

(*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 Ad2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]).

First, as to defendants, Metropolitan Transportation Authority ("MTA") and New York City Transit Authority ("NYCTA"), said defendants satisfied their *prima facie* burden of establishing the absence of triable issues of fact. Said defendants assert that they did not own, operate, maintain, control or repair the bus which allegedly collided with plaintiff's vehicle on May 3, 2006. In support of their motion, defendants attach, *inter alia*, the Affidavit of Tony Cipollone, Chief Risk Management Officer for the MTA Bus Company, who states that at the time of the accident and at the current time, the MTA Bus Company alone owned, operated, controlled, maintained, and repaired the bus involved in the accident and that neither the MTA, nor the NYCTA owned, operated, controlled, maintained, or repaired the bus. Moving defendants also attached the Affidavit of E. Marion London, the Borough Manager of the Queens and Richmond Claims Investigations Department for the NYCTA, who states that the bus involved in the accident was not owned, operated, controlled, maintained, or repaired by the NYCTA, or the MTA. Ms. London further avers that it appears that the bus was owned and operated by the MTA Bus Company, a different entity from the NYCTA and the MTA. Additionally, defendants provide case law which states that the MTA is an umbrella organization, whose subsidiaries include distinct legal corporations, with each subsidiary existing as a separate legal entity from the MTA.

The burden then shifted to plaintiff to present triable issues of fact against defendants, MTA and NYCTA. Plaintiff contends that the matter should not be dismissed against the

defendant, MTA because the exact nature of ownership of the bus which struck plaintiff's vehicle is unresolved as is the liability for the negligent operation of the bus by the bus driver. Plaintiff maintains that pursuant to the police accident report, which has been attached to the opposition papers, the ownership of the bus is not clear, given the contradictory registration provided to the police at the accident scene. Plaintiff asserts that the owner/registrant of the bus is identified on the police report as "NYC;Transit," and that the bus bore the "The Metropolitan Transportation Authority" logo. Plaintiff further states that she does not oppose dismissal of the action against NYCTA, only if the motion is sustained as to all other defendants, otherwise it should be sustained as against the NYCTA on the grounds of detrimental reliance and laches.

The Court finds that as to defendant NYCTA, plaintiff failed to present any evidentiary, non-conclusory proof sufficient to establish the existence of material issues of fact, as plaintiff relies on an unsworn and uncertified police accident report. Since the report is not before the court in admissible form, the plaintiff has not presented sufficient evidence in order to raise a triable issue of fact regarding the NYCTA (see, CPLR 3212[b]; *Friends of Animals, Inc. v. Assoc. Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979]). Furthermore, in her opposition papers, plaintiff states that the bus was owned by the MTA Bus Company.

The Court finds that as to defendant MTA, plaintiff failed to present any evidentiary, non-conclusory proof sufficient to establish the existence of material issues of fact. Plaintiff's attorney's characterization that the bus bore "The Metropolitan Transportation Authority" logo is insufficient to create a triable issue of fact since the attorney lacks personal knowledge of the facts in the matter and since such confusion regarding the logo is not a sound legal basis for defeating a summary judgment motion. Furthermore, in her opposition papers, plaintiff states that the bus was owned by the MTA Bus Company. It is undisputed that the MTA Bus Company is a subsidiary of the Metropolitan Transportation Authority. Case law has held that: "each subsidiary is responsible for the maintenance and repair of its own facilities, and the functions of the MTA do not include the operation, maintenance and control of any facility . . .it has been held that the MTA may not be liable for the torts committed by a subsidiary arising out of the operations of the subsidiary corporation." (*Noonan v. Long Island Railroad*, 158 AD2d 392, 393 [1st Dept 1990]).

Next, as to defendant MTA Bus Company, defendant argues that it should be dismissed because the plaintiff failed to comply

with Public Authorities Law § 1276(1), which section requires that as a condition precedent to the commencement of an action, that a demand be served upon MTA Bus Company, and that at least 30 days elapse before an action is commenced. Defendant MTA Bus Company further asserts that no demand was ever served on the MTA Bus Company and so the Court does not have subject matter jurisdiction. Plaintiff responds that pursuant to Public Authorities Law § 1276(6), the requirement for service of notice of claim does not apply to a subsidiary corporation of the authority. Plaintiff maintains that only a public "authority" is entitled to a Notice of Claim, and that the MTA Bus Company is not an authority, but rather a subsidiary of the MTA.

The Court finds that the Complaint shall not be dismissed as against defendant, The MTA Bus Company. While Public Authorities Law § 1276(1) states that as a condition precedent to the commencement of actions against the Metropolitan Commuter Transportation Authority, a demand must have been served and thirty days must have elapsed since the demand was presented to a member of the authority or other officer designated for such purpose, pursuant to Public Authorities Law § 1276(6): "[t]he provisions of this section which relate to the requirement for service of a notice of claim shall not apply to a subsidiary corporation of the authority." It is undisputed that the MTA Bus Company is a subsidiary of the Metropolitan Transportation Authority. "Section 1266(5) [of the Public Authorities Law] specifies that the MTA's subsidiary corporations are distinct entities and shall be individually subject to suit." (*Noonan v. Long Island Railroad*, 158 AD2d 392, 393 [1st Dept 1990]). Accordingly, as the MTA Bus Company need not be served with a notice of claim, and as the record before me indicates the existence of material issues of fact regarding the MTA Bus Company, the Complaint shall not be dismissed as against the defendant MTA Bus Company.

Next, that branch of defendants' motion seeking to dismiss the Complaint against defendant bus operator, Rajubhai N. Patel, is hereby denied. Defendants assert that defendant bus operator was an employee of the MTA Bus Company and at the time of the accident he was acting within the scope of his employment. Defendants further assert that the plaintiff has failed to comply with statutory pre-requisites for bringing suit against the MTA Bus Company, namely Public Authorities Law § 1276(1). Plaintiff argues that there is no statute or case law indicating that the individual employee is entitled to his/her own Notice of Claim.

Additionally, the defendants' request that a hearing be held on the issue of whether a valid demand was served upon defendant,

MTA Bus Company is hereby denied. Pursuant to the Public Authorities Law, the Complaint shall contain an allegation that 30 days have elapsed since the demand was presented to a member of the authority or other officer designated for such purpose. In the instant case, such an allegation has been made. Defendant, MTA Bus Company asserts that the demand was incorrectly served by plaintiff's attorney's office upon MTA's satellite office in Flushing, New York, instead of at the MTA Bus Company's address at 347 Madison Avenue, 9th Floor, New York, New York. While defendant, MTA Bus Company makes the assertion that the claim made upon a public authority must be served at the proper address or it is deemed a nullity, defendant admits that the demand was allegedly served upon the satellite office of the MTA Bus Company, and it fails to assert that it did not actually receive the demand. Additionally, the MTA Bus Company fails to make any claim of prejudice. Accordingly, the defendants' request that a hearing be held on the issue of whether a valid demand was served upon defendant, MTA Bus Company is hereby denied.

The Court finds that as there is no legal requirement for service of a notice of claim upon an employee of a subsidiary corporation of the MTA acting within the scope of his employment, the Complaint shall not be dismissed as against bus operator, Rajubhai N. Patel.

Finally, that branch of defendants' motion which seeks dismissal on the basis of failure to state a cause of action against them pursuant to CPLR 3211(a)(7) is denied. On a motion to dismiss on the ground that the Complaint fails to state a cause of action, the issue is limited to ascertaining whether the pleading states any cause of action, not whether there is evidentiary support for the Complaint. For the purpose of such motions, plaintiff's Complaint is liberally construed in a light most favorable to the plaintiff and all factual allegations are accepted as true (*LoPinto v. J.W. Mays, Inc.*, 170 AD2d 582 [2d Dept 1991]). As such, this Court finds that plaintiff's Complaint states a cause of action against defendants.

Accordingly, defendants' motion to dismiss is hereby granted as to defendants, New York City Transit Authority, and Metropolitan Transportation Authority, and hereby denied as to defendants MTA Bus Company, and bus operator, Rajubhai N. Patel. The Complaint shall be dismissed as against the New York City Transit Authority and the Metropolitan Transportation Authority only.

This constitutes the Decision and Order of the Court.

Dated: June 3, 2008

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Howard G. Lane, J.S.C.