaintiff sat on the curb. Asked to describe the step or curb that she fell off, plaintiff said that it was dark. Asked if anything limited her vision, she said that the area was dark, that the lighting was dark and dull, and that she did not notice any lights at all. She said that she did not see the pavement as she stepped onto it out of the bus. She also said that she did not remember if she saw the pavement or not. Plaintiff stated that the yellow part of the ground was dark and that she did not see the yellow mat.

Bernard D'Aleo and Jorge Reyes, Port Authority's representatives, state in their respective affidavits that they conducted searches, pertaining to gate 13, for reports of previous accidents and complaints about lighting and the condition of the platform and found none. During his deposition, D'Aleo testified that the gates, including gate 13, were inspected every day. On the curb at the bus stop is a yellow safety mat. The mat is a smooth surface interspersed with raised bumps, so its surface is bumpy. D'Aleo was asked if there were "any signs" at the gate "warning passengers getting off the bus to beware of the curb in going into the roadway?"

(Port Authority exhibit P at 55). He answered that the mat on the curb performed that safety function (*id.* at 56). Beneath the curb, on the roadway, is the same kind of mat colored red. D'Aleo stated that the gates, including gate 13, are cleaned three times a day. TUCS sweeps and mops the area, including the yellow mat, every day. More extensive cleaning is done once a year at springtime.

D'Aleo testified that the lighting at gate 13 is "mercury vapor or sodium vapor lighting, equivalent to something you would see in a stadium" (Port Authority exhibit P at 21). There are two light fixtures, one near the front door of the bus and the second toward the rear of the bus. Each light provides 13,600 lumens of light. One lumen is equivalent to one candle power. D'Aleo stated that the lighting at gate 13 is enough to read by. Some daylight penetrates to gate 13, as well as some light from the interior of the bus terminal. There is minimal sunlight.

D'Aleo further testified that he did not know whether the level of lighting was mandated by any administrative code. He stated that the light bulbs are changed once a year, unless one goes out and has to be changed sooner. TUCS changes the light bulbs and otherwise maintains the lights. If a light at gate 13 was not working, there would have been a report of it. There were no such reports.

Jorge Rojas, a TUCS supervisor, testified that grime settles in the valleys of the yellow mat in between the raised bumps. Regular cleaning and mopping does not get rid of all of the grime, which can be removed only by power washing, as part of the extensive yearly station cleaning.

The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once a prima facie showing has been made, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*,

100 NY2d 72, 81 [2003]).

On a motion for summary judgment, the court's task is issue finding rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court determines if bona fide issues of fact exist and does not resolve issues of credibility, which are left for the trier of fact (*Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]). The motion is viewed in the light most favorable to the motion opponent, who is given the benefit of all reasonable inferences that can be drawn from the evidence (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Nevertheless, the court must evaluate whether the issues of fact alleged by the opposing party are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]). Summary judgment is properly granted when the opponent of the motion raises only "tailored" testimony or "feigned" issues of fact (*Perez v Bronx Park S. Assoc.*, 285 AD2d 402, 404 [1st Dept 2001]). Conclusory statements or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]).

A landowner is under a duty to maintain its property in a reasonably safe condition (*Perez*, 285 AD2d at 403). Port Authority's evidence shows that the area where plaintiff fell was reasonably safely maintained. The lights were working and there was a safety mat on the ground warning of the approach to the curb. Plaintiff does not establish that the yellow mat was so dirty that it could not be seen. Plaintiff states that she did not see it because it was obscured by the line of passengers. Plaintiff fails to show that the lighting was insufficient, that the yellow mat did not function as a safety feature, or that there was a defective or dangerous condition. There is no evidence of any defects.

Plaintiff testified at her deposition that the area where she fell was dark, but she did not clearly state that lack of lighting caused her to fall. Thus, the deposition testimony fails to clearly state that the lighting was a causative factor in the accident (*see Hunt v New York City Hous. Auth.*, 280 AD2d 391, 392 [1st Dept 2001]; *Wright v South Nassau Communities Hosp.*,

254 AD2d 277, 278 [2d Dept 1998]). Although plaintiff stated that she did not see the yellow mat, she also said that she was looking at the person in front of her as she walked. "Generally, a plaintiff's firsthand account of the cause of an accident is essential to establish a prima facie case for negligence" (*Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007]). The deposition testimony does not present a prima facie case.

A plaintiff in a negligence case must present a theory of liability and facts in support of the theory on which the jury can base a verdict (*Lynn v Lynn*, 216 AD2d 194, 195 [1st Dept 1995]). There must be evidence establishing that the defendant's negligence was the proximate cause of the harm alleged (*Cosmos, Queens Ltd. v Matthias Saechang Im Agency*, 74 AD3d 682, 684 [1st Dept 2010]). In this case, plaintiff's theory of liability is lacking not only because of the uncertain deposition testimony, but also because of the allegations in the pleadings, which present a different theory of liability than presented in the deposition.

As Port Authority correctly states, the amended complaint, the amended notice of claim, and the bills of particulars do not mention inadequate lighting as causing plaintiff's fall. In general "the prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings" (*Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2d Dept 2010]). Although the officer's report stated that the lighting was not adequate, the pleadings do not mention the lighting and it was not raised as a cause of the accident until plaintiff's deposition. As the First Department once noted "noteworthy in this regard was the circumstance that plaintiff's deposition testimony as to the manner in which his accident occurred contradicted his pleadings" (*Desocio v Fifth Ave. & Fifty Ninth Corp.*, 262 AD2d 67, 67-68 [1st Dept 1999]).

As demonstrated by the questions that Port Authority asked at plaintiff's deposition, it already had notice that the lighting was an issue. The failure to allege lighting in the pleadings does not appear to have been prejudicial to defendants. But the fact remains that the deposition testimony, regarded in a light favorable to plaintiff, does not link the lighting and the fall. The

testimony thus fails to raise an issue of fact to counter the evidence that the lighting was adequate.

Plaintiff's daughter submits an opposing affidavit in which she states that the lighting in the terminal was "very dark and it was hard to see the pavement of the ground outside of the bus" (Plaintiff exhibit B at 2). Since plaintiff does not state that darkness caused her to fall, this affidavit does not raise an issue of fact as to whether darkness caused the accident. For the same reason, the report by the Port Authority officer, which states that the area was not well illuminated, cannot be used to demonstrate the existence of an unsafe condition. Also, the report is unsworn and no excuse is offered for failing to proffer it in admissible form (*see Brown v Smalls*, 104 AD3d 459, 460 [1st Dept 2013]; *Maldonado v Townsend Ave. Enters., Ltd. Partnership*, 294 AD2d 207, 208 [1st Dept 2002]).

The supplemental bill of particulars alleges that defendants were delinquent in allowing passengers to walk to the baggage compartment too close to each other and that, thus, the curb or yellow mat could not be seen. It was not the duty of Port Authority or TUCS to control how the passengers went to get their bags out of the bus. A common carrier such as a bus company has a duty to stop at a place where passengers may disembark in safety and leave the area (*Malawer v New York City Tr. Auth.*, 18 AD3d 293, 294-295 [1st Dept 2005], *affd* 6 NY3d 800 [2006]). The carrier is liable if the bus is parked in a way that forces the passenger to navigate through a dangerous or defective path to board or exit the bus (*id.* at 295). Peter Pan, as a common carrier, has a duty to provide departing passengers with a safe place to exit the bus and collect their bags. However, there is no evidence that the duty was breached. Plaintiff alleges that the method of bag collection was not safe, but she does not plead pushing or crowding. She does not claim that she was unable to find a safe place or that her movements were restricted due to overcrowding (*see Madden v Pine Hill-Kingston Bus Corp.* 288 AD2d 600, 601 [3d Dept 2001]; *Gordon v New York City Tr. Auth.*, 267 AD2d 201, 202 [2d Dept 1999]). Peter Pan shows that it acted reasonably and plaintiff does not counter this showing.

Peter Pan did not have a duty to maintain and repair the area where plaintiff got off the bus. Peter Pan had a licensing agreement with Port Authority. As a licensee, Peter Pan did not take on a duty to maintain the areas unless its agreement stated otherwise (*Venduro v Port Auth. of N.Y. & N.J.*, 57 AD3d 387, 387 [1st Dept 2008]; *Abraham v Port Auth. of N.Y. & N.J.*, 29 AD3d 345, 347 [1st Dept 2006]). The agreement states that lighting, repairs, and maintenance are Port Authority's responsibility (Port Authority exhibit V, ¶ 5).

Under the licensing agreement, Peter Pan agreed to indemnify and hold harmless Port Authority from all claims and demands of third persons, arising out of any default of Peter Pan in performing or observing any provision of the agreement or the use or occupancy of the space by Peter Pan (Port Authority exhibit V, ¶ 9.1). Also, Peter Pan agreed to secure insurance naming Port Authority as additional insured (*id.*, ¶ 9.2).

Under the contract between Port Authority and TUCS, the latter agreed to indemnify and hold harmless Port Authority against all claims and demands of third persons arising out of or in any way connected with the contract and the services and activities of TUCS under the contract (Port Authority exhibit R, ¶ 20). TUCS also promised to take out insurance naming Port Authority as additional insured (*id.*, ¶ 9).

Since Peter Pan did not engage in a default and TUCS's activities under the contract are not implicated, they are not obligated to indemnify Port Authority. Common-law indemnification is not available because Port Authority has not been held vicariously liable and the proposed indemnitors have not been found negligent (*see Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]).

Concerning Port Authority's breach of contract claims, to prove that it procured the required insurance, Peter Pan submits a policy insuring itself which attaches an endorsement. The endorsement entitled, "Additional Insurance Required by Written Contract," defines an insured as a person or organization that "you are required to include as an additional insured on this policy by a written contract or written agreement . . ." (Peter Pan exhibit I). The

endorsement states that the insurance for the additional insured is excess.

Port Authority replies that it is not insured because it is not named in the policy. To qualify as additional insured a person need not be specifically named in the policy (*Kassis v Ohio Cas. Ins. Co.*, 12 NY3d 595, 599-600 [2009]). The policy in this case does not require that Peter Pan provide the insurer with the names of the additional insured parties. Since the licensing agreement provides that Peter Pan shall procure insurance naming Port Authority as additional insured, the language in the endorsement is sufficient to make Port Authority an additional insured.

Under an agreement providing that one party will procure insurance covering another as an additional insured, the insurance for both is assumed to be primary insurance, unless the agreement says otherwise (*Pecker Iron Works of N.Y. v Traveler's Ins. Co.*, 99 NY2d 391, 392 [2003]). A policy that designates one entity a named insured and another an additional insured extends the same protection to each, absent a provision in the policy indicating that the rights or obligations of persons insured should differ based upon such designations (*id.* at 393). The agreement between Peter Pan and Port Authority does not specify what kind of insurance will be provided for the latter. The agreement appears to specify primary insurance for Peter Pan. Therefore, the expectation is that the insurance for Port Authority will be primary (*id.*). The result would be the same if the agreement did not specify any kind of insurance for Peter Pan. However, the policy in this case affords Peter Pan primary coverage, but explicitly provides excess coverage for Port Authority, the additional insured. A party who procures the promised insurance may still be liable for a breach, if the insurance procured does not match the coverage promised (*see Nrecaj v Fisher Liberty Co.*, 282 AD2d 213, 214 [1st Dept 2001]). As the parties do not discuss this aspect of the insurance policy, and the court deems it useful that they should, Port Authority's motion for breach of contract is denied without prejudice.

TUCS does not claim to have procured any insurance covering Port Authority. While Port Authority is not entitled to indemnification or contribution from TUCS or Peter Pan, a claim

for breach of contract based on failure to procure insurance entitles the promisee to out-of-pocket damages caused by the breach (*see McLaughlin v Ann-Gur Realty Corp.*, 107 AD3d 469, 470 [1st Dept 2013]; *Cucinotta v City of New York*, 68 AD3d 682, 684 [1st Dept 2009]). Therefore, Port Authority is awarded summary judgment on liability against TUCS for breach of contract. Damages will be determined later.

The complaint is dismissed as against all defendants. The counterclaims and cross claims are dismissed as against all defendants, except for the claims for breach of contract that Port Authority asserts against Peter Pan and TUCS. Port Authority's claim against Peter Pan is denied and the claim against TUCS is granted on liability.

In conclusion, it is

ORDERED (motion sequence number 004) that the motion by defendant Peter Pan Bus Lines, Inc. for summary judgment dismissing the complaint, counterclaims, and cross claims is granted to the extent that all are dismissed as against said party, except for the third counterclaim for breach of contract by defendant/third-party plaintiff the Port Authority of New York and New Jersey; and it is further

ORDERED (motion sequence number 005) that the motion by defendant/third-party plaintiff the Port Authority of New York and New Jersey for summary judgment

1. dismissing the complaint, counterclaims, and cross claims is granted and all such claims are dismissed as against said party,
2. on contractual and common-law indemnification and contribution is denied,
3. on breach of contract as against defendant Peter Pan Bus Lines, Inc. is denied without prejudice, and
4. on breach of contract as against defendant/third-party defendant T.U.C.S. Cleaning Services, Inc. is granted on liability and damages will be determined later; and it is further

ORDERED (motion sequence number 007) that the motion by defendant/third-party

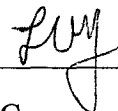
defendant T.U.C.S. Cleaning Services, Inc. for summary judgment dismissing the complaint, counterclaims, and cross claims is granted and all such claims are dismissed as against said party, except for the fourth cause of action in the third-party complaint and the third cross claim by defendant/third-party plaintiff the Port Authority of New York and New Jersey which are not dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

No costs.

Dated: 1/27/14

ENTER:



J.S.C.

FILED
JAN 31 2014
NEW YORK
COUNTY CLERK'S OFFICE