

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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C/kmb

_____AD3d_____

Submitted - February 22, 2011

DANIEL D. ANGIOLILLO, J.P.
ANITA R. FLORIO
JOHN M. LEVENTHAL
ROBERT J. MILLER, JJ.

2010-03657

DECISION & ORDER

Leslie Karen Lariviere, appellant-respondent,
v New York City Transit Authority, respondent-
appellant, et al., defendants.

(Index No. 10792/09)

Ronemus & Vilemsky, New York, N.Y. (Michael B. Ronemus and Susan J. Kerker of counsel), for appellant-respondent.

Wallace D. Gossett, Brooklyn, N.Y. (Lawrence Heisler of counsel), for respondent-appellant.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Kings County (Sherman, J.), dated March 10, 2010, as denied those branches of her motion which were pursuant to General Municipal Law § 50-e(6) and CPLR 3025(b) for leave to amend her notice of claim and complaint, respectively, to assert a derivative cause of action to recover for loss of services on behalf of her husband, nonparty John David Lariviere, and the defendant New York City Transit Authority cross-appeals, as limited by its brief, from so much of the same order as granted that branch of the plaintiff's motion which was for summary judgment against it on the issue of liability.

ORDERED that the order is reversed insofar as appealed from, on the facts and as a matter of discretion, and those branches of the plaintiff's motion which were pursuant to General Municipal Law § 50-e(6) and CPLR 3025(b) for leave to amend her notice of claim and complaint, respectively, are granted; and it is further,

ORDERED that the order is affirmed insofar as cross-appealed from by the defendant New York City Transit Authority; and it is further,

March 29, 2011

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ORDERED that one bill of costs is awarded to the plaintiff.

The plaintiff pedestrian was crossing the street within a crosswalk with the traffic light and pedestrian crossing signal in her favor when she was struck by a bus operated by the defendant New York City Transit Authority (hereinafter the NYCTA), as it was making a left turn. The NYCTA did not deny that the plaintiff was within the crosswalk and had the traffic and pedestrian signals in her favor at the time of the accident. The evidence submitted by the plaintiff established that, as a matter of law, the defendant driver violated the Traffic Rules and Regulations of the City of New York (34 RCNY) § 4-03(a)(1)(i) and that the plaintiff was free from comparative fault (*see Klee v Americas Best Bottling Co., Inc.*, 60 AD3d 911; *Voskin v Lemel*, 52 AD3d 503; *Hoey v City of New York*, 28 AD3d 717; *cf. Cator v Filipe*, 47 AD3d 664). In opposition, the NYCTA failed to raise a triable issue of fact. Accordingly, that branch of the plaintiff's motion which was for summary judgment on the issue of liability was properly granted.

The Supreme Court should have granted those branches of the plaintiff's motion which were for leave to amend her notice of claim and complaint, respectively, to assert a derivative cause of action to recover for loss of services on behalf of her husband, nonparty John David Lariviere. The plaintiff sought leave to amend her notice of claim in order to supply an omission (*see* General Municipal Law § 50-e[6]). The proposed amendment sought to add a derivative claim predicated upon the same facts which had already been included in the plaintiff's notice of claim and her testimony at the General Municipal Law § 50-h hearing, which was held about seven weeks after the accident. Therefore, the NYCTA had been duly and timely notified (*see Burgarella v City of New York*, 265 AD2d 361). Under the circumstances of this case, since there can be no possible prejudice to the NYCTA, that branch of the motion which was for leave to amend the notice of claim should have been granted.

Further, that branch of the plaintiff's motion which was for leave to amend the complaint pursuant to CPLR 3025(b) should have also been granted. "Leave to amend should be freely given absent prejudice or surprise" (*Rosicki, Rosicki & Assoc., P.C. v Cochems*, 59 AD3d 512, 514). The proposed amendment, which relates to the derivative claim, was neither palpably insufficient nor patently devoid of merit, and there was no evidence that the amendment would prejudice or surprise the NYCTA (*see Sanatass v Town of N. Hempstead*, 64 AD3d 695; *Zorn v Gilbert*, 60 AD3d 850).

The NYCTA's remaining contention is without merit.

ANGIOLILLO, J.P., FLORIO, LEVENTHAL and MILLER, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court