

Davis v New York City Tr. Auth.

2009 NY Slip Op 31679(U)

July 20, 2009

Supreme Court, New York County

Docket Number: 400844/2008

Judge: Harold B. Beeler

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

HAROLD BEELER
J.S.C.

PRESENT: _____
Justice

PART 21

Davis, S

INDEX NO. 400844108

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

NYC Transit

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

This case shall be transferred to another part because ~~to~~ Transit Authority and MTA are no longer parties.

Dated: 7/21/09

HAROLD BEELER
J.S.C. J.S.C.

JUL 21 2009

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

-----X

SHANA DAVIS,

Plaintiff,

-against-

**Index No. 400844/2008
SEQUENCE MS001
DECISION & ORDER**

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY,
CYNTHIA RILEY, and XAVIER AGUILERA

Defendant,

-----X

HAROLD B. BEELER, J.S.C.:

FILED
JUL 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

This decision arises from a complex motion sequence where the initial motion and several of the subsequent cross-motions have since been withdrawn. As a result, the following motions are to be decided by the Court:

1. Defendant Metropolitan Transit Authority ("MTA") moves for summary judgment dismissing the complaint against it, on the grounds that (a) it is not a proper party, and that (b) the statute of limitations has run.
2. Defendant New York City Transit Authority ("Transit Authority") moves for summary judgment dismissing the complaint against it, on the grounds that it is not a proper party.
3. Defendant Cynthia Riley ("Riley") moves for summary judgment dismissing the complaint against her, on the grounds that the statute of limitations has run.
4. Plaintiff Shana Davis ("Davis" or "plaintiff") moves for leave to amend her caption to substitute non-party MTA Bus Company for MTA.

Factual and Procedural History

On May 26, 2006, Davis, a passenger in a car driven by Brandon Dixon (Dixon),¹ was injured in a motor vehicle accident between a bus owned by MTA Bus Company, driven by Riley, and another motor vehicle driven by defendant Xavier Aguilera (“Aguilera”) at the intersection of Broadway and 21st Street. The May 29, 2006 New York State Department of Motor Vehicles Police Accident Report (MV-104AN) provided that vehicle #1 was driven by Aguilera; vehicle #2 by Dixon; and vehicle #3, the bus, by Riley. The attending officer’s notes provided:

At T/P/O Driver of veh #1 states that he was S/B on 21st when at the intersection of Broadway a MTA bus making a left turn on Broadway cause veh #1 to stop causing him to slide into veh # 2.
At T/P/O Driver #2 states he was heading S/B on 21st with a green light when a MTA bus made a left from 21st to head W/B on Broadway causing him to hit into the bus.

At T/P/O Driver #3 states she was heading N/B on 21st maked [sic] a left to head W/B on Broadway when the veh #2 hit into the bus at said location.

The MV-104AN diagram reflected that both vehicles struck the right passenger side of the bus.

The MV-104AN listed Aguilera’s address in Elmhurst, New York 11373, and Riley’s address in the Bronx, New York 10460. Vehicle #3 is listed as belonging to the MTA Bus Company with an address at 341 Madison Avenue, New York, New York 10017.

Davis served summonses and complaints on MTA, Riley, and Transit Authority on August 31 2007. Aguilera was initially served on September 2, 2007 and was served again on September 8, 2007. Neither Riley nor MTA Bus Company was served with a summons and

¹ Dixon is the plaintiff in a separate action arising out of the same events, Dixon v. New York Transit Authority, Index No. 400657/2008.

complaint at the addresses listed for them on the MV-104AN accident report.

Correspondence annexed to Davis's cross-motion paints an unclear picture of defendants' representation. A stipulation between Transit Authority's inhouse counsel and Marlo Polese, Esq. of Heleme Fromm, Esq., dated September 7, 2007, provides that the defense of Transit Authority was undertaken by Fromm, general counsel to MTA Bus Company. Davis annexes a cover fascimile for this stipulation, dated April 17, 2008.

However, on November 1, 2007, Joseph Sullivan, of Sullivan & Brill, LLP, submitted correspondence as counsel for Transit Authority and MTA, in the form of a letter to plaintiff's counsel requesting an extension to serve an answer. The cover page identified the matter as "Davis v. MTA Bus Co. et al." On November 30, 2007, MTA and Transit Authority served separate answers on Davis (both through Sullivan), with identical cross claims against Aguilera. The first cross claim sought indemnification from Aguilera based on his negligent acts or omissions. The second cross claim alleged that the plaintiff's injuries were caused by Aguilera's negligent acts and omissions. No demands accompanied the Transit Authority and MTA cross claims. The affidavits of service do not reflect that the Transit Authority's and MTA's answers and cross-claims were served on Riley or Aguilera at their addresses listed on the MV-104AN.

On December 6, 2007, Sullivan faxed to plaintiff a proposed stipulation regarding a change of venue to New York County. The cover page identified the two matters as "Dixon v. MTA Bus Co. et al" and "Davis v. New York City Transit Authority."

This motion sequence commenced on May 22, 2008 when Davis served her motion for a default judgment against Riley and Aguilera, which has since been withdrawn.

Aguilera eventually served a verified answer and cross claim on September 4, 2008. His

cross claim is directed against co-defendants Transit Authority, MTA and Riley.

Fifteen days after Aguilera served his answer, on September 19, 2008, Riley formally appeared by of a cross motion to Davis's motion for default judgment. In the cross-motion, Riley argues that she was an employee of non-party MTA Bus Company at the time of the accident, and that Davis filed her complaint more than one year and thirty days after the accrual of her cause of action. Riley further argues that Public Authorities Law § 1276 (1) and (2), the statute limitations applicable to the MTA, applies to Riley as an employee of non-party MTA Bus Company. Even though Aguilera appeared in the action as of September 4, 2008, the affidavit of service attached to Riley's cross motion reflects that a copy of her cross motion was not served on Aguilera.

On October 3, 2008, Davis served her opposition to Riley's cross-motion, as well as her own cross-motion, in which she withdrew her initial motions for default judgment against Riley and Aguilera, and requested leave to amend the complaint, pursuant to NY CPLR § 3025 (b), to correct a "misnomer" in the caption by substituting the MTA Bus Company for MTA as a named defendant. The affidavit of service attached to Davis's October 3, 2008 cross-motion reflects that copies were served on Transit Authority, MTA, Riley, and Aguilera,

On October 13, 2008, Riley served a memorandum of law in reply to Davis's opposition to her October 3, 2008 cross-motion. Riley argued that the action against her should be dismissed because she was never properly served, pursuant to NY CPLR § 306; and because the applicable statute of limitations, pursuant to Public Authorities Law § 1276(2), had already expired. The affidavit of service attached to Riley's October 13, 2008 memorandum of law reflects that Riley, again, failed to serve Aguilera.

Discussion

Statute of Limitations for MTA

MTA cross-moves for dismissal of Davis's complaint on the ground that the action against it is time barred pursuant to Public Authorities Law § 1276.

Public Authorities Law §§ 1276 (1) and (2) provides that the statute of limitations against MTA or any of its subsidiary corporations is one year, with a thirty day toll from the day a plaintiff serves the statutorily required notice of claim, thus extending the period to one year and thirty days if the plaintiff serves a timely notice of claim. *Burgess v. Long Island Railroad Authority*, 79 N.Y.2d 777, 778; 578 N.E.2d 269, 579 N.Y.S.2d 631 (1991).²

Davis failed to serve MTA within the statute of limitations. The cause of action arose on May 29, 2006, and the statute of limitations expired on June 28, 2007. She did not serve a summons and complaint on either Transit Authority or MTA until August 31, 2007. Therefore the action is time barred as against MTA.

MTA and Transit Authority as Proper Parties

MTA is a public benefic corporation that oversees New York's City's mass transportation system, serving as the umbrella organization for its operating agencies. *New York Public Interest Group Straphangers Campaign, Inc. v Metropolitan Trans. Auth.*, 309 A.D. 2d 127, 134, 763

² The statute limitations for actions against Transit Authority is governed by Public Authorities Law § 1212, and had not yet expired at the time plaintiff served its summons and complaint. Transit Authority does not move on this ground.

N.Y.S.2d 13 (1st Dept 2003). *leave to appeal denied*, 100 N.Y.2d 513, N.E.2d 617, 767 N.Y.S.2d 394 (2003). The “functions of the MTA with respect to public transportation are limited to financing and planning and do not include the operation, maintenance and control of any facility.” *Cusick v. Lutheran Medical Center*, 105 A.D.2d 681, 481 N.Y.S.2d 122 (2d Dept 1984). “MTA may not be liable for the torts committed by a subsidiary arising out of the operations of the subsidiary corporation.” *Noonan v Long Island Railroad*, 158 A.D.2d 392, 393, 551 N.Y.S.2d 232 (1st Dept 1990). Public Authority Law § 1266 (5) provides that each subsidiary shall be subject to suit pursuant to Public Authority Law § 1276.

MTA Bus Company, a subsidiary of named defendant MTA, owns, operates and controls the subject bus. Because MTA is not liable in tort for actions of its subsidiary, the claims against MTA are dismissed on that ground.

Similarly, Transit Authority is not a proper party because it does not own, operate or control the bus. Those responsibilities lie solely with MTA Bus Company. Riley acknowledges, and counsel for MTA does not contest, that the bus is owned solely by MTA Bus Company. Therefore, the claims against Transit Authority are dismissed.

Aguilera’s cross-claims against MTA and Transit Authority are dismissed, because they are not proper parties. The cross-claims by MTA and Transit Authority are dismissed as moot, because they relate to the underlying claims against them, which have been dismissed.

Riley’s Cross Motion to Dismiss

Public Authorities Law § 1276 (3) provides that an authority shall assume the liability for the negligence of an employee in the operation of a vehicle belonging to that authority. The

authority becomes the real party in interest and the statute of limitations applicable to the authority becomes applicable to the employee. *Albano v. Hawkins*, 82 A.D.2d 871, 871, 440 N.Y.S.2d 327 (2d Dept 1981). Public Authorities Law § 1276 (2)'s limitations period would have been applicable to MTA Bus Company had it been named as a defendant, and, thus, it applies to Riley. Riley was also served after the one year and thirty day time period had expired. However, the record reflects that Riley's motion papers were not served on co-defendant Aguilera in accordance with CPLR 2103(e), which "requires that any papers served on any party in the action shall likewise be served on every other party in the action." *Nosonowitz v. Nosonowitz*, 284 A.D.2d 586, 587, 726 N.Y.S.2d 486 (3d Dept 2001); *see also Russo v. Herbert Construction Co.*, 272 A.D.2d 193, 193-194, 708 N.Y.S.2d 291 (1st Dept 2000). A party who has appeared in an action is entitled to be kept abreast of all developments in the litigation regardless of whether they concern that party directly. McKinney's Cons Laws of NY, Book 7B, CPLR C2103:6.

Riley did not serve a copy of her September 19, 2008 cross-motion and October 13, 2008 memorandum of law upon Aguilera subsequent to his appearance, nor did Riley respond to the cross-claim and demands in Aguilera's September 4, 2008 Answer.

While the Court understands the harshness of the result, it cannot relieve Riley from the requirement to notify affected parties. Accordingly, Riley's cross motion is denied without prejudice.

Plaintiffs' Cross-Motion to Add MTA Bus Company as a Party

Davis argues that she should be granted leave to amend a "misnomer" in the caption,

adding MTA Bus Company as a defendant, because MTA Bus Company has allegedly appeared in the action, and the MTA Bus Company has the same agent for service of process as the MTA thus was apprised of the pending action. Davis cites *Rivera v. The Beer Garden*, 51 A.D.3d 479, 857 N.Y.S.2d 557 (1st Dept 2008) for the proposition that, even after the statute of limitations has run, leave to amend to correct the defendant's name in the caption should be granted when the proposed defendant is aware that it is the intended defendant. She further relies on *Sessa v. Board of Assessors of Town of North Elba*, 46 A.D.3d 1163, 1166, 46 A.d.3d 1163, 847 N.Y.S.2d 765 (3d Dept 2007) for the proposition that an appearance letter from a defendant subjects the defendant to the court's jurisdiction.

To further support her argument, plaintiff relies on communications from MTA to plaintiff in connection with this litigation, referring to "Re: Davis v MTA Bus Co. et. al." and "Re: Dixon v MTA Bus Co. et. al. & Davis v The New York City Transit," and other communications sent from MTA's counsel, who is also counsel for MTA Bus Company. Defendant argues that that these documents establish that (1) MTA Bus Company was a misnamed defendant; (2) these communications are the equivalent to an appearance letter from the MTA Bus Company as a defendant; and (3) MTA Bus Company made itself the real "party in interest."

This Court need not determine whether any of these arguments has merit, because none would entitle plaintiff to amend its complaint. At best, plaintiff's addition of a party would relate back to the filing of the original complaint. As discussed above, the original complaint was filed past the expiration of the statute of limitations pursuant to Public Authorities Law § 1276, a limitation that applies equally to MTA Bus Company as a subsidiary of the MTA. Accordingly,

amending the complaint to add subsidiary MTA Bus Company would be untimely, regardless if the change is accepted as a "correction." Accordingly, plaintiff's cross-motion to add MTA Bus Company in the caption is denied.

Accordingly, it is hereby

ORDERED that plaintiff's cross-motion and cross-motion are denied;

ORDERED that New York Transit Authority's cross-motion to dismiss plaintiff's complaint is granted;

ORDERED that MTA's cross-motion to dismiss plaintiff's complaint is granted;

ORDERED that defendant Aguilera's cross-claims against New York City Authority and MTA are dismissed;

ORDERED that New York City Transit Authority's and MTA's cross-claims against Aguilera are dismissed;

ORDERED that Cynthia's Riley's cross-motion to dismiss plaintiff's complaint is denied without prejudice;

ORDERED that Cynthia Riley is directed to serve a copy of her September 19, 2008 cross-motion and her October 13, 2008 memorandum of law on Xavier Aguilera within fourteen days from service of this order with notice of entry; and it is further

ORDERED that the remainder of the action shall continue.

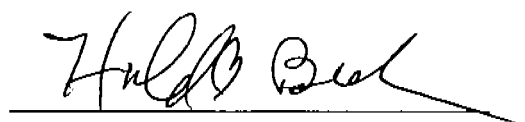
All other relief not expressly granted is denied.

This constitutes the decision and order of the court.

Dated: New York, New York

July 20, 2009

ENTER:



Harold B. Beeler, JSC

HAROLD BEELER
J.S.C.

JUL 21 2009

FILED
JUL 28 2009
COUNTY CLERK'S OFFICE
NEW YORK