Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 22**
Justice

EMMANUEL OKORO, Plaintiff,	Index No. 6077/05
-against-	Motion Date July 17, 2007
THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MABSTOA, METROPOLITAN TRANSPORTATION AUTHORITY and BUS OPERATOR PERIGAN, Defendants.	Motion Cal. No. 12
	Motion Sequence C 004

The following papers numbered 1 to 13 read on this motion by defendants, New York City Transit Authority, MABSTOA, Metropolitan Transportation Authority for summary judgment pursuant to CPLR 3212 and dismissing the Complaint of the plaintiff; cross motion by plaintiff pursuant to CPLR 3214 compelling defendant, New York City Transit Authority to comply with plaintiff's Notice for Discovery and Inspection dated January 2, 2006.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1-4
Cross Motion.....	5-8
Affirmation in Opposition.....	9-11
Reply Affirmation.....	12-13

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Defendants', New York City Transit Authority, MABSTOA, Metropolitan Transportation Authority (hereinafter collectively referred to as "the NYCTA defendants") motion for summary judgment pursuant to CPLR 3212 and dismissing the Complaint of the plaintiff is denied.

In this action, plaintiff seeks to recover damages from defendants for personal injuries arising from an incident whereby

on April 15, 2004, plaintiff was a passenger on a bus owned and operated by the NYCTA defendants and was first unlawfully imprisoned by defendant, bus operator, Perigan, when plaintiff was refused exit off the bus. Thereafter, plaintiff was allegedly allowed to exit the bus and was threatened and attacked by bus operator Perigan, resulting in severe and serious injuries to the plaintiff. Plaintiff alleges negligence on the part of the NYCTA defendants (vicarious liability) and that they failed in their duty to protect the plaintiff from the happening of the incident as well as a cause of action for negligent hiring and retention of bus operator, Perigan.

The NYCTA defendants bring this motion for summary judgment, dismissing the Complaint of plaintiff, Emmanuel Okoro on the grounds that the defendant is not vicariously liable for the actions of defendant bus operator, Perigan which were outside the scope of his employment.

At the outset, the Court notes that the moving defendants have failed to address the cause of action in plaintiff's Complaint for negligent hiring. While the notice of motion states that it was for summary judgment dismissing the entire complaint, the supporting papers fail to address the cause of action for negligent hiring. Therefore, defendants have failed to make a *prima facie* showing with respect to the second cause of action *(see, Piccinich v. New York Stock Exchange, Inc. et. al.*, 257 AD2d 438 [1st Dept 1999]).

The NYCTA defendants' motion for summary judgement on the remaining causes of action is denied as said defendants have failed to show that there is no substantial issue of fact in this case and therefore nothing to try. Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*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 evidence in plaintiff's opposition papers demonstrates that there are controverted issues of fact in connection with, *inter alia*, whether tortuous acts committed by the employee were solely for personal motives unrelated to the furtherance of NYCTA business, (*see, Vega v. Northland Marketing Corp.*, 289 AD2d 569 [2d Dept 2001]), whether the NYCTA defendants had been aware of previous disciplinary problems relating to bus operator, Perigan and whether the NYCTA defendants breached a duty of care owed to

plaintiff. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, the NYCTA defendants' motion is denied.

Plaintiff's cross motion pursuant to CPLR 3214 compelling defendant, the New York City Transit Authority ("NYCTA") to comply with plaintiff's Notice for Discovery and Inspection dated January 2, 2006 is hereby granted to the following extent:

Plaintiff maintains that on January 2, 2007, it served a Notice for Discovery and Inspection upon the defendant, the NYCTA, and includes with its cross motion an affidavit of service of such document. As of the time the plaintiff brought the cross motion, in June of 2007, there was no response to the Notice of Discovery and Inspection received by plaintiff. In this discovery document, plaintiff requests information pertaining to bus operator, Perigan's employment/disciplinary/complaint history and maintains that such information is imperative to the prosecution of the matter. Plaintiff maintains that it needs to show that the New York City Transit Authority was aware of behavioral problems and/or complaints regarding Mr. Perigan in the past in order to impose liability upon defendants.

The NYCTA maintains that plaintiff's cross motion to compel discovery is untimely. It asserts that a Compliance Conference was held on December 16, 2006, and at that point plaintiff did not give any indication that it was seeking any records regarding defendant, Perigan. Thereafter, the plaintiff served a Note of Issue and Certificate of Readiness on or about February 14, 2007, wherein the Certificate of Readiness states that there are "no outstanding discovery requests." While the affirmation submitted with the Certificate of Readiness advises that discovery has not been completed, no specific items of discovery are identified, and in the six months after the filing of the Note of Issue, no written request was made for additional discovery. Furthermore, the NYCTA asserts that by letter dated January 31, 2007 (a copy of which is attached to its opposition papers), defendant, NYCTA responded to the plaintiff's Notice for Discovery and Inspection, and the response provided specific objections and the bases therefore to the information sought. It is the NYCTA's position that plaintiff failed to respond to defendant's valid objection, and as such, there has been a waiver of plaintiff's entitlement to further pursue that discovery demand.

Plaintiff replies that all discovery motions in Queens County are filed after the Note of Issue has already been filed and the Note of Issue was filed because the Court demanded plaintiff to do so. Plaintiff further maintains that item number "7" of the Certificate of Readiness which states "discovery proceedings now known to be necessary completed" is not checked,

and the accompanying affirmation indicated that the Note of Issue is being filed at the direction of the Court. Furthermore, plaintiff states that until the instant cross motion, it never received defendant's letter dated January 31, 2007 purportedly responding to the Notice for Discovery and Inspection. However, even after receiving such letter, plaintiff feels its cross motion is necessary because the defendants have objected to all of the items sought in the Notice for Discovery and Inspection claiming privilege. Finally, plaintiff urges that at the very least, there should be an in camera inspection of the employment/disciplinary/complaint records of defendant Perigan to determine if there is anything in the records which may be of value to the plaintiff in the prosecution of the case.

This Court finds that under CPLR 3101(a), the parties may engage in liberal discovery of evidence that is "material and necessary" for the preparation of trial (s*ee, Allen v. Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]). "The words 'material and necessary' as used in the statute are to be interpreted liberally, to require disclosure, upon request, of any facts bearing on the controversy which will assist in the preparation for trial." (*Anonymous v. High School for Environmental Studies et. al.*, 820 NYS2d 573, 578 [1st Dept 2006]) (citations omitted). The Court is given broad discretion to supervise discovery (*Lewis v. Jones et. al.*, 182 AD2d 904 [3d Dept 1992]). It is determined that the documents sought in plaintiff's discovery demands are material and necessary to a fair resolution of the case. The defendant, NYCTA has responded to plaintiff's discovery request by asserting that the documents requested are "personal and confidential information" and as such has refused to produce such documents. "The burden of establishing that the documents sought are covered by a certain privilege rests on the party asserting the privilege." (*Anonymous v. High School for Environmental Studies et. al.*, *supra* at 578). In the instant matter, defendant has merely asserted the boilerplate claim of privilege, stating that the requested material is "personal and confidential." Such boilerplate claims are insufficient as a matter of law (*See id.*) The defendant has failed to show what is in the personnel file or that anything in the file is protected by privilege (*Watson v. Mix*, 38 AD2d 779 [4th Dept 1972]). "The mere conclusory statement that it is confidential establishes nothing." (*See Id*; *see also, Ogilvie v. City of New York*, 44 AD2d 586 [2d Dept 1974]). Accordingly, plaintiff's motion to compel discovery is granted, with leave to defendant to move for a protective order as to specifically identified documents alleged to be privileged.

Ordered that the NYCTA either comply with plaintiff's Request for Discovery and Inspection dated January 2, 2007, or otherwise move for a protective order as to specifically identified documents alleged to be privileged within thirty (30)

days from the date of service of a copy of this Order with Notice of Entry.

The foregoing constitutes the decision and order of this Court.

Dated: August 7, 2007

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Howard G. Lane, J.S.C.