

**Ohlhausen v New York City Tr. Auth.**

2008 NY Slip Op 33603(U)

September 23, 2008

Supreme Court,, New York County

Docket Number: 103140/06

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 21

ROLF OHLHAUSEN,

Plaintiff,

-v-

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

INDEX NO. 103140/06

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

MOTION SEQ. NO. 005

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

The following papers, numbered 1 to 3 were read on this motion for Summary Judgment

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1

Answering Affidavits- Exhibits 2

Replying Affidavits 3

CROSS-MOTION: YES  NO

**FILED**  
SEP 26 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff on September 14, 2005 when his motorcycle was hit by a New York City Police Department vehicle in the intersection of West 10<sup>th</sup> and West 4<sup>th</sup> Streets in Manhattan. A New York City Transit Authority (NYCTA) bus was also at the intersection, and the operator of the bus had allowed the police car to cross in front of it, against the light, at which time the collision occurred. In addition to bringing suit against the City of New York, plaintiff also sued the NYCTA as he alleges that it

was negligent through its operator, for amongst other things, waving the police officer through the intersection, which said act plaintiff contends affirmatively contributed to the happening of the accident. NYCTA now moves for summary judgment dismissing the action against it.

#### APPLICABLE LAW & DISCUSSION

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). “But when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the trial calendar and thus deny to other litigants the right to have their claims promptly adjudicated” (Andre v Pomeroy, 35 NY2d 361 [1974]).

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor (CPLR 3212[b]), and must do so by tender of evidentiary proof in admissible form.

In the instant case, Jeffrey Whaley, the bus operator operating the subject bus at the time of the incident, stated in his affidavit, that just before the accident, he waved the police car through the intersection. The driver of the police vehicle that came into contact with the plaintiff, was Police Officer Keith Murray and he also testified at his deposition that just before he entered the intersection the bus driver waved him through.

It is well settled that “[u]nder certain circumstances, a driver of a motor vehicle may be liable to a pedestrian where that driver undertakes to direct a pedestrian safely across the road in front of his vehicle, and negligently carries out that duty” (Valdez v Bernard, 123 AD2d 351 [2<sup>nd</sup> Dept 1986]). Although the facts are slightly different in this case, the theory of possible

negligence remains. In the instant action, the undisputed fact is that the bus driver waved the police officer through the intersection just before the accident. As such, contrary to movants contentions, factual issues exist with regard to whether the bus driver negligently waved the police officer through the intersection and whether his conduct in that regard was a proximate cause of plaintiff's injuries (see Yau v New York City Transit Authority, 10 AD3d 654 [2<sup>nd</sup> Dept 2004]). These factual issues should be left to a jury.

Accordingly it is

ORDERED that the motion for summary judgment is denied. This constitutes the decision and order of the court.

Dated: 9/23/08

*Donna M. Mills*  
J.S.C.  
**DONNA M. MILLS, J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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