

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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TRACY MARTIN,

Plaintiffs,

- against -

THE CITY OF NEW YORK, NEW YORK CITY
TRANSIT AUTHORITY, AMBOY BUS CO., INC.,
HERBERT TORRES and WOLF TARA DENEEN,
Defendants.

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Index
Number: 26656/04

Motion
Date: SEPT. 18, 2007

Motion
Cal. Number: 22
Motion Seq. No. 1

The following papers numbered 1 to 21 read on this motion by defendant New York City Transit Authority (TA) for summary judgment dismissing the complaint against said defendant and cross-motion by defendants Amboy Bus Co. and Herbert Torres for summary judgment dismissing the complaint as against said defendants.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply Affirmation.....	8-9
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Memorandum of Law in Support of Cross-Motion.....	14-15
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Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

Although counsel for movant represents that he is the attorney of record for the TA and Deneen and that the instant motion is by the TA and Deneen, an answer has only been interposed by the TA. Deneen has not appeared in this action. Therefore, the instant motion is deemed brought only by the TA.

Motion by the TA for summary judgment on the issue of liability is granted.

In order to obtain summary judgment, the movant must make a

prima facie showing that it is entitled to said relief, by tendering evidentiary proof in admissible form sufficient to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). The TA has met its burden.

Plaintiff allegedly sustained injuries as a result of a motor vehicle accident in which the motor vehicle, a mini-van, owned by Amboy, operated by Torres and in which plaintiff was a passenger collided with the motor vehicle, a bus, owned by the TA and operated by Deneen on Metropolitan Avenue at the intersection with Woodward Street in Kings County on May 3, 2003.

Plaintiff was employed to escort handicapped children on and off the mini-van. At the time of the accident, she was riding alone in the van with Torres and was proceeding to the parking garage on Woodward street. As the mini-van was in the process of making a right turn from Metropolitan Avenue onto Woodward Street, it came into contact with the TA bus, which had been stopped at the bus stop on Metropolitan Avenue at the corner of Woodward Street. The TA bus sustained damage to its driver's-side mirror and the minivan sustained damage to its middle to rear passenger side.

At plaintiff's statutory 50-H hearing, plaintiff testified that she when she first saw the TA bus it was traveling along Metropolitan Avenue in the same direction as her mini-van (transcript pp. 25-26). The bus thereafter was stopped at the bus stop and was taking on passengers as the mini-van proceeded to turn to go into the garage (pp. 21, 23). The location where she saw the bus stopped was a designated bus stop (p. 28). When asked, "When you saw the Transit Authority bus stop at this bus stop was the bus still going straight, or was it making a turn?", plaintiff responded, "We were making a turn" (p. 26, emphasis added). Plaintiff stated that her mini-van was making a right turn to go into the garage. When asked if she saw the TA bus when her mini-van started to make a right turn, she answered in the affirmative (p. 32). When asked what the bus was doing when the mini-van started to make the right turn, plaintiff answered, "Well, it wasn't doing nothing till I heard a bang" (p. 32). When asked again if the bus was moving, standing still or something else, plaintiff responded, "No, it wasn't moving" (p. 33). When pressed again with the question, "As he started to make a right turn into the garage did you ever see the Transit Authority bus move?", plaintiff answered, "No" (p. 33).

At his deposition, Torres testified that at the time of contact, the bus was in motion (p.23). However, he subsequently testified that the bus was not in motion but was stopped at the bus

stop (pp. 25, 26). He stated that when he started to make the right turn, the bus was stopped (p.31). When asked whether there came a time when the bus started moving, he answered, "No" (p. 31). Thereupon, when asked, "Okay. Well, how did you know it moved?", he gave the non-responsive and incoherent answer, "Because I was past the bus already and when the accident occurred" (p. 31). He also stated that he felt contact rather than see the motion of the bus (p. 32). Moreover, he also testified that the bus was still in the parking lane when he last saw it, that at the time he made his turn he checked for traffic on the right side and could see the bus before he made his turn and at that time the bus was still stopped (p.62). Therefore, his initial statement in his deposition that the bus was moving and his statement in his accident and incident reports that the mini-van was struck in the rear by the bus are entirely contradicted by his later testimony, are admittedly not based upon personal observation but speculation and, thus, raise no questions of fact. What Torres actually saw was not that the bus was in motion at the time of the accident, but that it was stationary. He did not see the collision, but merely felt the impact.

Therefore, the testimony of plaintiff at her 50-H hearing and the deposition testimony of Torres establishes that the bus was stopped at an authorized bus stop picking up passengers at the time of the accident and, therefore, did not strike plaintiff's vehicle. Plaintiff's incongruous casting of the accident in terms of the bus hitting the mini-van in her 50-H hearing and her affidavit annexed to the opposition papers, obviously to create a feigned issue of fact, is not compatible with her description of the accident and does not raise an issue of fact (see Telfeyan v. City of New York, 40 AD 3d 372 [1st Dept 2007]; Stancil v. Supermarkets General, 16 AD 3d 402 {2nd Dept 2005}).

In opposition, plaintiff fails to raise an issue of fact as to liability.

Accordingly, the motion is granted and the complaint is dismissed as against the TA.

The notice of "cross-motion" is deemed a notice of motion, since plaintiff was not a moving party (see CPLR 2215).

Motion by defendants Amboy Bus Co. and Herbert Torres for summary judgment on the grounds that plaintiff is barred by the Workers' Compensation Law from maintaining the action against them and that plaintiff did not sustain a serious injury is denied.

Plaintiff's contention, asserted in her opposition papers,

that the cross-motion is untimely is without merit. The note of issue was filed on April 19, 2007. The cross-motion was filed on August 16, 2007, within the 120-day period required under CPLR 3212(a). Plaintiff's counsel asserts that there is no record that the instant cross-motion was filed. However, the notice of cross-motion clearly bears on its face the stamp of the Queens County Clerk indicating that the cross-motion was filed on August 16, 2007 and that the filing fee was paid.

Counsel's contention that the cross-motion was short served is also without merit. Since the motion (improperly denominated a "cross-motion") was served by mail, Amboy and Torres were required to give 13 days' notice of their motion (8 days, pursuant to CPLR 2214[b] plus five days for mailing pursuant to CPLR 2103[b][2]). They have done so. The motion was served on August 15, 2007 and the return date was August 28, 2007, which is 13 days. Counsel's counting of the 13 days from the date of receipt of the motion (August 16th) is in error. Service of motion papers by mail is complete upon mailing, not receipt (see CPLR 2103[b][2]). The five days added to the eight-day notice requirement under CPLR 2214(b) is to take into account a reasonable time for receipt of motion papers from the date they are mailed. Therefore, Amboy's and Torres' motion is timely and was not short-served.

Counsel for Amboy and Torres contends, first, that plaintiff's action against them is barred by the Workers' Compensation Law. Counsel argues that Amboy was a special employer of plaintiff by virtue of its subsidiary relationship with Metropolitan and Atlantic Express Transportation Corp., Inc. and because Amboy exercised control over Metropolitan employees, controlled and directed the details and schedule of plaintiff, had the authority to hire and fire all employees and paid plaintiff. Therefore, plaintiff may not maintain this action against them, pursuant to Workers' Compensation Law §11.

A person may be deemed to have more than one employer, a general employer and a special employer, for purposes of the Workers' Compensation Law (see Vanderwerff v. Victoria Home, 299 AD 2d 345 [2nd Dept 2002]). It has long been recognized that a person's status as a special employee is usually a question of fact that may not be resolved by summary judgment (see Schramm v. Cold Spring Harbor Laboratory, 17 AD 3d 661 [2nd Dept 2005]). However, a determination of special employment may be made as a matter of law where certain undisputed critical facts are established which compel that conclusion and leave no room for any triable issue of fact (see Thompson v. Grumman Aerospace Corp, 78 NY 2d 553 [1991]). While not entirely dispositive of the issue, a critical factor is whether defendant "controls and directs the manner, details and

ultimate result of the employee's work" (id at 558). The Court of Appeals in Thompson v. Grumman (supra) found a special employment based upon the following factors: The general employer was performing no work for the special employer and did not retain control over the employee. "All essential, locational and commonly recognizable components of the work relationship were between [the special employer] and [the employee]." The employee was assigned to the special employer exclusively on a full-time basis and considered a supervisor of the special employee to be his boss. He reported to the special employer's supervisor, who regularly directed, assigned, instructed, supervised and controlled his work duties. The work performed by the employee was solely in furtherance of the special employer's business at its facility. The employee could not be reassigned by the general employer and could be terminated only by the special employer. The general employer was not performing the special employer's work and had no direct control, knowledge or expertise with respect to the labor its employee was performing for the special employer. Rather, the general employer surrendered direction and control over its employee to the special employer, who assumed and exercised that exclusive control.

While the factors considered in Thompson arose from the facts of that case, and no single factor is dispositive, it can be concluded from the holding of the Court of Appeals that a finding of special employment may be made on summary judgment only where the totality of undisputed facts admit of no other conclusion except that the employee worked for the special employer, was under its exclusive direction and control and considered the special employer to be his or her boss with respect to the work being performed.

The affidavits and the deposition testimony of plaintiff, relied upon by Amboy and Torres, fail to establish as a matter of law that plaintiff was Amboy's special employee.

It is undisputed that plaintiff was employed by Metropolitan Escort Services, Inc. at the time of the accident. Jerome Dente, chief operations officer of Atlantic, avers in his affidavit annexed to the "cross-motion", that Metropolitan was a wholly owned subsidiary of Atlantic at the time of the accident and that Amboy is also a wholly owned subsidiary of Atlantic. He avers that Metropolitan's sole purpose was to serve Amboy and that "it was plainly obvious" to plaintiff that her day-to-day operations were controlled by Atlantic and Amboy.

Dente avers that Amboy is responsible for the day-to-day supervision of all drivers and has the unilateral authority to hire

and fire all employees.

Annette Carter, an employee of Atlantic in its human resources department, avers in her affidavit in support of the "cross-motion" that Torres was employed by Amboy and that plaintiff was employed by Metropolitan. She also avers that plaintiff and Torres were paid by their respective subsidiary companies. Nevertheless, she states that both work for Atlantic.

Plaintiff, in her deposition, testified that she was employed by Atlantic. She also stated that she knew of Amboy and knew that "[i]t's the contract we are under" (deposition transcript p.57), the name of her supervisor and that some of the buses had both Amboy's name written on them in large letters and Atlantic's name in small letters. She did not state, as counsel mischaracterizes her testimony, that she was paid her salary by Amboy. Indeed, Carter states in her affidavit that plaintiff was employed by Metropolitan, while Torres was employed by Amboy and that each were paid by their respective subsidiary companies.

Torres, in his deposition, stated that Amboy was his employer and believed that plaintiff was an Amboy employee because "she worked with me." He also expressed his belief that Atlantic was "the same company" as Amboy and that all the buses have the Atlantic name on them. He also stated that he thought the two companies had different payrolls but also stated that his payroll was from Atlantic Express.

There is no affidavit of an Amboy supervisor or officer with knowledge of the particulars of plaintiff's employment relationship with Amboy averring that plaintiff was its special employee. Indeed, the record on this motion indicates that plaintiff was employed and paid by Metropolitan. No supervisor or other employee of Amboy was identified as acting in a supervisory capacity over plaintiff. Counsel ultimately bases his special employment argument upon the mere fact that Metropolitan and Amboy are subsidiaries of Atlantic.

Amboy and Torres have, thus, failed to proffer sufficient evidence, on this record, to establish as a matter of law that plaintiff was a special employee of defendant (see Schramm v. Cold Spring Harbor Laboratory, supra). The status of plaintiff as a special employee, therefore, remains a question of fact to be decided at trial.

Amboy and Torres have also failed to submit sufficient evidence, in admissible form, to establish prima facie that plaintiff did not sustain a serious injury (see Insurance Law

§5102[a]; Gaddy v. Eyler 79 NY2d 995 [1992]).

The affirmed report of the TA's examining orthopedist, dated October 17, 2006, relates full ranges of motion of plaintiff's cervical and lumbar spines, elbows, wrists and knees by setting forth the ranges of motion in degrees and comparing these results to the normal ranges of motion in degrees. The affirmed report of the TA's examining neurologist, dated March 14, 2007, also relates full ranges of motion of plaintiff's cervical and lumbar spines and right shoulder, setting forth the ranges of motion in degrees and comparing same to the normal ranges in degrees. However, these reports are devoid of any mention of what objective tests were used to derive the stated results. The failure of the TA's physicians to state and describe the objective tests that were used rendered their opinions with respect to plaintiff's ranges of motion insufficient and of no probative value (see Vazquez v. Basso, 27 AD 3d 728 [2nd Dept 2006]; Nembhard v. Delatorre, 16 AD 3d390 [2nd Dept 2005]). Moreover, the only range of motion test described in the neurologist's report was a straight leg raising test. This report stated that straight leg raising was possible up to 30 degrees, as compared to the normal range of 90 degrees. This finding, therefore, raises a question of fact as to whether plaintiff sustained a serious injury.

Accordingly, Amboy's and Torres' motion is denied.

Dated: October 9, 2007

KEVIN J. KERRIGAN, J.S.C.