

**Fogle v City of New York**

2010 NY Slip Op 32346(U)

August 27, 2010

Sup Ct, NY County

Docket Number: 105190/2006

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE  
J.S.C.

PART 5

Index Number : 105190/2006

FOGLE, ALPHONSO

vs

CITY OF NEW YORK

Sequence Number : 002

DISM ACTION/ INCONVENIENT FORUM

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

The following papers, numbered 1 to 3 were read on this motion ~~to~~ for summary judgment

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

Answering Affidavits — Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

1

2

3

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**FILED**

**AUG 31 2010**

NEW YORK  
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 8/27/10

**AUG 27 2010**

Barbara Jaffe  
BARBARA JAFFE J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
ALPHONSO FOGLE,

Plaintiff,

-against-

Index No. 105190/2006

Motion Seq. No.: 002

Motion Cal. No.: 53

Motion arg.: 8/3/10

**DECISION AND ORDER**

THE CITY OF NEW YORK, METROPOLITAN  
TRANSPORTATION AUTHORITY, and  
NEW YORK CITY TRANSIT AUTHORITY,

Defendants.  
-----X

BARBARA JAFFE, JSC:

**For plaintiff:**

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Ronald Paul Hart, Esq.  
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212-766-1443

**For City:**

Andrew Lucas, ACC  
Corporation Counsel  
100 Church Street  
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212-442-6855

By notice of motion dated June 14, 2010, defendant City moves pursuant to CPLR 3211(a)(7) and 3212 for an order summarily dismissing the complaint and any cross-claims against it, and pursuant to CPLR 3126 for an order dismissing the complaint for failure to comply with certain court orders or, in the alternative, precluding plaintiff from offering evidence of damages at trial. Plaintiff opposes the motion. As City agreed at oral argument to take plaintiff's deposition at the hospital where he presently resides, I need not address its motion pursuant to CPLR 3216.

I. BACKGROUND

On April 5, 2005, plaintiff was allegedly injured as he attempted to enter a bus in his wheelchair at 41<sup>st</sup> Avenue and 21<sup>st</sup> Street in Queens County. (Affirmation of Andrew Lucas,

ACC, dated June 14, 2010, Exh. B). On or about April 14, 2006, plaintiff commenced the instant action. (*Id.*). On or about May 16, 2006, City served its answer and on or about May 26, 2006, defendant Metropolitan Transportation Authority (MTA) served its answer. (*Id.*, Exhs. C, D).

On July 12, 2007, the parties entered into a case scheduling order by which they agreed that the plaintiff would be deposed on December 5, 2007. Plaintiff failed to appear and the deposition was rescheduled for May 14, 2008. Again, plaintiff failed to appear.

By decision and order dated May 30, 2008, another justice of this court dismissed the instant complaint as against the MTA and New York City Transit Authority (NYCTA) on the grounds that they had demonstrated that the bus on which plaintiff was injured is operated by non-party MTA Bus Company and that plaintiff failed to serve the MTA and NYCTA with a notice of claim, and denied City's motion pursuant to CPLR 3211(a)(7), finding that plaintiff had sufficiently stated a cause of action against it. (*Id.*, Exh. F).

## II. CONTENTIONS

City argues that at the time of plaintiff's accident, it did not own, operate, or control the bus line on which plaintiff was injured, relying on the affidavit of Patrick J. Meehan, an inspector in the Coordinated Street Furniture Franchise Unit of the City of New York Department of Transportation (DOT), who attests that he conducted a fruitless search of DOT records for franchise agreements and insurance certificates relating to the Q66 bus line for the period of April 5, 2003 through April 5, 2005 and that based on his knowledge and experience at DOT, the Q66 bus line is part of the Metropolitan Transit Authority Bus Company and was neither owned nor operated by the City on April 5, 2005. (Lucas Aff., Exh. J).

In opposition, plaintiff maintains that, based on the May 2008 decision, City is barred

from relitigating its entitlement to summary judgment, and that the affidavit offered by City is “non-evidentiary,” “irrelevant,” and “self-serving, and that having failed to offer it in support of its earlier motion to dismiss, it cannot offer it now. (Affirmation of Anthony Loman, Esq., dated July 8, 2010). He also claims that as MTA’s website reflects that the MTA Bus Company “completed its take over [of] the bus route from” City approximately 10 months after the accident, and as DOT was the insurance policyholder for the bus on which he was injured (*id.*, Exhs. H, I), that he has raised a triable issue of fact warranting denial of City’s motion.

In reply, City denies that it is barred from seeking summary judgment, observing that the court in its May 2008 decision, denied its motion to dismiss for failure to state a cause of action, and that given the differing standards of a motion to dismiss and a motion for summary judgment, the May 2008 decision does not bar the instant motion for summary judgment. (Affirmation in Reply of Andrew Lucas, ACC, dated July 15, 2010). It argues that MTA’s website also reflects that City never operated any of the bus lines, but that the MTA Bus Company assumed control of them from several private companies, which occurred from January 2005 through February 2006. That DOT was the policyholder, it also maintains, does not prove that it owned or operated the bus line as it is as consistent with its franchising to private companies the operation of the bus lines which were then required to insure DOT against any loss. In further support, City offers the MTA Bus Company’s occurrence report relating to plaintiff’s accident. (*Id.*, Exh. 4).

### III. ANALYSIS

There being no indication in the May 2008 decision that City had moved for summary judgment pursuant to CPLR 3212, or that the court denied its motion on any ground other than

City's failure to demonstrate that plaintiff had failed to state a cause of action, there is no reason, nor does plaintiff offer one, for finding that the instant motion is City's second motion for summary judgment. That the relief sought in interposing a motion pursuant to CPLR 3211(a)(7) and CPLR 3212 is identical is immaterial. Consequently, City is not barred from seeking summary dismissal pursuant to CPLR 3212.

The proponent of a motion for summary judgment must establish, *prima facie*, its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Walden Woods Homeowners Assn. v Friedman*, 36 AD3d 691 [2d Dept 2007]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. (*Id.*). The opposing party then has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. (*Zuckerman v New York*, 49 NY2d 557 [1980]). A defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Transp. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

Here, City has offered sufficient evidence to establish, *prima facie*, that it neither owns nor operates the bus on which plaintiff fell. That it held an insurance policy does not raise an issue of fact, nor does the printout of the MTA Bus Company website.

#### IV. CONCLUSION

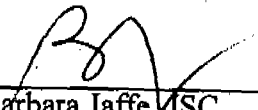
Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is granted

and the complaint and all cross-claims are hereby dismissed as against it, and the Clerk is directed to enter judgment in favor of said defendant.

This constitutes the decision and order of the court.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

DATED: August 27, 2010  
New York, New York

**AUG 27 2010**

**FILED**  
**AUG 31 2010**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**