Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

SILVIA HERBERT, Plaintiff,	Index No. 22300/06
-against-	Motion Date November 13, 2007
NEW YORK CITY TRANSIT AUTHORITY, "JOHN DOE" and METROPOLITAN TRANSIT AUTHORITY, Defendants.	Motion Cal. No. 6
	Motion Sequence No. S001

The following papers numbered 1 to 10 read on this motion by defendants, New York City Transit Authority and Metropolitan Transportation Authority for an Order pursuant to CPLR 3211 and 3212 dismissing plaintiff's Complaint against them on the grounds that plaintiff has failed to state a cause of action against the defendants; cross motion by plaintiff, Silvia Herbert for leave to amend the complaint.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1-4
Cross Motion.....	5-8
Reply Affirmation.....	9-10

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

That branch of defendants' New York City Transit Authority ("NYCTA") and the Metropolitan Transportation Authority ("MTA" s/h/a Metropolitan Transit Authority) motion for an Order pursuant to CPLR 3211 and 3212 dismissing plaintiff's Complaint against them on the grounds that plaintiff has failed to state a cause of action against the defendants, NYCTA and MTA is granted.

The action is one for personal injuries allegedly sustained by plaintiff, Silvia Herbert, on February 13, 2006, wherein plaintiff alleges that while exiting the Q40 Bus at a bus stop located at the intersection of Sutphin Boulevard and Archer

Avenue, County of Queens, City and State of New York, she slipped and fell because of snow and ice located on the steps of the bus.

Defendants, New York City Transit Authority ("NYCTA") and the Metropolitan Transportation Authority ("MTA" s/h/a Metropolitan Transit Authority) maintain that assuming every allegation purported by the plaintiff is true, the plaintiff's Complaint must be dismissed because defendants NYCTA and MTA did not own, maintain, operate or control the Q40 bus line, and therefore, neither defendant owed any duty of care to a person in the position of plaintiff, a passenger on the Q40 Bus. Defendants maintain that they served an Answer which included an affirmative defense which informed the plaintiff that she had brought the action against the wrong parties, and indicated that the MTA Bus Company is the proper party that this action should have been brought against. Defendants also maintain that there is absolutely no evidence to show that the Q40 Bus was the property of the defendants, NYCTA and MTA. In support of its motion, defendants proffer an affidavit of Karl Stricker, General Superintendent, Special Operations at the Manhattan and Bronx Surface Transit Operating Authority, a subsidiary of the NYCTA. Mr. Stricker states in his affidavit that through his position, which he has held since 1999, he has access to files and records relating to bus routes under the jurisdiction of the NYCTA, and he has access to records which identify the different organizations that operate bus routes in New York City and the specific routes that these organizations operate. He states that on the day of the accident, neither defendant NYCTA, nor defendant MTA, operated the Q40 Bus, and on the day of the accident, the Q40 Bus was operated by the MTA Bus Company.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83 [1994].) In determining whether plaintiff's complaint states a valid cause of action, the court must accept each allegation as true, without expressing any opinion on plaintiff's ultimate ability to establish the truth of these allegations before the trier of fact (*219 Broadway Corp. v. Alexanders, Inc.*, 46 NY2d 506 [1979]; *Tougher Industries, Inc. v. Northern Westchester Joint Water Works*, 304 AD2d 822 [2nd Dept. 2003]). The court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (s*ee, CPLR 3211[a][7]*; *Hoag v. Chancellor, Inc.*, 246 AD2d 224 [1st Dept. 1998].)

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 proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Defendants have presented sufficient evidence to establish that as a matter of law there is an absence of a triable issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). This Court finds that the Affidavit of Karl Stricker, included as part of defendants' moving papers is an affidavit from one with personal knowledge of the facts in this matter (*see*, CPLR 3212b), and as such, defendants proffered sufficient proof in evidentiary form to establish the absence of a triable issue of fact.

Plaintiff failed to proffer sufficient proof in evidentiary form to establish a triable issue of fact. In support of its motion, plaintiff merely proffers an attorneys affidavit, which fails to raise any evidentiary proof to rebut defendants' *prima facie* case, as the attorney does not state that he has personal knowledge of the facts in this matter and it is well settled that an affidavit or affirmation from a party's attorney who lacks personal knowledge of the facts, is of no probative value and is insufficient to support an award of summary judgment (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Amaze Med. Supply, Inc. v. Allstate Ins. Co.*, 3 Misc 3d 133(A), [App Term, 2d and 11th Jud Dists 2004]; *Wisnieski v. Kraft*, 242 AD2d 290 [2d Dept 1997]; *Lupinsky v. Windham Constr. Corp.*, 293 AD2d 317 [1st Dept 2002]); and an affidavit of plaintiff, which raises no triable issues of fact.

Accordingly, as there are no triable issues of fact, summary judgment is warranted and the Complaint is dismissed as against defendants, NYCTA and MTA.

That branch of defendants' motion seeking dismissal of plaintiff's Complaint based upon the grounds that plaintiff failed to meet the notice of claim requirement mandated by General Municipal Law 50(e) and Public Authorities Law § 1212 is thereby rendered moot, however, *assuming arguendo* that the Court were to consider such branch of the motion, the entire motion would still be denied.

The plaintiff undisputedly failed to serve the defendants with a Notice of Claim within ninety (90) days of the alleged accident, and therefore, the Complaint must be dismissed. Pursuant to both Public Authorities Law § 1276(2) and case law, a tort action against a public authority cannot be commenced unless a notice of claim is served on the authority in compliance with New York General Municipal Law § 50(e), which law requires that a notice of claim be served within ninety (90) days of when the claim arises (*Natoli v. Board of Education*, 277 AD2d 915 [2d Dept 1950], *aff'd* 303 NY 646 [1951]). While the Courts do have discretion to grant applications to serve late notices of claim, the Courts do not have discretion to grant applications to serve late notices of claim made after the expiration of the statute of limitations period for tort actions to be brought against the NYCTA and MTA (s*ee,* New York General Municipal Law § 50[e]). The statute of limitations period for personal injury actions against the NYCTA and MTA is one year and ninety (90) days pursuant to Public Authorities Law § 1212(2). The accident occurred on February 13, 2006. As of the date of the instant motion, the statute of limitations period for the commencing of the action has expired. Therefore, the Court could not grant any application by the plaintiff for an extension to file a late notice of claim *(Hochberg v. City of New York*, 99 AD2d 1028, *aff'd*, 63 NY2d 665 [NY 1984]).

Accordingly, the Complaint is dismissed as against defendants NYCTA and MTA.

Plaintiff's cross motion seeking leave to amend the Complaint to read MTA Bus Company instead of and in place of Metropolitan Transportation Authority (s/h/a Metropolitan Transit Authority), which is in essence, a motion to add MTA Bus Company as a party to the action is hereby granted. Plaintiff seeks leave of the Court to file and serve an amended Complaint to reflect the name MTA Bus Company, instead of the Metropolitan Transportation Authority (s/h/a Metropolitan Transit Authority). Plaintiff maintains that no prejudice will result if their cross motion is granted since the MTA Bus Company is the same entity as the one they brought suit against with the same address for service of process and filing of notices of claim. Plaintiff attaches as Exhibit "D" of its cross motion, a correspondence from the MTA Bus Company which clearly states that the MTA Bus Company is in receipt of plaintiff's Notice of Claim and No-Fault Application. Such correspondence is dated May 1, 2006, a date well within the ninety (90) day time period set forth by New York General Municipal Law § 50-e; and the correspondence indicates that the MTA Bus Company opened a file and assigned a file number to the matter. Moreover, plaintiff contends that the agent for the service of process is identical for both the MTA and the MTA Bus Company. Plaintiff therefore argues that the MTA Bus Company was made aware of plaintiff's notice of claim well within the

ninety (90) day statutory period, and will not be prejudiced by the amendment.

Defendants argue that plaintiff's cross motion is defective because the MTA Bus Company should have been served with the cross motion so that it could have a chance to respond and defend itself, and according to the affidavit of service in plaintiff's cross motion MTA Bus Company was never served with the cross motion. They contend that plaintiff knew that the MTA Bus Company was the correct entity to sue because they received the MTA Bus Company's correspondence dated May 1, 2006, acknowledging receipt of plaintiff's Notice of Claim and informing the plaintiff that the MTA Bus Company has opened a file on this case. Defendants maintain that the location where the plaintiff served its Summons and Complaint upon the MTA accepts service for both the MTA and MTA Bus Company. When papers are served at the location, process servers are asked to identify which entity is being served and are then stamped with the specific identity, MTA or MTA Bus Company that is accepting service. The plaintiff's copy of the Summons and Complaint attached to its cross motion indicates that the service of the Summons and Complaint was "ACCEPTED FOR MTA ONLY."

Defendants further argue that plaintiff cannot substitute non-party MTA Bus Company in place of defendant MTA in this action since the MTA and MTA Bus Company are separate entities. They also maintain that the MTA's role is limited to finance and planning, and it cannot be liable for one of the local Transit entities such as the NYCTA or MTA Bus Company, (*citing Soto v. New York City Transit Authority*, 19 AD3d 579 [2d Dept 2005], *aff'd*, 6 NY3d 487 [2006] and *Emerick v. Metropolitan Transportation Authority*, 272 AD2d 150 [1st Dept 2000]). Defendants contend that MTA Bus Company is a public benefit corporation which was created as a subsidiary of the MTA to run certain bus lines throughout the City of New York, such as the Q40; and that pursuant to Public Authorities Law § 1266, the MTA possesses the inherent power to create subsidiary corporations, which can be public benefit corporations. Defendants allege that the distinctions between the MTA and MTA Bus Company are clear in that the MTA's role in transportation is finance and planning, while MTA Bus Company is a public benefit corporation that owned and operated the Q40 Bus line on the day of plaintiff's accident. They conclude that the plaintiff knew that the proper defendant for the lawsuit was the MTA Bus Company, but still failed to file suit against the MTA Bus Company before the expiration of the 1-year and ninety (90) day statute of limitations period pursuant to Public Authorities Law § 1212(2).

It is well settled law that motions for leave to amend the pleadings are to be freely granted, as long as there is no prejudice or surprise to the adversary (CPLR 3025(b); *Wirhouski*

v. Armoured Car & Courier Serv., 221 AD2d 523 [2d Dept 1995]). The trial court has discretion to grant the motion to amend pleadings and "[i]n exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom." *(Branch v. Abraham & Strauss Dept. Store*, 220 AD2d 474 [2d Dept. 1995]). Under CPLR 2001, the Court can allow a mistake to be corrected "upon such terms as may be just." *(see also,* CPLR 3025(b), which states that leave to amend pleadings shall be freely granted on such terms that are just.

The Court has discretion to add MTA Bus Company as a defendant to the action. CPLR Section 1003: Nonjoinder and misjoinder of parties states in relevant part, that "[p]arties may be added at any stage of the action by leave of court. . ." While a motion to add a party must be made on notice to everyone who is already a party, notice need not be given to the party sought to be added (David D. Siegel, New York Civil Practice, [4th ed. 2005] § 138, at 236-238; s*ee,* CPLR 1003). Plaintiff demonstrated that MTA Bus Company should be joined as a defendant in this action, as plaintiff attaches as an exhibit to its cross motion a correspondence from the MTA Bus Company which clearly states that the MTA Bus Company is in receipt of plaintiff's Notice of Claim and No-Fault Application and which correspondence indicates that the MTA Bus Company opened a file and assigned a file number to the matter *(see, Levykh v. Laura*, 274 AD2d 418 [2nd Dept. 2000]).

Accordingly, plaintiff's motion which in effect seeks to join a party defendant (MTA Bus Company) is granted. Plaintiff is given permission to add MTA Bus Company as a party defendant by the filing and service upon all parties of a Supplemental Summons and Amended Complaint (*see, Connell v. Hayden*, 83 AD2d 30 [2nd Dept 1981]) together with a copy of this order and notice of entry within thirty (30) days from the date of entry of this Order.

The foregoing constitutes the decision and order of this Court.

Dated: December 10, 2007

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Howard G. Lane, J.S.C.