

Hernandez v Metropolitan Transp. Auth.

2023 NY Slip Op 34691(U)

September 26, 2023

Supreme Court, Queens County

Docket Number: Index No. 704310/2018

Judge: Mojgan C. Lancman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

PART 20

-----X
JUSTINA ARENAZA HERNANDEZ,

Index No.: 704310/2018

Plaintiff,

Motion Seq. No.: 2

-against-

Motion Date: 7.19.2023

THE METROPOLITAN TRANSPORTATION
AUTHORITY, THE MTA BUS CO., MTA NEW
YORK CITY TRANSIT AUTHORITY and JOHN
DOE,

Motion Cal No.: 24

Defendants.
-----X



The e-filed papers bearing NYSCEF numbers 17-53 were read on: (1) the motion made by the plaintiff, Justina Arenaza Hernandez (the “Plaintiff”), for an Order, *inter alia*, granting leave to amend the notice of claim *nunc pro tunc*; and (2) the cross-motion of the defendant MTA Bus Company i/s/h/a The MTA Bus Co. (“MTA Bus”) for an Order, *inter alia*, dismissing the complaint pursuant to CPLR §§ 3211 [a] [7] and 3212.

The Plaintiff commenced this cause seeking to recover damages for personal injuries allegedly sustained when a bus in which she was a passenger “... failed to slow and stop ... in a gradual manner, and otherwise stopped ... short, causing ... [her] to strike metal structures within the bus and to fall to the floor of the bus on the stair located at the rear of the bus” (the “Accident”) (*see* NYSCEF Doc. No. 42, the notice of claim). Both the notice of claim and the complaint incorrectly indicate that the Accident took place on May 15, 2017. The Plaintiff contends that the Accident actually occurred on May 22, 2017, a week later.

Presently before the Court are two motions. The Plaintiff seeks to amend the notice of claim and the complaint to reflect the correct date of the Accident; to restore this cause to the active discovery calendar; and to compel responses to her discovery demands. MTA Bus cross-moves to dismiss based upon CPLR §§ 3211 [a] [7] and 3212 because the notice of claim is defective in that it sets forth the wrong Accident date.

For the following reasons, (1) the motion is denied; (2) the cross-motion is granted and the complaint is dismissed as to MTA Bus; and (3) this cause is also dismissed as to the Metropolitan Transportation Authority i/s/h/a The Metropolitan Transportation Authority (the “MTA”), New York City Transit Authority i/s/h/a MTA New York City Transit Authority (“NYCTA”) and John Doe (all defendants shall be referred to collectively as the “Transit Defendants”).

I. Factual Background and Procedural History

The notice of claim, which was served on June 26, 2017, states that the Accident took place on May 15, 2017.

A no-fault application filed by the Plaintiff with MTA Bus, the owner of the bus implicated in the Accident, sets forth an Accident date of May 15, 2017.

At the statutory hearing held at the request of MTA Bus on October 12, 2017, the Plaintiff testified that the Accident took place on May 15, 2017.

The Plaintiff commenced this cause on March 22, 2018 by filing the summons and complaint. In the complaint, she alleged that the Accident took place on May 15, 2017.

In her bill of particulars, dated March 18, 2019, the Plaintiff reiterated that the Accident occurred on May 15, 2017.

At her deposition, which was held on September 29, 2021, the Plaintiff testified as to the wrong Accident date, May 15, 2017.

According to the Plaintiff's counsel, he reviewed his client's medical records in 2022 and determined that the correct date of the Accident, based upon emergency room records, was May 22, 2017.

The Plaintiff contends that the error with respect to the Accident date is predicated upon an "Incident Information Slip" issued by the New York City Police Department, which indicates that the Accident occurred on May 15, 2017.

MTA Bus alleges that the Accident was "unreported," meaning that "[t]he first alleged notice of this claim was in the form of a Notice of Claim ... which gave the [A]ccident date of May 15, 2017."

In sum, the notice of claim, no-fault application, complaint, and bill of particulars set forth the wrong Accident date: May 15, 2017. The Plaintiff erroneously testified at both her statutory hearing and deposition that the Accident took place on May 15, 2017.

The Plaintiff filed the present motion for leave to amend both the notice of claim and the complaint *nunc pro tunc* to reflect the correct Accident date on June 24, 2023.

II. Discussion

There is no dispute that the notice of claim is defective in that it sets forth the incorrect Accident date, May 15, 2017. The issue presented is whether this error is excusable, which would allow for amendment to state the correct date of the Accident, May 22, 2017, or whether, as MTA Bus suggests, this error is fatal. For the following reasons, the Court concludes that the incorrect Accident date set forth in the notice of claim warrants the dismissal of this cause as to MTA Bus.

Pursuant to CPLR § 3211 [a] [7], “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the pleading fails to state a cause of action.”

“When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference” (*Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, Nat'l Ass'n v. Nomura Credit & Cap., Inc.*, 30 NY3d 572, 582 [2017] [internal quotation marks and citations omitted]).

The Second Department held as follows in *Burgos v City of New York*, 202 AD3d 744, 745-746 [2d Dept 2022] with respect to a CPLR 3211 [a] [7] motion predicated upon a defective notice of claim:

To enable authorities to investigate, collect evidence and evaluate the merit of a claim, persons seeking to recover in tort against a municipality are required, as a precondition to suit, to serve a Notice of Claim. General Municipal Law § 50–e(2) requires that the notice of claim set forth, among other things, the nature of the claim and the time when, the place where and the manner in which the claim arose. The test of the sufficiency of a notice of claim is whether it includes information sufficient to enable the public entity to locate the place, fix the time, and understand the nature of the accident. . . . Whether the notice of claim substantially complies with the requirements of the statute depends on the circumstances of each case. A court determining a motion to dismiss a complaint on the ground that the notice of claim is insufficient, in addition to examining the four corners of the notice of claim, may consider the testimony provided during an examination pursuant to General Municipal Law § 50–h, as well as any other evidence properly before the court [internal quotation marks and citations omitted].

An amendment to a notice of claim to reflect the correct date of an accident is substantive, not technical, in nature (*see Matter of Lesaine v New York City Health & Hosps. Corp.*, 199 AD3d 1005 [2d Dept 2021]). “Amendments of a substantive nature are not within the purview of General Municipal Law § 50-e [6]” (*Ryabchenko v New York City Tr. Auth.*, 174 AD3d 549, 550 [2019]).

In any event, leave to amend the notice of claim and the complaint must be denied because the significant and inexcusable delay in seeking amendment would prejudice MTA Bus. The Plaintiff’s motion to amend was made on June 24, 2023, over six years after the Accident. The Second Department has denied motions to amend a notice of claim and granted motions to dismiss the complaint where the delay in seeking amendment is less than six years (*see Rankine v New York City Transit Authority*, 48 AD3d 659 [2d Dept 2008]; *Khait v New York City Transit Authority*, 38 AD3d 613 [2d Dept 2007]; *Kotler v City of New York*, 266 AD2d 355 [2d Dept 1999]; *Torres v City of New York*, 260 AD2d 368 [2d Dept 1999]).

In sum, the Court concludes that the wrong Accident date contained in the notice of claim, the complaint and the bill of particulars, and testified to by the Plaintiff at her statutory hearing and deposition, coupled with the gross delay in moving to correct the error, "... hindered the ability ... [of MTA Bus] to conduct a prompt and meaningful investigation of the claim" (*id.*, a 746; *see also D'Alessandro v. New York City Tr. Auth.*, 83 NY2d 891; *Parker-Cherry v. New York City Hous. Auth.*, 62 AD3d 845). Accordingly, the branch of the cross-motion filed by MTA Bus to dismiss this cause pursuant to CPLR §3211 [a] [7] is granted and the Plaintiff's motion to amend the notice of claim and the complaint is denied.

MTA Bus also moves for summary judgment. As a result, the Court may search the record and grant summary judgment to a non-moving party where that party is entitled to said relief (*see Graham v New York City Transit Authority*, ___ AD3d ___, 2023 NY Slip Op 04581 [2d Dept 2023]; *Sindoni v Board of Educ. of Skaneateles Cent. Sch. Dist.*, 217 AD3d 1363 [4th Dept 2023]).

The MTA is entitled to summary disposition based on well-settled law. "[T]he functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility" (*Delacruz v Metropolitan Transp. Authority*, 45 AD3d 482, 483 [1st Dept 2007] [internal quotation marks and citations omitted])."

It is also well-established that the MTA "... is not vicariously liable for the torts of its subsidiaries" (*Fridman v New York City Tr. Auth.*, 131 AD3d 1202, 1203 [2d Dept 2015] [citations omitted]). MTA Bus, the owner of the bus implicated in the Accident, is a subsidiary of the MTA; thus, the MTA cannot be held vicariously liable for torts committed by MTA Bus (*see Watkins-Bey v City of New York*, 174 AD3d 553 [2d Dept 2019]).

NYCTA is also entitled to summary judgment. Here, it is undisputed, pursuant to the answer of the Transit Defendants, that the bus at issue was owned by MTA Bus. Furthermore, the Plaintiff filed a claim for no-fault benefits with MTA Bus. Lastly, the affirmation in support of the Plaintiff's motion indicates that the "Plaintiff was a passenger on the defendant MTA Bus Co. Q 33 Bus." As NYCTA did not own or operate the bus at issue, the complaint must be dismissed against it (*see Brunson v City of New York*, 150 AD3d 1189; *Fridman v New York City Tr. Auth.*, 131 AD3d 1202).

Lastly, this cause is dismissed as to the defendant John Doe, the operator of the bus at issue, pursuant to CPLR 3215 [c]. Despite the fact that this cause was commenced in 2018, the Plaintiff had never moved for a default judgment against him.

In light of the foregoing determinations, the remaining branches of the Plaintiff's motion, which seek to restore this cause to the active discovery calendar and to compel discovery responses from the Transit Defendants, are denied as academic.

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the motion of MTA Bus to dismiss the complaint pursuant to CPLR § 3211[a] [7] is granted; and it is further,

ORDERED, that the Plaintiff's complaint is dismissed insofar as asserted against MTA Bus; and it is further,

ORDERED, that upon searching the record, MTA and NYCTA are granted summary judgment dismissing the complaint insofar as asserted against them, and it is further,

ORDERED, that the complaint is dismissed insofar as asserted against John Doe pursuant to CPLR § 3215 [c]; and it is further,

ORDERED, that MTA Bus shall serve a copy of this Order with Notice of Entry upon the Plaintiff via NYSCEF by November 20, 2023; and it is further,

ORDERED, that the Clerk of the Court shall: (1) mark his or her records to reflect that this cause is dismissed as to all defendants; (2) close all motions; and (3) close all appearances.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
September 26, 2023



MOJGAN C. LANCMAN, J.S.C.

