

**Sutin v Manhattan and Bronx Surface Tr.  
Operating Auth.**

2007 NY Slip Op 31770(U)

June 14, 2007

Supreme Court, New York County

Docket Number: 0102618/2001

Judge: Donna Marie Mills

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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
Justice

PART 21

SUTIN, MYRA

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY  
Defendant.

**FILED**

JUN 22 2007

NEW YORK  
COUNTY CLERK'S OFFICE

INDEX No. 102618/01

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion for Summary Judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits 2

Replying Affidavits 3

CROSS-MOTION: \_\_\_\_\_ YES  NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 6-14-07

Donna M. Mills  
J.S.C.

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 21

-----x  
MYRA SUTIN,

Plaintiff,

Index No. 102618/01

-against-

MANHATTAN AND BRONX SURFACE  
TRANSIT OPERATING AUTHORITY,

Defendant.

**FILED**  
JUN 22 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

-----x  
DONNA M. MILLS, J.:

Defendant Manhattan and Bronx Surface Transit Operating Authority (MBSTOA) moves, pursuant to CPLR 3211 and 3212, for an order granting summary judgment dismissing plaintiff's complaint.

This is a personal injury action. Plaintiff alleges in the complaint that, on November 17, 2000, at approximately 9:45 A.M., while a passenger on a bus, owned and operated by MBSTOA, she sustained serious injuries when she tripped and fell to the ground while exiting the bus. Plaintiff claims that her injuries were due to MBSTOA's failure to provide a safe location for passengers to disembark at the bus stop, which was located at the intersection of West 63<sup>rd</sup> Street and Broadway in Manhattan.

On or about December 29, 2000, plaintiff filed a notice of claim alleging that she "was caused to fall to the ground while attempting to exit from the M104 bus which failed to provide a safe location for passengers to exit." In January 2001,

plaintiff commenced the instant action, making a similar claim. In its answer, MBSTOA generally denies the allegations of the complaint, and asserts the affirmative defense that whatever injuries plaintiff sustained were caused, in whole or in part, by her own conduct.

In support of its motion to dismiss the complaint, MBSTOA argues that plaintiff is basing her complaint on speculation, and that she has not established a prima facie case on the cause of her accident. It is also argued, inter alia, that plaintiff's claim in her bill of particulars that MBSTOA was negligent in failing to let passengers off parallel to the curb, and within twelve (12) inches of the curb at the bus stop, in violation of the New York City Traffic Rules and Regulations (Chapter 4 of Title 34 of the Rules of the City of New York § 4-10 [c] [1]<sup>1</sup>, is an impermissible "shift in theory," since this was not mentioned in the original notice of claim or the statutory hearing (50-h) hearing on January 26, 2001.

At her 50-h hearing, in her deposition testimony dated October 27, 2006, in her verified bill of particulars, and in her notice of claim, plaintiff alleges that she was caused to fall due to the positioning of the bus, which was parked too far away

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<sup>1</sup>34 RCNY §4-10 [c] [1] provides, in relevant part, : "Pickup and discharge of passengers at designated bus stops ... While engaging in the picking up or discharging of passengers, buses must be within twelve inches of the curb and parallel thereto, except where a bus stop is physically obstructed."

from the curb<sup>2</sup> for her to safely step off of the bus. At her 50-h hearing, plaintiff testified that she remembers thinking as she was getting off the bus that it looked "a little awkward and (that she) must have put her foot on the curb." She further testified that the next thing she was aware of was that she was on the sidewalk pavement. She stated that she thinks the "positioning of the bus" caused her accident by not providing sufficient clearance between the step and the street, and by not being sufficiently close enough to the sidewalk, for her to safely get off the bus.

In her affidavit in opposition, plaintiff states that the driver of the bus never lowered the bus prior to the passengers exiting the bus. She also repeats her claim that the positioning of the bus caused her accident. She maintains that the bus driver parked the bus too far away from the curb for her to safely step off of the bus onto the curb, street or sidewalk, and that the positioning of the bus caused her to take an awkward step off the bus, which resulted in her fall.

MBSTOA's argument that plaintiff is attempting to assert a new theory of liability in her bill of particulars than that alleged in her notice of claim is unavailing. "It is well

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<sup>2</sup>In her deposition testimony, plaintiff defines "curb" as the edge of the pavement. In the affirmation in opposition, plaintiff's counsel defines "curb" as the "edge of the sidewalk," and "sidewalk" as "the elevated (in relation to the street) paved walkway along the street."

established that the purpose of the notice of claim is to give a municipal authority the opportunity to investigate" (Goodwin, Jr. v New York City Hous. Auth., - AD2d -, 834 NYS2d 181, 185, 2007 WL 1247589 [1<sup>st</sup> Dept May 1, 2007]; Caselli v City of New York, 105 AD2d 251, 252 [2d Dept 1984]). MBSTOA was sufficiently apprised, in the notice of claim and in plaintiff's 50-h hearing, that plaintiff was basing her theory of liability on a claim that the bus driver negligently failed to position the bus in order to provide plaintiff with a safe place to exit the bus.

The Appellate Division, First Department has consistently held that General Municipal § 50-e is to be flexibly applied (id.). This court construes the phrase "safe place to exit," to include the safe positioning of the bus in accordance with the statutory standard set forth in 34 RCNY § 4-10 (c) (1). This is not at odds with plaintiff's prior allegations (contrast Lewis v New York City Hous. Auth., 237 AD2d 414 [2d Dept 1997]). Finally, MBSTOA has failed to demonstrate any prejudice.

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant the court in directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966, 967 [1988]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065, 1067 [1979]). In the absence of a clear showing that there are no

material issues of fact, the motion is to be denied regardless of the insufficiency of the opposing papers (Ayotte v Gervasio, 81 NY2d 1062 [1993]; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]; see Shamberg Marwell Cherneff & Hocherman, P.C. v Laufer, 193 AD2d 664 [2d Dept 1993]).

On the other hand, if the movant makes a prima facie showing, the opposing party must demonstrate by sufficient evidence in admissible form the existence of a factual issue which would require a trial (see, Ferber v Sterndent Corp., 51 NY2d 782, 783 [1980]; Zuckerman v City of New York, 49 NY2d 557, 562 [1979]). Additionally, the drastic remedy of summary judgment is rarely granted in negligence cases, since the very question of defendant's negligence or lack of negligence is a jury question, except where the facts clearly show the absence of any fault or culpable conduct by defendant (Chahales v Garber, 195 AD2d 585, 586 [2d Dept 1993]).

This court finds that MBSTOA has not met its initial burden, because issues of fact exist as to whether plaintiff's fall was proximately caused by the failure of the bus driver to exercise due care in positioning the bus, so that plaintiff was provided with a safe spot from which to disembark (Malawer v New York City Tr. Auth., 18 AD3d 293, 294-295 [1<sup>st</sup> Dept 2005], affd 6 NY3d 800 [2006]).

To establish a prima facie case against MBSTOA, plaintiff must establish: (1) the existence of a duty owed to plaintiff; (2) a breach of that duty; and (3) and that the breach proximately caused plaintiff's injury (Gross v New York City Tr. Auth., 256 AD2d 128 [1<sup>st</sup> Dept 1998]). The scope of the duty of care owed by a bus operator to passengers encompasses a reasonably safe place to board and to disembark (Blye v Manhattan and Bronx Surface Tr. Operating Auth., 124 AD2d 106 [1<sup>st</sup> Dept 1987], affd 72 NY2d 888 [1988]).

As noted in Blye,

[T]he law is well established that a common carrier's duty of care to an alighting passenger is to stop at a place where the passenger can alight safely and towards that end 'to exercise reasonable and commensurate care in view of the dangers to be apprehended' [citation omitted].

Id. at 109.

In general, the question of whether a common carrier breached this duty is a question of fact (Gross v New York City Tr. Auth., 256 AD2d at 129): Here, there is no allegation of an obstruction or defect which would have impeded plaintiff's safe exit from the bus. However, genuine issues of fact exist as to whether the bus driver's positioning of the bus created a dangerous path, i.e., not enough room for plaintiff to safely step off the bus, instead of a clear, direct and safe path from


which to exit the bus (id.), and whether this proximately caused plaintiff's accident (see Malawer v New York City Tr. Auth., supra; Zuckerman v New York, supra).

Accordingly, it is

ORDERED that defendant Manhattan and Bronx Surface Transit Operating Authority's motion for summary judgment dismissing the complaint is denied.

DATED: 6-14-07

ENTERED:

J.S.C. 

**FILED**

JUN 22 2007

**NEW YORK  
COUNTY CLERK'S OFFICE**