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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 22

MURAD MAYAYEV,
Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY and "JOHN DOE", name fictitious as unknown to plaintiff,
Defendants.

Index No. 11742/07

Motion Date March 4, 2008

Motion Cal. No. 10

Motion Sequence No. 001

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

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, and on the grounds that there are no triable issues of fact is granted.

The action is one for personal injuries allegedly sustained by plaintiff, Murad Mayayev, on May 23, 2006, wherein plaintiff alleges that while a passenger on the Q38 Bus at the intersection of 63rd Drive and Queens Boulevard, County of Queens, City and State of New York, the bus driver made a sudden, unexpected, jerking, and violent maneuver which caused the claimant to fall and sustain serious personal injuries to his body. Plaintiff alleges that the bus was owned and operated by defendants.

Defendants, NYCTA and the MTA 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, manage, operate, or control the Q38 bus line, and therefore, neither defendant owed any duty of care to a person in the position of plaintiff, a passenger on the Q38 Bus. In support of their motion, moving 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 Q38 Bus, and on the day of the accident, the Q38 Bus was operated by non-party "MTA Bus Company." Finally, moving defendants cite to case law stating that the MTA is never a proper party to an action involving allegedly negligent conduct in the operations of the transit system.

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 (*see*, 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, NYCTA and MTA 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 3212[b]), 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 attorney's 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 (*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 plaintiff's own statutory hearing transcript, which raises no triable issues of fact.

Accordingly, defendants' motion is granted.

That branch of plaintiff's cross motion seeking to correct a typographical error in the Summons and Complaint and adding the word "Bus" after the words "Metropolitan Transportation Authority" is hereby denied. Plaintiff has failed to provide sufficient proof that it actually intended to sue "MTA Bus" as opposed to the MTA. Plaintiff's excuse sounds in the nature of law office failure, however, plaintiff has failed to provide corroboration for its excuse. Plaintiff has failed to provide an affidavit from the one who made the typographical error and has failed to prove that the error was a mere administrative error as opposed to a substantive error. Plaintiff's papers support the intention that it intended to sue the MTA, not the "MTA Bus,"

from the beginning. For example, there was no service of a Summons and Complaint on the "MTA Bus," and plaintiff's papers say "MTA" when defining the defendants *(see, Abrams v. City of New York*, 13 AD3d 566 [2d Dept 2004] (where the plaintiff's excuse for the default was "vague and unsubstantiated" the Court properly exercised its discretion in finding the excuse to be unreasonable); *Grezinsky v. Mount Hebron Cemetery*, 305 AD2d 542 [2d Dept 2003] (where the movant failed to set forth detailed factual allegations of the reason for its law office failure, the excuse was not deemed to be reasonable). Plaintiff's excuse of law office failure is undetailed and uncorroborated and, therefore, does not demonstrate a reasonable excuse (*Solomon v. Ramlall*, 18 AD3d 461 [2d Dept 2005]).

That branch of plaintiff's cross motion seeking to substitute "Metropolitan Transportation Authority Bus" for Metropolitan Transportation Authority" is hereby denied. Plaintiff has failed to prove that Metropolitan Transportation Authority and MTA Bus are one in the same entity. Additionally, it has been held that, "the failure to name the real party in interest cannot be remedied by resort to the expedient of substitution." *(National Financial Co. v. Uh*, 279 AD2d 374 [1st Dept 2001]).

That branch of plaintiff's cross motion seeking to add "Metropolitan Transportation Authority Bus" as a party is denied. 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]) and pursuant to CPLR 1003, the Court has discretion to grant leave to add parties at any stage of an action. However, it would be an error for the Court to grant leave to add a party when the statute of limitations has clearly run (*see Lewis v. Wascomat*, 125 AD2d 194 [1st Dept 1986]). In the instant case, plaintiff has conceded that by the date that defendants served their instant motion to dismiss, "the one year and ninety day Statute of Limitations expired for commencement of suit upon "MTA Bus." (See ¶14 of Timothy L. Bompart's Affirmation in Support of the Cross Motion). As plaintiff is conceding that the Statute of limitations had run at the time it brought the instant cross motion to add the party, "Metropolitan Transportation Authority Bus," that branch of the cross motion is denied.

That branch of plaintiff's cross motion seeking to substitute "Metropolitan Transportation Authority Bus" for defendant "John Doe" and amending plaintiff's Complaint is hereby denied. Pursuant to CPLR 1024, "[a] party who is ignorant. . .of the name or identity of the person who may properly be made a

party, may proceed against such person as an unknown party by designating so much of his name and identity as is known." Plaintiff cannot now claim that when it served the summons and complaint, it intended for the "John Doe" to be the "Metropolitan Transportation Authority Bus" in that ¶12-16 of the complaint clearly indicate that John Doe referred to the operator of the bus involved in plaintiff's accident. Accordingly, that branch of the cross motion is denied.

That branch of plaintiff's cross motion seeking to equitably estop defendant MTA from disclaiming ownership and control of the subject bus is hereby denied. It is well-established law that the doctrine of equitable estoppel can only be invoked "where a governmental subdivision acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice," and the doctrine "is to be invoked sparingly and only under exceptional circumstances." (*LoCiciro v. Metropolitan Transportation Authority*, 288 AD2d 353 [2d Dept 2001][citations omitted]). "Only a showing of fraud, misrepresentation, deception, or similar affirmative misconduct, along with reasonable reliance thereon, will justify the imposition of estoppel." (*Yassin v. Sarabu*, 284 AD2d 531 [2d Dept 2001] [citations omitted]).

The Court finds that on June 5, 2007, the moving defendants served an Answer which denied, albeit upon information and belief, ownership and operation of the bus in question. This should have put the plaintiff on notice that the moving defendants may not have been the correct parties to sue (*see, Zaiman v. Metropolitan Transit Authority*, 186 AD2d 555 [2d Dept 1992]). Furthermore, there is no evidence that the NYCTA or the MTA acted wrongfully or negligently, or in any way that could reasonable induce the plaintiff into believing that it had sued the proper party. (*See Id.*) It is undisputed that a letter dated September 29, 2006 was sent by the MTA Bus Company which acknowledged plaintiff's claim against MTA Bus Company and requested discovery, including a hearing. The Court does not find that there was any intention on the part of the MTA or NYCTA to mislead or deceive plaintiff into believing it had sued the correct party.

Accordingly, plaintiff's cross motion is denied in its entirety.

The foregoing constitutes the decision and order of this Court.

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Dated: APR 22 2008

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Howard G. Lane, J.S.C.