

<b>Liverpool v LeCruise</b>
2007 NY Slip Op 32536(U)
August 6, 2007
Supreme Court, Queens County
Docket Number: 0020388/2002
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**  
**Justice**

**IAS PART 22**

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ROXANNE LIVERPOOL and SILVAN  
PRESCOTT,

Plaintiffs,

-against-

JOHN R. LECRUISE, NEW YORK CITY  
TRANSIT AUTHORITY, COUNTY OF NASSAU,  
METROPOLITAN SUBURBAN BUS AUTHORITY  
and OSCAR WALTER,  
Defendants.  
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Index No. 20388/02

Motion

Date June 26, 2007

Motion

Cal. No. 7

Motion

Sequence No. S005

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

This is an action to recover for personal injuries sustained by plaintiff, Roxanne Liverpool, on April 10, 2002, when she was a passenger on a bus owned by the New York City Transit Authority ("NYCTA") and operated by John R. LeCruise. It is alleged that John R. LeCruise drove into the rear of another bus owned by MTA-Long Island Bus s/h/a Metropolitan Suburban Bus Authority and the County of Nassau and operated by Oscar L. Walter. A derivative loss of service claim has been asserted by Roxanne Liverpool's

husband, plaintiff, Silvan Prescott based upon the alleged injuries to his wife.

That branch of defendants', County of Nassau, MTA-Long Island Bus s/h/a Metropolitan Suburban Bus Authority and Oscar L. Walter's ("the MTA-Long Island Bus defendants") motion seeking summary judgment on the issue of liability and pursuant to CPLR 3211 and 3212 dismissing all claims and cross claims asserted against them on the basis that defendants, NYCTA and John R. LeCruise ("the NYCTA defendants") were the sole proximate cause of the plaintiffs' injuries and on the grounds that it has already been established as law of this case that only the NYCTA defendants are liable for the subject accident is hereby granted.

The MTA-Long Island Bus defendants contend that the NYCTA defendants have litigated and lost the same issue of liability in three prior cases, and are therefore now collaterally estopped from asserting liability for the subject bus accident. It is undisputed that the above-captioned action was joined for trial by Hon. Joan M. Durante on May 21, 2003 with the action of *Deborah Grant v. the NYCTA and the Metropolitan Suburban Bus Authority*, Queens County Index Number 26143/02, as well as with two other actions arising from the same subject accident. In the *Grant* action, defendant, the NYCTA brought a summary judgment motion on the basis that plaintiff did not sustain a serious injury causally connected to the accident (a "threshold motion"), and defendant Metropolitan Suburban Bus Authority cross-moved on the basis of both liability and threshold grounds. In an Order dated July 26, 2004, Hon. Roger N. Rosengarten dismissed all claims against defendant Metropolitan Suburban Bus Authority on liability grounds, and as to the threshold grounds in the motion and cross motion, Justice Rosengarten found that the plaintiff's Complaint was dismissed as against all defendants.

In another action in which passengers alleged injuries in the subject accident, *Paragas v. Lecruise et. al.*, defendant, the NYCTA moved for summary judgment against plaintiff on threshold grounds, and defendants Metropolitan Suburban Bus Authority and Oscar L. Walter cross-moved for summary judgment on liability grounds without opposition, and for summary judgment against plaintiff on threshold grounds. In an Order dated November 27, 2005, Hon. Lee A. Mayersohn denied defendant NYCTA's motion for summary judgment and granted defendants' Metropolitan Suburban Bus Authority and Oscar L. Walter's motion as to liability against the NYCTA defendants.

In a third action in which passengers alleged injuries in the subject accident, *Walters v. NYCTA and LeCruise.*, plaintiff, Erika K. Walters brought an action against NYCTA and John R. LeCruise. The NYCTA did not bring a third party action alleging any negligence on the part of the MTA-Long Island Bus defendants.

In an Order dated December 14, 2004, Hon. Roger N. Rosengarten granted summary judgment to the plaintiff on the issue of liability only, against defendants, NYCTA and John R. LeCruise.

The MTA-Long Island Bus defendants argue that the NYCTA defendants are collaterally estopped from asserting at trial that the MTA-Long Island Bus defendants are responsible for the subject accident to any degree. They assert that the doctrine of collateral estoppel precludes a litigant from re-litigating an issue where that litigant has had a full and fair opportunity to litigate the issue in a prior proceeding where the identical issue was necessarily decided, citing *Capital Telephone Co., Inc v. Pattersonville Telephone Co., Inc*, 56 NY2d 11 (1982). It is the MTA-Long Island Bus defendants' contention that the issue of liability presented in this action is identical to the issue as decided in the *Grant* action. The action brought by plaintiff Grant was for injuries sustained by a passenger on the same NYCTA bus as a result of the same rear-end collision with the same MTA-Long Island Bus vehicle on April 10, 2002. They argue that the issue of liability was necessarily decided, as the issue of the MTA-Long Island Bus' negligence was decided prior to any other issue warranting summary judgment in the *Grant* action. Moving defendants also contend that the summary judgment order issued in favor of MTA-Long Island Bus in the *Grant* action was granted on the merits, upon a determination, after consideration of the opposition papers of the NYCTA (which asserted that triable issues of fact existed), that no legally sufficient evidence was presented to establish any negligence on the part of Metropolitan Suburban Bus Authority. Thus, the decision in *Grant* is asserted to act as a bar, by virtue of collateral estoppel, to any re-litigation of the issue of liability for the subject accident by the NYCTA. Finally, moving defendants contend that while this decision alone was sufficient to determine the liability issue, the same issue was needlessly litigated in the *Paragas* and *Walters* actions, where it was again found that MTA-Long Island Bus defendants bear no liability for the accident.

The NYCTA defendants argue that collateral estoppel is inapplicable in the instant matter even though three related actions stemmed from the one incident. Said defendants contend that collateral estoppel does not apply to an issue that has been resolved by default as opposed to on its merits, and because the NYCTA did not submit any opposition to the MTA-Long Island Bus' motions to dismiss on the issue of liability in the aforementioned cases, the MTA-Long Island Bus' motions were granted on default, as opposed to on their merits, and therefore they have no bearing on the issue of collateral estoppel in this case. It is the NYCTA defendants' contention that they defaulted on the issue of liability in the prior matters. As proof for their position they rely on the fact that plaintiffs, in their cross motion state, "The NYCTA has not even made an effort to

contest liability in other cases arising from the same accident." They also argue that in the *Grant* and *Paragas* cases, the Court reasoned that the MTA-Long Island Bus' motions to dismiss concerning liability as against that of the NYCTA should be granted because the NYCTA failed to submit any evidence on the issue of liability. They state that the NYCTA's liability was not fully litigated at that time, and therefore, collateral estoppel does not apply to this case. They additionally argue that the NYCTA did not oppose or offer any evidence to refute the issue of liability in the *Walters* case, and so the matter was again decided on default and should be viewed as a nullity for collateral estoppel purposes. Furthermore, the NYCTA defendants contend that in the instant matter that they have submitted the affidavit of one with personal knowledge of the facts in the matter as well as new and additional testimony in the form of a deposition of Vinnette Bygrave, a passenger in the NYCTA bus, and a plaintiff in a related action whose testimony was not available at the time of the *Grant* and *Walters* motions, and was most likely unavailable at the time of the *Paragas* motion.

In their reply motion, the MTA-Long Island Bus defendants dispute the NYCTA defendants' contention that all prior proceedings were granted upon default without the NYCTA defendants being given an opportunity to fully and fairly litigate the issue, and affirmatively state that none of the prior decisions were granted upon default. The MTA-Long Island Bus defendants reference a copy of the opposition papers of the NYCTA in the *Grant* action, wherein the NYCTA defendants contended, *inter alia*, that "The Metropolitan Suburban Bus Authority made a sudden stop as it was traveling ahead of the bus which was being operated by the defendant NYCTA." The MTA-Long Island Bus defendants further argue that the Order issued by Justice Rosengarten in the *Walters* action established that the Court's decision to grant summary judgment against the NYCTA defendants on the issue of liability was made after careful consideration of an affirmation in opposition which was submitted by the NYCTA and marked by the Court. Additionally, they argue that the NYCTA defendants' assertion that the "testimony of Ms. Bygrave was not available at the time of the *Grant* and *Walters* motions, and was most likely unavailable at the time of the *Paragas* motion" is false because the transcript submitted by the NYCTA defendants of Ms. Bygrave's testimony on February 15, 2005 was not unavailable at the time of the *Paragas* motion, as the *Paragas* motion was submitted 8 months after the February 15, 2005 deposition. The moving defendants also claim that the NYCTA defendants' contention that they could not obtain the testimony of Ms. Bygrave prior to the decisions in *Grant* and *Walters* is false. It is claimed the NYCTA had a full and fair opportunity to depose all witnesses prior to the summary judgment motions which found liability solely attributable to the NYCTA defendants. It is also claimed that the NYCTA defendants

previously deposed Ms. Bygrave at a 50-h hearing on April 23, 2003, at least a year prior to the submission of the *Grant* and *Walters* summary judgment motions.

This Court finds that summary judgment on the issue of liability is warranted against the NYCTA defendants. It is well-established law that for collateral estoppel to apply, "the issue as to which preclusion is sought [must] be identical with the issue decided in the prior proceeding, that the issue [must] have been necessarily decided in the prior proceeding, and that the litigant who will be precluded in the present proceeding [must] have had a full and fair opportunity to litigate the issue in the prior proceeding." (*Capital Telephone Co., Inc. v. Patterson Telephone Co., Inc.*, 56 NY2d 11 [1982]). In the instant case, it is undisputed that the issue to be decided is identical to the issue decided in the *Grant*, *Paragas*, and *Walters* cases. Nor do the NYCTA defendants dispute in their papers to this motion that the issue was not necessarily decided in the prior proceedings.<sup>1</sup> They merely state that they did not have a full and fair opportunity to litigate the issue in the prior proceedings, because the motions were granted on default, not on the merits. The Court finds that the NYCTA defendants did have a full and fair opportunity to litigate the issue in the prior proceedings. First, in the *Grant* action, the NYCTA submitted opposition papers, wherein they opposed liability by contending that "The Metropolitan Suburban Bus Authority made a sudden stop as it was traveling ahead of the bus which was being operated by the defendant NYCTA." In that action, the Court found that the NYCTA did not submit sufficient legal evidence to rebut the presumption of negligence that arises in a rear-end collision, and dismissed the liability claims against Metropolitan Suburban Bus Authority. Second, in the *Paragas* action, a decision was issued by Hon. Lee A. Mayersohn which indicates that no opposition was offered by the NYCTA defendants on the issue of liability. The decision makes no mention of any default. Judge Mayersohn found against the NYCTA defendants on the issue of liability. Third, in the *Walters* action, the decision of Hon. Roger N. Rosengarten indicates that there was an affirmation in opposition submitted by the NYCTA defendants opposing plaintiff, Walter's summary judgment motion on the issue of liability. Justice Rosengarten considered the opposition before granting the plaintiff's motion. Accordingly, as in the prior cases, the NYCTA either opposed the summary judgment motions on liability, or had the opportunity to oppose the motions, it is found that the NYCTA defendants had a full and fair opportunity to litigate the issue in the prior proceedings. As the Court has determined multiple times that the NYCTA is solely responsible for the accident, and it is

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<sup>1</sup>The Court notes that the issue was in fact, necessarily decided, as the issue of liability was "distinctly decided" in an earlier proceeding. *See, Eaton v. Alger*, 47 NY345 (NY 1872).

undisputed that the NYCTA defendants have not moved to renew or reargue any of the prior decisions, the NYCTA defendants are barred from re-litigating the issue at this point.

That branch of the MTA-Long Island Bus defendants' motion seeking costs and sanctions pursuant to 22 NYCRR 130-1.1 for frivolously refusing to discontinue their meritless cross claims against the MTA-Long Island Bus defendants despite numerous prior adverse determinations is denied as set forth hereafter.

Pursuant to 22 NYCRR 130-1.1, conduct is deemed frivolous if: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." The MTA-Long Island Bus defendants argue that it is frivolous conduct that the NYCTA defendants have refused the MTA-Long Island Bus defendants' requests for discontinuance of cross-claims where the issue of liability has already been decided three prior times. The moving defendants also assert that the NYCTA defendants have failed to obey Orders of this Court. They attach an Order issued by Hon. Roger N. Rosengarten on January 4, 2007, which directed that counsel for all parties in the action appear for a conference on January 17, 2007, "bring their entire file on the action" and "have full knowledge of all aspects of this action with authority to resolved all issues." It is undisputed that: the NYCTA defendants appeared at that conference but were unprepared, that the conference was then adjourned until March 7, 2007, and that on March 7, 2007, the NYCTA defendants failed to appear.

The NYCTA defendants argue that sanctions are unwarranted in this case, since the prior judgments were granted on default and before new evidence was obtained by them. As such, they feel that they have a good faith basis to oppose the motion, and not voluntarily accept liability.

At this stage, the Court finds that the MTA-Long Island Bus defendants have failed to show sufficient cause to warrant sanctions (see, *Schaeffer v. Schaeffer*, 294 AD2d 420 [2<sup>nd</sup> Dept 2002]; *Breslaw v. Breslaw*, 209 AD2d 662 [2<sup>nd</sup> Dept 1994]). The conduct of the NYCTA defendants has not risen to the level of frivolous.

That branch of plaintiffs' cross motion seeking an Order granting summary judgment to the plaintiffs against the NYCTA defendants is hereby granted.

Plaintiffs adopt all of the arguments submitted by the moving defendants in their main motion, stating that if co-

defendants are granted summary judgment, then plaintiffs are also entitled to summary judgment as a matter of law. Plaintiffs also reiterate that Justice Rosengarten has decided the case on the merits and since that decision has not been appealed and the time to do so has expired, there is no issue of fact to be decided by a jury. Additionally, plaintiffs assert that the NYCTA submitted opposition papers in the *Walters* case, wherein there was an attorney's affirmation stating: "Defendants do not oppose that portion of plaintiff's motion seeking summary judgment in favor of the plaintiff."

The NYCTA defendants argue that in the *Walters* action, they moved for summary judgment and prevailed on the issue of threshold; and so while the Court also granted liability against the NYCTA in that case, since the sustaining threshold injuries are a prerequisite to bringing an action pursuant to CPLR 5102(d), the decision on liability is of no consequence. They argue that collateral estoppel will not apply because the issue of liability was not "necessarily decided". They state that in *Paragas*, the NYCTA moved for summary judgment on threshold and Metropolitan Suburban Bus Authority cross-moved for summary judgment on liability. They maintain that the Court denied the NYCTA's threshold motion, but granted Metropolitan's motion on liability and specifically noted that the liability portion was not opposed by the NYCTA. As such, it is argued that the NYCTA defaulted on the issue of liability and so the NYCTA defendants conclude that: "Because the TRANSIT AUTHORITY did not submit any opposition to the MTA-Long Island Bus' motion to dismiss *on the issue of its liability* in *Paragas*, the MTA-Long Island Bus' motion was granted on default, not on its merits, and therefore they do not have any bearing on the merits of this action in the form of collateral estoppel." Finally, the NYCTA defendants conclude that collateral estoppel doesn't apply. In the *Grant* action, they filed a motion for summary judgement on threshold grounds and Metropolitan Suburban Bus Authority moved for summary judgment on liability grounds. Both of these motions were granted, and the NYCTA defendants assert that the liability of the parties is worthless since the plaintiff cannot bring suit since the injuries did not meet threshold. It is argued that once the NYCTA's motion was granted on threshold, the plaintiff's Complaint was immediately dismissed against all parties, thereby making liability a moot, "non-necessary" issue. The NYCTA defendants do not provide any case law or other legal authority to support such an argument. Finally, NYCTA defendants concede that they did enter opposition based upon liability in *Grant*, but maintain that at that time, the deposition of Vinnette Bygrave had not yet been taken, and so now there is new evidence. They maintain that the 50-h testimony could not have been used since Ms. Bygrave was not asked about the actions of the Metropolitan Bus prior to the accident.

In their reply papers, plaintiffs reiterate that during the Court conference held on March 7, 2007 before Justice Rosengarten, plaintiffs and moving defendants were directed to bring motions for summary judgment, and plaintiffs point out that the NYCTA defendants submitted opposition papers in all three cases, never moved to vacate any of the purported defaults, or to renew and reargue any of the purported defaults, and never appealed any of the Orders. Plaintiffs also maintain that on two of the motions (*Paragas* and *Walters*), the NYCTA actually chose not to dispute liability, and in the third (*Grant*), they disputed it, but were unsuccessful.

This Court reiterates the reasoning previously set forth regarding the granting of the MTA-Long Island Bus Defendants' main motion, and likewise grants plaintiffs' cross motion. While in its opposition papers to plaintiffs' cross motion, the NYCTA defendants make the argument that the issue of liability was not necessarily decided because once the motions were granted on threshold grounds, there was no need to go any further and so any liability decision would not be a "necessary" one, they have failed to provide any legal support for this proposition, nor has this Court found any such support. To the contrary, the Court notes that the issue of liability was in fact, necessarily decided, as the identical issue of liability was "distinctly decided" in an earlier proceeding (see, *Eaton v. Alger, supra*). Accordingly, plaintiffs' cross motion is granted.

That branch of plaintiffs' cross motion seeking an Order assessing costs against the NYCTA defendants is denied as set forth hereafter.

Plaintiffs adopt all of the arguments submitted by the MTA-Long Island Bus defendants in their main motion and reiterate that it is frivolous for the NYCTA defendants to oppose summary judgment on liability in this case when two Justices, in three separate opinions, have already found them liable, and there is no law or theory which supports their position to contest liability. Plaintiffs also reiterate that the NYCTA defendants violated the Court's Order dated January 4, 2007 on two separate occasions by failing to show up prepared to "So-Ordered" Court conferences.

The NYCTA defendants do not address the Court Order of January 4, 2007 or any Court conferences in their opposition papers to plaintiffs' cross motion.

This Court finds that plaintiffs' cross motion for sanctions is denied. (*See this Court's reasoning supra*).

Defendants', New York City Transit Authority ("NYCTA") and John R. LeCruise's cross motion for summary judgment and

dismissal of the plaintiffs' Complaint on the basis that plaintiff, Roxanne Liverpool has failed to satisfy the "serious injury" standard, pursuant to New York Insurance Law § 5102(d) is denied. Said defendants make the instant cross motion for summary judgment on threshold grounds beyond 120 days from the filing of the Notice of Trial. CPLR 3212(a) states in relevant part that: "such motion shall not be made later than 120 days after the filing of the note of issue, except with leave of court on good cause shown." On or about February 25, 2005, defendants, Metropolitan Suburban Bus Authority and Oscar L. Walter moved for summary judgment based upon threshold grounds. Thereafter, on or about April 5, 2005, defendants, NYCTA and John R. LeCruise brought a cross motion seeking summary judgment on threshold grounds. In an Order dated August 9, 2005, both the motion and the cross motion were denied by the Hon. Roger N. Rosengarten. Justice Rosengarten's Order states: "[t]he movants have failed to show good cause for extending their time to file the motions some 18 months after filing of the Note of Issue." In the instant cross motion, the cross moving defendants' purported "good cause" consists of its contention that the Court has recently relaxed the time restrictions upon the filing of summary judgment motions, and therefore their untimely motion should be heard. Said defendants argue that the Court permitted plaintiff and co-defendants to make summary judgment motions beyond the 120-day period, and that if the Court is going to consider one summary judgment motion, it should consider all the summary judgment motions on their merits, or else defendants, the NYCTA and John R. LeCruise will be prejudiced. It is undisputed that no leave was ever granted by this Court to the defendants, the NYCTA and John R. LeCruise to either file or re-file a motion for summary judgment on the issue of whether the plaintiff can satisfy the threshold of serious injury. As the cross moving defendants have failed to demonstrate "good cause" as to why they should be allowed to make their summary judgment threshold motion years after the Note of Issue has been filed, defendants' cross motion is denied.

The foregoing constitutes the decision and order of this Court.

Dated: August 6, 2007

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**Howard G. Lane, J.S.C.**