

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

2007 NY Slip Op 32209(U)

July 16, 2007

Supreme Court, New York County

Docket Number: 0100705/2005

Judge: Nicholas Figueroa

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

PRESENT: HON. NICHOLAS FIGUEROA  
Justice

PART 46

Index Number : 100705/2005

MONTAIGNE, JEFFREY

vs

MABSTOA

Sequence Number : 001

VACATE

INDEX NO. 100705/05

MOTION DATE 4/5/07

MOTION SEQ. NO. 001

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

is motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2, 3

4, 5

6

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*See accompanying decision  
and order*

**FILED**  
JUL 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

*MJ*

Dated: July 16, 2007

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

JEFFREY MONTAIGNE,

Plaintiff,

Index No. 100705/05

- against -

**DECISION  
AND ORDER**

MANHATTAN AND BRONX SURFACE  
TRANSIT OPERATING AUTHORITY (MABSTOA),  
MTA/NEW YORK CITY TRANSIT AUTHORITY,  
and ROGER R. REECE,

Defendants.

**FILED**  
JUL 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Nicholas Figueroa, J.:

Plaintiff moves for an order pursuant to CPLR §§4110(b), 4404, 5015, and other unspecified provisions of the CPLR, setting aside the verdict and directing a verdict in his favor. Plaintiff asserts that the verdict must be set aside because of error in the verdict sheet, errors in the charge and because the verdict was against the weight of the evidence.

There is no basis for relief under CPLR §4110(b) or CPLR §5015(a). This statute concerns newly discovered evidence; however, it is inapplicable when a CPLR §4404 motion is timely, as it is in this case.

The jury verdict was based on a fair interpretation of the evidence (see *Grassi v. Ulrich*, 87 NY2d 954, citing *Lolik v. Big v. Supermarkets*, 86 NY2d 744, quoting *Moffatt v. Moffatt*, 86 AD2d 864). Plaintiff's expert testified that the accident could not have occurred, unless defendant bus driver drove defendant's bus while it was in a kneeling position. Therefore, the court correctly submitted the threshold question to the jury: "Did defendants operate their bus while it was in a

kneeling position as it approached the bus stop on August 11, 2004?”

The jury answered no to this question.

Given the jury’s answer to the first interrogatory, there was no need for it to proceed. Because the accident could not have happened unless the bus was kneeling, any further factual determination could not have been based on competent proof (see *Cassano v. Hagstrom*, 5 NY2d 643). Had the jury been asked to determine liability without regard to whether the bus was in a kneeling position, it would have had to speculate on the reason for the alleged contact between the bus mirror and plaintiff’s head.

The jury finding that the bus was not kneeling was based on a fair interpretation of the evidence. A contrary finding would have required the jury to find that the bus traveled several blocks at a very low rate of speed. It rejected this unlikely scenario and the court will not interfere with this finding (see *Brown v. Taylor*, 221 AD2d 208).

Given the jury finding, plaintiff’s other arguments based on the charge (CPLR 4110-b), are academic. In any event, the court did not err in failing to charge Vehicle and Traffic Law §1146, as this statute deals with roadway collisions. Nor did it err by not charging Vehicle and Traffic Law §1151-a, as that statute refers to a driver’s duty to yield to a pedestrian when the driver is emerging from an alley or driveway.

Plaintiff’s argument that he is entitled to a verdict in his favor as a matter of law is without merit. Even if the jury had found that the bus had been in a kneeling question, there still would have been factual questions concerning defendants’ liability. This is not a case where there were facts and reasonable inferences that would compel a finding in favor of plaintiff as a matter of law (see *Cohen v. Hallmark Cards*, 45 NY2d 493).

Therefore, it is

ORDERED that this motion is denied.

This constitutes the decision and order of the court.

Dated: July 16, 2007

ENTER

A handwritten signature in black ink, appearing to be 'M. J.', written over a horizontal line.

J.S.C.

**FILED**

JUL 23 2007

NEW YORK  
COUNTY CLERK