

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12
Justice

- - - - - x

MATTHEW J. LONG,

Plaintiff,

Index No.: 3352/06

- against -

Motion Date: 5/31/06

ALLEN; AME TRANSPORTATION CORP.,
BRYANT L. BARR, ACADEMY BUS TOURS OF
NEW YORK, INC., TRANSPORT WORKERS
UNION OF GREATER NEW YORK ("LOCAL
100") and BEAR, STEARNS & CO., INC.,

Motion No. 18

Defendants.

- - - - - x

The following papers numbered 1 to 17 on this motion:

	<u>Papers Numbered</u>
Defendant Local 100's Notice of Motion- & Memorandum of Law-Affirmation-Affid(s)- Service-Exhibit(s)	1-4
Plaintiff's Affirmation in Opposition & Memorandum of Law-Affidavit(s)-Exhibit(s)	5-8
Defendant Bear, Stearns Notice of Cross- Motion-Affirmation-Affid(s)-Svc-Exh(s)	9-13
Defendant Local 100's Reply Memorandum of Law & Affid-Svc	14-15
Defendant Bear, Stearns' Reply Affirmation- Affid-Svc	16-17

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By Notice of Motion and Memorandum of Law, Transport

Worker's Union of Greater New York (Local 100), seeks an Order of the Court, pursuant to CPLR §3211(a)(7), dismissing the complaint against Local 100 for failure to state a cause of action and awarding costs.

Plaintiff files an affirmation in opposition, and Memorandum of Law and defendant, Local 100, files a Memorandum of Law in reply.

Defendant Bear, Stearns, and Co., Inc., (Bear, Stearns) files a cross-motion for an order granting them summary judgment and dismissing the complaint and all cross-claims as to them. Plaintiff files an affirmation in opposition, and defendant Bear, Stearns files a reply.

Accordingly, pursuant to the accompanying memorandum, it is hereby

ORDERED, that the motion to dismiss plaintiff's complaint as to defendant, Transport Worker's Union of Greater New York (Local 100) is granted with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and, it is further

ORDERED, that the Clerk is directed to enter judgment accordingly; and, it is further

ORDERED, that the remainder of the action shall continue.

Dated: Jamaica, New York
June 27, 2006

JOSEPH P. DORSA
J.S.C.

MEMORANDUM

SUPREME COURT - STATE OF NEW YORK
COUNTY OF QUEENS - **IAS PART 12**

- - - - -x
MATTHEW J. LONG,

Plaintiff,

Index No. 3352/06

- against -

By: **DORSA, J.**

ALLEN; AME TRANSPORTATION CORP.,
BRYANT L. BARR, ACADEMY BUS TOURS
OF NEW YORK, INC., TRANSPORT WORKERS
UNION OF GREATER NEW YORK ("LOCAL 100")
and BEAR, STEARNS & CO., INC.,

Defendants.

- - - - -x

The underlying cause of action is a claim for injuries sustained by plaintiff, Matthew Long, on December 22, 2005, at approximately 5:45 a.m., when he was struck by a bus while riding his bicycle on the streets of Manhattan, NY.

Plaintiff, a New York City firefighter, was on his way to

work at Randall's Island training facility. The bus which struck plaintiff, was operated by defendant, Bryant L. Barr, an employee of co-defendant, Allen; AME Transportation Corp., a private bus company. Plaintiff alleges that he was struck when the bus, without warning, crossed multiple lanes of traffic to make a right hand turn.

At the time that this accident occurred, members of Local 100 of the Transport Worker's Union, an unincorporated, voluntary association, were engaged in the third day of a strike action. Plaintiff alleges that defendant, Local 100, engaged in a strike action in violation of §210(1) of the NY Civil Service Law, also known as, the Taylor Law. Plaintiff also alleges that defendant, Local 100, violated an order of Supreme Court Justice, the Hon. Theodore Jones. These violations, plaintiff argues, form the basis of his cause of action against Local 100, for "[i]f the strike had not occurred, plaintiff would have been riding public transit" (plaintiff's Memorandum of Law, Preliminary Statement), and would therefore not have been on his bicycle to be struck by a bus which, likewise, would not have been there.

In regard to his claim against Bear, Stearns, plaintiff alleges that they (Bear, Stearns) contracted with defendant,

Academy Bus Tours, Inc. (Academy), to provide transportation for their employees to and from work for the duration of the strike. To accommodate all of the people they were hired to transport, Academy subcontracted with three other bus companies, including Allen; AME Transportation Company (Allen). The agreement, which defendant Bear, Stearns alleges was oral, involved a total of forty (40) buses at a rate of sixty-four thousand dollars (\$64,000) per day.

Bear, Stearns maintains that they exercised no supervision, authority, or control over the operation of the buses hired to pick-up their employees. Plaintiff responds that under the circumstances (i.e., the cost, the emergency nature of the arrangements, and the need to make the selected routes appropriate to transport their employees), defendant's claim that they exercised no control over the operation is not credible.

CROSS-MOTION FOR SUMMARY JUDGMENT

For the purposes of expediency, the Court will first address the cross-motion for Summary judgment by Bear, Stearns.

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material

issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form." Santanastasio v. Doe, 301 A.D.2d 511, 753 N.Y.S.2d 122 (2d Dept. 2003).

Bear, Stearns maintains through the affidavit of Lawrence Rogers, Senior Managing Director, that an "oral arrangement" was made between Bear, Stearns and Academy to provide bus service at various locations throughout the city for employees of Bear, Stearns between the hours of 5:30 a.m. to 10:30 a.m., and 3:30 p.m. to approximately 7:30 p.m. for each working day that the strike continued. Bear, Stearns maintains that they had no knowledge of or control over the selection of the subcontracting company hired by Academy, nor did they "supervise, direct or control the means, manner or operation of the bus or bus driver involved in plaintiff's accident." (See Defendant Bear, Stearns' Exh. C, Affidavit of Lawrence Rogers, p. 11).

Plaintiff maintains that Bear, Stearns' contention, that they made an "oral agreement" with Academy costing them \$64,000 per day, and exercised no supervision or control over any aspect of the routes to be taken, or the frequency of the buses running, simply lacks credibility. In response to Bear, Stearns' contention, plaintiff is unable to offer evidence to the contrary, noting that at the time of the motions, only five

months had elapsed since the accident and virtually no discovery had taken place. Sovik v. Healing Network, 244 A.D.2d 985, 986, 665 N.Y.S.2d 997, 999 (4th Dept. 1997); Exec. Aviation Servs., Inc. v. Flightways of Long Island, Inc., 15 A.D.3d 611, 612, 790 N.Y.S.2d 537, 538 (2d Dept. 2005). The information needed, plaintiff claims, is in the exclusive control of defendants without such discovery.

When information is "exclusively within the knowledge of the defendants... before any pretrial disclosure... summary judgment is inappropriate..." Donato III v. Elrac, Inc., 18 A.D.3d 696, 697, 795 N.Y.S.2d 348, 349 (2d Dept. 2005).

"Moreover, questions of credibility on motions for summary judgment should not be determined by affidavit, but rather, the movant's version should be subjected to cross-examination." Id. at 698.

Accordingly, defendant Bears, Stearns' cross-motion for summary judgment is denied with leave to renew upon completion of discovery.

LOCAL 100'S MOTION FOR DISMISSAL OF COMPLAINT

The opening sentence of the Court of Appeals decision in Burns v. Lindner, 59 N.Y.2d 314, 464 N.Y.S.2d 712 (1983), sets

the stage for the issues before this Court in defendant Local 100's motion to dismiss the complaint as to them.

"The Taylor Law...proscription against strikes by public employees neither preempts the right of persons injured by an unlawful strike to sue for damages nor provides a private right to sue for violation of its provisions..." Id. at 322.

After the Transit Worker's Union (TWU), the Amalgamated Transit Union (ATU), and various Locals engaged in a strike in New York City in 1980, two separate law firms sued the unions, alleging various causes of action based on a violation of the Taylor Law and an injunction issued by a Supreme Court Justice prohibiting the strike.

The defendant unions in that action moved to dismiss the complaint and the trial court denied the motion on all but one cause of action. The Appellate Division modified, by dismissing the complaints entirely. As of right, and by permission of the Appellate Division, the matter was brought to the Court of Appeals.

In addressing the question of whether a violation of the Taylor Law created a private cause of action, the Court answered with a resounding, no (emphasis added).

Because the statute was silent on the issue of private right of action, neither specifically granting or denying such, the Court looked to the legislative history, and could not discern a legislative intent to provide a private remedy. Id. at 329. "...[T]he provisions of the present statute and the history of their enactment strongly suggest that a private action based upon the statute was not intended..." Id. "Implication of a private action is, moreover, inconsistent with the purposes of the Taylor Law." Id. at 330. In the end, however, the Court observed that "...[a]llthough it is within the competence of the legislature to abolish common law causes of action, there is no express provision to that effect in the statute..." Id. at 331.

Thus, we are left with the tension between a precedent which declares that no private cause of action was created by the Taylor Law, nor was one prohibited. It is necessary therefore, that this Court, as the Court did in Burns, must examine the elements of the claim by plaintiff to determine, pursuant to CPLR §3211(a)(7), whether plaintiff has indeed stated a cause of action cognizable under the law.

To the extent however, that plaintiff attempts in the second cause of action of his complaint to create a private

cause of action based on defendant Local 100's violation of both the Taylor Law and the Order of the Supreme Court Justice Theodore Jones, such action is not cognizable under the law and must therefore be dismissed. Burns v. Lindner, 59 N.Y.2d 314, 464 N.Y.S.2d 712 (1983), *in accord*, Sheehy v. Big Flats Comm. Day, Inc., 73 N.Y.2d 629, 543 N.Y.S.2d 18 (1989).

Defendant Local 100 argues hypothetically that, even in instances where the legislature statutorily created a private cause of action, the cause may not be maintained if the injury alleged is not of a kind which the legislature intended to protect against. DeCaprio v. New York City R.R. Co., 231 N.Y. 94, 131 N.E. 743 (1921). "...[O]nly if the person seeking redress comes within the protective orbit of the statute, will his claim based upon a breach of a statutory duty be upheld..." Lopes v. Rostad, 45 N.Y.2d 617, 623, 412 N.Y.S.2d 127, 129 (1978).

The statutory citing for the commonly called "Taylor Law" is Article 14, Public Employees' Fair Employment Act, §210(1), Prohibition of Strikes. In the same said article, the legislature spelled out, in a "statement of policy" the purpose of the statute, to wit:

The legislature of the State of New York declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees to protect the public by assuring, at all times, the orderly and uninterrupted operations and function of government. Art. 14, Pub. Employees' Fair Employment Act, §200.

In numerous instances following the passage of this law, Courts have held this to mean that the legislative purpose was to: "promot[e]...harmonious and co-operative relationships between government and its employees..." [Civil Serv. Employee Ass'n. v. Helsby, 31 A.D.2d 325, 297 N.Y.S.2d 813 (3d Dept. 1969), *aff'd by* 24 N.Y.2d 993, 302 N.Y.S.2d 822 (1969)]; "insure tranquility in the government's labor relations...and protect the public generally" [Ulster County v. CSEA Unit of Ulster County Sheriff's Dep't., 37 A.D.2d 437, 326 N.Y.S.2d 706 (3d Dept. 1971)]; "prohibit...strikes [and promote] the general welfare of the public..." [Caso v. Dist. Council 37, Am. Fed. of State County & Municipal Employees, 43 A.D.2d 159, 350 N.Y.S.2d 173 (2d Dept. 1973)].

Nowhere in such a statement of purpose is there, nor has there been, a finding that the legislature intended to protect individuals from the negligent acts of third parties, such as the traffic accident in this case.

Plaintiff argues that his claim is one for common law negligence, and not negligence per se. (See Plaintiff's Memorandum of Law, p. 11). Therefore, plaintiff states defendant's argument that the injury is not one the legislature intended to prevent, is unavailing. The Court notes however, that defendant proffered such an argument, if, and only if, this Court found defendant Local 100's violation of the Taylor Law a basis for plaintiff's negligence claim.

Thus, the Court must now examine the viability of plaintiff's common law negligence claim against defendant Local 100.

"On a motion to dismiss pursuant to CPLR §3211, the pleading is to be afforded a liberal construction (see, CPLR §3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Arnav Industries, Inc. v. Brown, 96 N.Y.2d 300, 303, 727 N.Y.S.2d 688, 690 (2001); see also, Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 746 N.Y.S.2d 858 (2002)(the pleadings, in CPLR §3211 motion to dismiss are necessarily afforded a liberal construction); Schlackman v. Weingast & Assocs., 18 A.D.3d 729, 795 N.Y.S.2d

707 (2d Dept. 2005)(a pleading attacked for insufficiency must be accorded a liberal construction, and if it states, in some recognizable form any cause of action known to our law, it cannot be dismissed).

A common law claim for negligence requires a plaintiff to plead and prove that the purported tortfeasor owed a duty of care to the injured party [Espinal v. Melville Snow Contractors Inc., 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002)], that said tortfeasor breached the duty owed, [Strauss v. Belle Realty Co., 65 N.Y.2d 399, 492 N.Y.S.2d 555 (1985)], that the breach of that duty was the legal cause and not merely the "cause-in-fact" of plaintiff's injury [Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928)(emphasis added)], and finally that the injury resulted in damages [Levine v. New York, 309 N.Y. 88, 127 N.E. 825 (1955)].

As to the first element, the Court has sufficiently answered this question in the negative. The Taylor Law provides no basis for a finding that defendant owed a duty of care to this injured plaintiff as he is not, and plaintiff concedes he is not, an aggrieved party whom the legislature intended to protect. Burns v. Lindner, 59 N.Y.2d 314, 464 N.Y.S.2d 712 (1983); 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr.,

Inc., 96 N.Y.2d 280, 727 N.Y.S.2d 49 (2001). "Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm." 532 Madison at 289.

There being no duty of care to plaintiff as an individually aggrieved party, the question of whether defendant Local 100 breached a duty to plaintiff (emphasis added) must also be answered in the negative. Strauss v. Belle Realty Co., 65 N.Y.2d 399, 402, 405, 492 N.Y.S.2d 555, 556, 559 (1985)(emphasis added).

The question of whether defendant's alleged breach of duty to plaintiff can constitute the legal cause, or proximate cause of plaintiff's injury must also be answered in the negative.

Plaintiff maintains that if the strike had not occurred, plaintiff would have been riding public transit. (See, Plaintiff's Memorandum of Law, p. 1). Plaintiff maintains further, that "...it was foreseeable that a bus and a bicyclist, neither of which would have been on the road but for the strike, would collide." Id. at 3.

Plaintiff would have the Court accept this same "but for" logic which has led every untutored law student astray for many

years. There is, as there should be, however, a limit to such logic. Palsgraf, 248 N.Y. 339 (1928).

"Where the evidence as to the cause of the accident which injured plaintiff is undisputed, the question as to whether any act or omission of the defendant was a proximate cause thereof is one for the court and not for the jury." Rivera v. City of New York, 11 N.Y.2d 856, 857, 227 N.Y.S.2d 676, 677 (1962).

"Though negligence and proximate cause frequently overlap in the proof and theory which support each of them, they are not the same conceptually. Evidence of negligence is not enough by itself to establish liability. It must also be proved that the negligence was the cause of the event which produced the harm sustained by one who brings the complaint." Sheehan v. City of New York, 40 N.Y.2d 496, 501, 387 N.Y.S.2d 92, 95 (1976).

"Furthermore, proximate cause is no less essential an element of liability because the negligence charged is premised in part or in whole on a claim that a statute or ordinance... has been violated." Id. (citations omitted).

"[T]he risk of injury as a result of defendant's conduct must not be merely possible, it must be natural or probable" [Moncion v. Infra Metals Corp., 5 A.D.3d 310, 312, 800 N.Y.S.2d 381, 383 (1st Dept. 2005)], and "[a]lthough virtually every

untoward consequence can theoretically be foreseen 'with the wisdom born of the event,' the law draws a line between remote possibilities and those that are reasonably foreseeable" [Lee v. New York City Housing Auth., 25 A.D.3d 214, 217, 803 N.Y.S.2d 538, 541 (1st Dept. 2005)]. Plaintiff maintains, however, that a reasonably foreseeable consequence of Local 100's decision to strike would be that plaintiff would be on a bicycle traveling to work and that the bus transporting Bear, Stearns' employees would be there to collide with him. Such reasoning, the Court has already noted, is flawed, even if, as plaintiff contends, the harm was foreseeable. 532 Madison, 96 N.Y.2d at 289.

Moreover, even if we accept the circumstances described by plaintiff as a result of the strike as being true, (i.e., that the strike caused public congestion, disorder, frustration, and delay (plaintiff's Memorandum of Law, p. 16), such a circumstance, "...merely furnished the occasion for an unrelated act to cause injuries..." Derdiarian v. Feliz Contracting Corp., 51 N.Y.2d 308, 316, 434 N.Y.S.2d 166, 170 (1980). There was no more reason to believe New Yorkers would behave unreasonably, (i.e., crossing multiple lanes to make a right hand turn), as

behaving reasonably (i.e., driving more cautiously in increased traffic).

Plaintiff likens this circumstance to the situation in O'Neill v. City of Port Jervis, 253 N.Y. 423, 171 N.E. 694 (1930), where defendant's active obstruction of a city street compelled the injured party to detour to a place of danger. Such is not the case here, for following plaintiff's logic, every street in New York City would have constituted a place of danger, and any and every traffic accident the fault of the TWU Local 100.

"The existence and scope of a tortfeasor's duty is, of course, a legal question for the courts, which fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." 532 Madison, 96 N.Y.2d at 288 (citations omitted).

Plaintiff's reliance on 532 Madison for the proposition that his cause of action against Local 100 should be maintained because he, unlike the plaintiffs in 532 Madison, is claiming

losses due to personal injuries and not economic loss is misplaced. While that may indeed be the holding in 532 Madison, it still must be determined that defendant owes a duty of care to plaintiff, a question that has been firmly answered in the negative (Pulka v. Edelman, 40 N.Y.2d 781, 390 N.Y.S.2d 393 (1976)).

Finally, plaintiff maintains that it was defendant Local 100's actual and intended consequence of the strike that there would be chaos, injury, and even death in the New York City streets; and, that it was foreseeable that New York City citizens would behave unreasonably (i.e., drive badly; have accidents), as opposed to more reasonably (i.e., as the Mayor suggested with more caution). (See, Plaintiff's Memorandum of Law, pp. 14, 16).

In response, defendant points out that "...where a defendant has engaged in intentional, wrongful conduct, the defendant cannot be liable in negligence, even where a physical injury may have been inflicted inadvertently by reason of such conduct." See Defendant's Reply Memorandum of Law, pp. 4, 5, (citing, Wertzberger v. City of New York, 254 A.D.2d 352, 680 N.Y.S.2d 260, 261 (2d Dept. 1998); Panzella v. Burns, 169 A.D.2d 824, 825, 565 N.Y.S.2d 194, 195 (2d Dept. 1991); *in accord*,

Salemeh v. Toussaint, 25 A.D.3d 411, 810 N.Y.S.2d 1 (1st Dept. 2006); Messina v. Matarraso, 284 A.D.2d 32, 36, 729 N.Y.S.2d 4, 7 (1st Dept. 2001); Mazzaferro v. Albany Motel Enterprises, 127 A.D.2d 374, 376-77, 515 N.Y.S.2d 631, 632-3 (3d Dept. 1987).

A short form order accompanies this memorandum.

Dated: Jamaica, New York
June 27, 2006

JOSEPH P. DORSA
J.S.C.