

<b>Wessler v New York City Tr. Auth.</b>
2008 NY Slip Op 30764(U)
March 11, 2008
Supreme Court, New York County
Docket Number: 0119044/2003
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

WESSLER, FRAN STERN et al.,  
Plaintiff,

INDEX No. 119044/03

-v-

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

NEW YORK CITY TRANSIT AUTHORITY, et al.,  
Defendants.

MOTION SEQ. No. 002

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

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

1

Answering Affidavits- Exhibits \_\_\_\_\_

2

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

3+4

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

3+4

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

3+4

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 3/11/08

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION

\_\_\_\_\_ NON-FINAL DISPOSITION

**FILED**  
MAR 18 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

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

-----x  
FRAN STERN WESSLER and STEPHEN WESSLER,

Plaintiff,

Index No.: 119044/03

- against -

THE CITY OF NEW YORK, NEW YORK CITY  
TRANSIT AUTHORITY and MANHATTAN AND  
BRONX SURFACE TRANSIT OPERATING  
AUTHORITY,

Defendants.

-----x  
DONNA MILLS, J:

**FILED**  
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In light of the First Department's recent landmark ruling in Cabrera v City of New York, (45 AD3d 455 [1<sup>st</sup> Dept 2007]), defendants New York City Transit Authority (NYCTA) and Manhattan Bronx Surface Transit Operating Authority (MBSTOA), move for an order: (a) granting defendants permission to move for summary judgment one year after note of issue has been filed; and (b) if permission is granted, pursuant to CPLR 3211 (a) (7), dismissing the complaint, dated October 20, 2003 (the Complaint), on the ground that plaintiff's theory of liability in this personal injury action is void as a matter of law.

Based on the following reasons, defendants' motion is granted in its entirety.

On January 20, 2003, plaintiff, Fran Stern Wessler, allegedly sustained personal injuries when she stepped off of a curb onto an uneven roadway in front of a bus stop. The bus stop at issue is located on the north side of East 72<sup>nd</sup> Street, between 1<sup>st</sup> and 2<sup>nd</sup> Avenues, New York, New York. This action ensued. Plaintiff's husband, Stephen Wessler, also brings a claim of loss of consortium.

On February 7, 2006, plaintiff moved to strike NYCTA and MBSTOA's answers for a purported failure to provide outstanding disclosure. The NYCTA and MBSTOA cross-moved to

dismiss the Complaint on the ground that they did not make a special use of the roadway. The City of New York moved to dismiss based on lack of notice. On June 26, 2006, in a non-final disposition, the court dismissed the action as against the City of New York on the ground that it did not have prior written notice, and denied the cross motions by NYCTA and MBSTOA, without reaching the merits. Note of Issue was filed on August 24, 2006. The case is set for trial on March 11, 2008.

On November 27, 2007, the First Department changed the law with respect to whether a transit authority may be held liable for the wear and tear produced by its buses along the roadway adjoining its bus stops, holding that it may not (Cabrera, 45 AD3d at 455). Defendants urge that in light of the recent holding they be permitted to file the instant summary judgment motion notwithstanding the fact that it is beyond the 120-day requirement under CPLR 3212 (a). This court agrees.

Pursuant to CPLR 3212 (a), a motion for summary judgment may not be made later than 120 days after the filing of the notice issue, except with leave of court on good cause shown. In Brill v City of New York, (2 NY3d 648, 652 [2004] ), the Court of Appeals held that “good cause ‘in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, non-prejudicial filings, however tardy.” Although this motion is made beyond 120 days after the note of issue was filed, the court is satisfied that there is good cause for the delay based on the aforementioned change of law (see Armentano v Broadway Mall Properties, Inc., — AD3d —, 2008 NY Slip Op 01283, 2008 WL 391234 [2d Dept Feb 13, 2008], citing Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]; Brill, 2 NY3d 648).

The court, therefore, turns to the merits of the summary judgment motion. Defendants contend that the action should be dismissed as there is no longer a valid cause of action. Plaintiff

counters that even with the recent change in law, a valid cause of action exists.

In Cabrera, the First Department held that “the duty to maintain public sidewalks and roadways - including those adjacent to bus stops - in a reasonably safe condition and good repair, free from any defect, falls upon the city” (Cabrera, 45 AD3d at 455, citing Cioe v Petrocelli Elec. Co., Inc., 33 AD3d 377 [1<sup>st</sup> Dept 2006]). The court further held that “bus lanes, like other elements of the City’s infrastructure, are the responsibility of the City and do not constitute ‘a special use’ by the transit defendants” (*id.*, citing Towbin v City of New York, 309 AD2d 505 [1<sup>st</sup> Dept 2003]).

A special use occurs whenever public property, such as a street or sidewalk, has been altered or constructed in such a way as to confer a “special benefit” unrelated to its public use (see Kaufman v Silver, 90 NY2d 204 [1997]; D’Ambrosio v City of New York, 55 NY2d 454). In such situations, a duty of care is owed to the general public by the owner to maintain the street or sidewalk in a reasonably safe condition (see Kaufman, 90 NY2d at 207).

Plaintiff admits that in light of the First Department’s holding in Cabrera, “she would have no case” if she was relying solely on the “special use doctrine.” Plaintiff contends, however, that she relies on a “cause and create theory.” Namely, she argues that since defendants’ buses created the actual defect, they should be held liable for the consequences of the defect (see e.g., Witter v City of New York, 217 AD2d 580 [2d Dept 1995]).

Plaintiff’s claim essentially relies on Matias v New York City Transit Authority (292 AD2d 311 [1<sup>st</sup> Dept 2002]). In Matias, the plaintiff was injured due to an alleged defect on the sidewalk, which was allegedly caused by the buses’ use of a bus stop resulting in the asphalt forming a mound, which caused the curb to crack (292 AD2d 311). There, the court held that “with respect to the moving defendants’ contention that the City is exclusively responsible for the maintenance of its sidewalks, we note that there may be more than one proximate cause of an

accident” (*id.*). As such, the First Department reversed the order of the lower court granting summary judgment dismissing the complaint.

However, Cabrera expressly overruled the holding in Matias, stating “[t]o the extent that Matias[ ] upon which plaintiff relies, leads to a contrary result, we overrule” (45 AD3d at 455). Moreover, the underlying cases on which the First Department relied, specifically addressed and rejected any such “cause and create theory.”

For example, in Shaller v City of New York, (41 AD3d 697 [2d Dept 2007]), the Second Department held that “although the plaintiffs alleged that the NYCTA created or contributed to the defect which caused the injured plaintiff’s fall, the allegations were based on the normal operation of NYCTA buses and therefore responsibility to repair such a defect rested with the City” (41 AD3d at 698).

Likewise, in Tanger v City of New York, “the plaintiff alleged that the NYCTA created the defect which caused him to fall” (41 AD3d 582 [2d Dept 2007]). The Supreme Court denied the NYCTA’s motion for summary judgment (*id.*). The Second Department reversed, holding, “these allegations were based on the normal operation of NYCTA buses, and the responsibility to repair such a defect rested with the City, not the NYCTA” (*id.*, citing McFarlane v City of New York, 243 AD2d 691 [2d Dept 1997]).

It is clear from the language of Cabrera and the precedent the First Department relies on, that defendants cannot be held liable under either a special use or cause and create theory.

Therefore, the motion for summary judgment by defendants is granted.

### **Conclusion**

It is ORDERED that the motion by defendants New York City Transit Authority and Manhattan Bronx Surface Transit Operating Authority for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon

the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 3/11 /2008

ENTER: [Signature]  
J.S.C.

**FILED**  
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