Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Chad Marion, an infant by his parent and natural guardian, Kenya Marion, and Kenya Marion, Individually,

Plaintiffs,

- against -

City of New York, New York City Department of Transportation, MTA-New York City Transit Authority, New York City Transit Authority, Metropolitan Transportation Authority, MTA Bus Company, John Doe "A" (representing the driver of the City Bus whose identity is unknown) and Charles Smith,

Defendants.

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Index Number: 27722/10

Motion Date: 2/8/11

Motion Cal. Number: 12

Motion Seq. No.: 1

The following papers numbered 1 to 21 read on this motion by plaintiffs for leave to serve a late notice of claim upon defendants, New York City Transit Authority (TA), MTA-New York City Transit Authority (MTA), MTA Bus Company and New York Department of Transportation (DOT) and for leave to serve an amended notice of claim upon the City, TA, MTA, MTA Bus and DOT; cross-motion by the TA, MTA and MTA Bus to dismiss the compliant against them; and cross-motion by the City to convert the City's cross-claim against co-defendant, MTA Bus Company, into a third party action.

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Upon the foregoing papers it is ordered that the motion and cross-motions are decided as follows:

Plaintiffs withdrew so much of the first branch of their

motion for leave to serve a late notice of claim upon the TA, MTA and DOT at the conference of this matter after the calling of the calendar on February 8, 2011. The remaining prong of plaintiffs' first branch of the motion for leave to serve a late notice of claim, pursuant to General Municipal Law §50-e(5), upon MTA Bus is denied.

The second branch of plaintiffs' motion for leave to serve an amended notice of claim upon the City, the TA, MTA, MTA Bus and DOT, pursuant to General Municipal Law §50-e(6), is granted solely to the extent that plaintiffs are given leave to serve an amended notice of claim upon the City only, within 30 days after entry of this order. In all other respects, the motion is denied.

Cross-motion by the TA, MTA and MTA Bus to dismiss the complaint against them upon the grounds that plaintiffs failed to serve a pre-requisite 30-day demand upon MTA Bus, pursuant to Public Authorities Law §1276(1), that the TA and MTA are not proper parties and that the City is solely responsible for the design, maintenance and placement of bus stops and crosswalks is granted.

Cross-motion by the City to convert its cross-claims against MTA Bus into a third-party action is granted.

Infant plaintiff allegedly sustained injuries as a result of being struck by a motor vehicle operated by defendant Smith after he alighted from a Q7 bus at the pedestrian crosswalk on Rockaway Boulevard and 145th Street in Queens County on January 12, 2010. It is alleged that the bus improperly stopped in the pedestrian crosswalk, causing the plaintiff to walk around the bus to cross the street, and that while he was properly using the crosswalk to cross, he was struck by the vehicle operated by Smith, who could not see plaintiff crossing the street because his view was obstructed by the bus.

The DOT, being merely a department or agency of the City, is not a proper entity that may be sued, but rather actions involving a City department or agency must be brought in the name of the City (see NYC Charter, Ch. 17, §396). With respect to MTA Bus, said entity is a subsidiary corporation of the MTA pursuant to Public Authorities Law §1266(5)(see certificate of incorporation of MTA Bus annexed to its cross-moving papers). The MTA is a distinct legal entity from its subsidiaries and is not liable for the torts of its subsidiary bus companies(see generally Portlette v. MTA, 25 AD 3d 389 [1st Dept 2006]; Emerick v. MTA, 272 AD 2d 150 [1st Dept 2000]; Noonan v. LIRR, 158 AD 2d 392 [1st Dept 1990]). Moreover, "It is well settled, as a matter of law, that 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 Med. Center, 105 AD 2d 681, 681 [2nd Dept 1984]).

Likewise, the TA is a separate and distinct legal entity (see HRH Construction LLC v. Metropolitan Transportation Authority, 33 AD 3d 568 [1st Dept 2006]); see also Lopez v. Metropolitan Transportation Authority,267 AD 2d 359 [2nd Dept 1999]). Since the TA, MTA and MTA Bus may separately sue and be sued (see Public Authorities Law §§ 1204[1], 1265[1] and 1266[5]), a tort committed by any one of those entities must be brought against that entity.

The undisputed evidence presented in the cross-motion by the TA, MTA and MTA Bus is that the Q7 bus in question was owned, operated and maintained by MTA Bus, not the MTA or the TA. Plaintiff's counsel concedes that MTA Bus is the proper party and not the MTA or the TA, and that the DOT is not an entity that may sue or be sued.

With respect to MTA Bus, the Court notes that the requirement for service of a notice of claim upon the MTA does not apply to subsidiary corporations of the MTA (see Public Authorities Law §1276[6]). Thus, the notice of claim requirement is inapplicable to MTA Bus. Therefore, that prong of the first branch of the motion for leave to serve a late notice of claim, pursuant to General Municipal Law §50-e(5), upon MTA Bus must be denied as moot.

The second branch of plaintiffs' motion seeking leave to serve an amended notice of claim upon the City, the TA, MTA, MTA Bus and DOT, pursuant to General Municipal Law §50-e(6), must be denied as to the TA, MTA, MTA Bus and DOT, for the reasons hereinabove stated, but must be granted with respect to the City. It is undisputed that the notice of claim requirements of General Municipal Law §50-e are applicable to the City. Moreover, the complaint alleges defective design of the Q7 bus stop and crosswalk, which are the responsibility of the City (see, Cioe v. Petrocelli Electric Co., Inc., 33 AD 3d 377 [1st Dept 2006]), and, therefore, states a cause of action against the City.

Plaintiffs seek to amend the notice of claim to recite that plaintiff was struck by "a privately owned vehicle" instead of "a NYC bus". The court has the discretion to grant leave to serve an amended notice of claim if the mistake, omission, irregularity or defect in the original notice was made in good faith and the municipality has not been prejudiced (see id.; Barrios v. City of New York, 300 AD2d 480 [2nd Dept. 2002]). No prejudice or surprise would result by allowing this amendment since not only was the City informed that plaintiff was struck by a private vehicle at his 50-h hearing, but counsel for the City was apprised of the error prior to the 50-h hearing. Indeed, the City does not oppose the granting of leave to serve an amended notice of claim upon it.

However, to the extent that plaintiffs also seek to amend the notice of claim to add the TA, MTA and MTA Bus to the notice of

claim, such request must be denied, for the reasons heretofore stated. Moreover, the addition of new parties is not properly the function of amendment. A notice of claim may properly only be amended to correct technical, inconsequential mistakes or omissions (see General Municipal Law §50-e[6]; Torres v. New York City Housing Authority, 261 AD 2d 273 [1st Dept 1999]). Amendments of a substantive nature are not permitted (see Gordon v. City of New York, 79 AD 2d 981 [2nd Dept 1981]). Clearly, the addition of an entirely new entity is not a mere technical matter.

Cross-motion by the TA, MTA and MTA Bus to dismiss the complaint against them upon the grounds that plaintiffs failed to serve a pre-requisite 30-day demand upon MTA Bus, pursuant to Public Authorities Law §1276(1), that the TA and MTA are not proper parties and that the City is solely responsible for the design, maintenance and placement of bus stops and crosswalks is granted.

As hereinabove stated, the subject Q7 bus was owned, operated and maintained by MTA Bus, a separate and distinct legal entity from the TA and MTA. Therefore, plaintiffs' claim relating to the negligent operation of the bus may not be brought against the TA or MTA. Moreover, with respect to plaintiffs' claim that the bus stop and crosswalk were negligently designed, since the City alone is responsible for the design and maintenance of bus stops and cross walks, no cause of action lies again the TA, MTA or MTA Bus. Therefore, the TA and MTA are entitled to dismissal of the complaint in its entirety against them, and MTA Bus is entitled to dismissal of plaintiffs' cause of action against it relating to the negligent design of the bus stop and crosswalk.

MTA Bus is additionally entitled to dismissal of the remaining cause of action against it for the negligent operation of the bus, upon the ground that plaintiffs have failed to serve the prerequisite 30-day demand required pursuant to Public Authorities Law §1276(1).

As a condition to the consent of the state to suits against the MTA, the complaint must contain an allegation that at least 30 days has elapsed since the authority was presented with the claim and the authority has neglected or refused to pay the claim (Public Authorities Law §1276[1]). This prerequisite 30-day demand applies not only to the MTA, but also to subsidiary corporations of the MTA (see Public Authorities Law §1276[6]). It is uncontroverted that MTA Bus is a subsidiary corporation of the MTA and, therefore, the requirement of Public Authorities Law §1276(1) is applicable to it. Since it is undisputed that plaintiffs failed to serve the requisite 30-day demand upon MTA Bus, the complaint must be dismissed in its entirety against MTA Bus.

Plaintiffs' counsel argues that the 30-day demand requirement

is not applicable to subsidiaries of the MTA pursuant to §1276(6) by virtue of the first sentence thereof which states, "The provisions of this section which relate to the service of a notice of claim shall not apply to a subsidiary corporation of the authority." Counsel's argument is without merit. Counsel confuses the 30-day demand required pursuant to §1276(1) with the notice of claim required pursuant to General Municipal Law §50-e. The latter is restricted in its application to the MTA by virtue of §1276(2), which specifically requires service on the MTA of a notice of claim pursuant to General Municipal Law §50-e, and pursuant to the first sentence of §1276(6) which excepts subsidiaries from this requirement. The former applies to the MTA by virtue of §1276(1) and to its subsidiaries by virtue of the second sentence of §1276(6). The statute's demand rule is distinct from the notice of claim requirement (see Andersen v Long Island Railroad, 59 NY 2d 657 [1983]). "[T]here are compelling reasons to distinguish between service of a 'notice of claim' and presentation of a 'demand' or 'claim' arising from the functional difference between the two. Presentation of the demand at any time within the statutorily prescribed period of limitations, with its accompanying 30-day waiting period, is designed to afford the public authority an opportunity, prior to incurring the expenses of litigation, to evaluate the claim and to determine whether to attempt an adjustment or to pay the claim. By some contrast, service of the notice of claim, within the 90-day period of limitations prescribed therefor, serves to assure that the public authority will be given prompt notice after the accrual of the claim to permit effective investigation of the circumstances out of which the claim arose" (id. at 661). Therefore, although the notice of claim requirement is not applicable to subsidiaries of the MTA, the 30-day demand requirement, which is different, does apply to subsidiaries (see Fleming v Long Issland Railroad, 130 AD 2d 59 [2nd Dept 1987]). To the extent that the case of Halsey v Patel (2008 Ny Slip Op 31603[U] [Supreme Ct, Queens County]), cited by counsel for plaintiffs, is to the contrary, this Court declines to follow it.

Accordingly, plaintiffs' motion is granted solely to the extent that plaintiffs are given leave to serve an amended notice of claim upon the City only within 30 days after entry of this order, and is denied in all other respects, and cross-motion by the TA, MTA and MTA Bus to dismiss the complaint against them is granted.

Cross-motion by the City to convert its cross-claims against MTA Bus into a third-party action is granted, there appearing no opposition.

Since the complaint is dismissed as against MTA Bus, the City is entitled to have its cross-claims for contribution and indemnification against MTA Bus contained in its answer converted

to a third-party action. Where a complaint is dismissed as against one defendant, but the dismissal does not reach a co-defendant's cross-claims against that defendant for contribution and indemnification, the Court should convert the cross-claims for contribution and indemnification to third-party claims and amend the caption of the action accordingly (see Aarvac Properties Corp. v. Sterling & Fleetwood Co, 129 AD 2d 600 [2nd Dept 1987]; Nelson v. Chelsea GCA Realty, Inc., 18 A.D.3d 838, 840 [2d Dept.2005]; Jones v. New York City Hous. Auth., 293 A.D.2d 371 [1st Dept.2002]; Eddine v. Federated Department Stores, Inc., 2008 NY Slip Op 31652[U] [Supreme Ct, NY County 2008]).

The caption of the action is hereby amended as follows:

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Chad Marion, an infant by his parent and natural guardian, Kenya Marion, and Kenya Marion, Individually,

Plaintiffs,

- against -

City of New York and Charles Smith,

Defendants.

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CITY OF NEW YORK,

Third-Party Plaintiff,

- against -

MTA BUS COMPANY,

Third-Party Defendant.

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Index Number: 27722/10

The City shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the Trial Term without undue delay.

MTA Bus shall serve an answer to the third-party complaint within 30 days after service upon it of a copy of this order with notice of entry.

Serve a copy of this order with notice of entry upon the attorneys for all parties without undue delay.

Dated: February 28, 2011

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KEVIN J. KERRIGAN, J.S.C.