

**Marte v City of New York**

2011 NY Slip Op 32494(U)

September 20, 2011

Sup Ct, NY County

Docket Number: 101769/09

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice*

PART 21

NARCITA G. MARTE,

Plaintiff,

- v -

INDEX NO. 101769/09

MOTION DATE 7/14/11

MOTION SEQ. NO. 002

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT  
AUTHORITY, METROPOLITAN TRANSPORTATION  
AUTHORITY, MANHATTAN AND BRONX SURFACE  
TRANSPORTATION OPERATING AUTHORITY (MABSTOA),  
and NATHANIEL LLOYD,

Defendants.

The following papers, numbered 1 to 6 were read on this motion for summary judgment as to liability

Notice of Motion— Affirmation — Affidavit — Exhibits A-F  No(s). 1-4

Answering Affirmation — Exhibits 1-4  No(s). 5

Replying Affirmation  No(s). 6

Upon the foregoing papers, it is ordered that this motion for summary judgment as to liability is decided in accordance with the annexed memorandum decision and order.

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


## FILED

HON. MICHAEL D. STALLMAN

SEP 21 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/20/11  
New York, New York

 J.S.C.

- 1. Check one: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check if appropriate:..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. Check if appropriate:.....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

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NARCITA G. MARTE

Plaintiff,

Index No. 101769/09

- against -

DECISION AND ORDER

THE CITY OF NEW YORK, NEW YORK CITY  
TRANSIT AUTHORITY, METROPOLITAN  
TRANSPORTATION AUTHORITY, MANHATTAN  
AND BRONX SURFACE TRANSPORTATION  
OPERATING AUTHORITY (MABSTOA) and  
NATHANIEL LLOYD,

Defendants.

**FILED**

SEP 21 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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**HON. MICHAEL D. STALLMAN, J.:**

In this personal injury action, plaintiff moves for summary judgment in her favor as to liability and for trial on damages only. Plaintiff alleges, that due to the negligence of the defendants New York City Transit Authority (NYCTA) and its bus operator, she was seriously injured when a NYCTA bus struck her as she was crossing West End Avenue allegedly in the crosswalk with the light in her favor.

**BACKGROUND**

The incident occurred on December 28, 2008. Plaintiff alleges that she was crossing West End Avenue westbound at the intersection of West End Avenue and West 87<sup>th</sup> Street, walking towards Riverside Drive. (Coffey Affirmation, Ex 1 [Plaintiff's EBT] at pages 17-18.) She asserts that she was crossing from the southeast corner of West End Avenue and West 87<sup>th</sup>

Street to the southwest corner of West End Avenue and West 87<sup>th</sup> Street. (Eilender Affirmation, Argiz Affidavit ¶ 5.) Plaintiff alleges that she was within the crosswalk with the light in her favor and that she looked both to her left and her right before stepping into the roadway. A NYCTA bus had been stopped at the red light on West 87<sup>th</sup> Street, and plaintiff alleges that the bus, while attempting to make a left-hand turn onto West End Avenue, came into contact with her on West End Avenue, allegedly striking her and knocking her down. Plaintiff contends that she had the right of way because she was walking across the roadway within the bounds of the crosswalk and with the light in her favor. At her deposition, she testified that she lost consciousness. (Plaintiff's EBT at pages 26-27.) She claims that someone at the hospital told her that she had been hit by a bus, but she does not remember the actual accident. (*Id.*) She did, however, state that she waited at the corner for the light to change in her favor and that she looked left and right before proceeding to cross the roadway.<sup>1</sup> (*Id.* at pages 22, 26.)

Defendant bus operator, Nathaniel Lloyd, testified at his deposition that he came to a stop at the red light on West 87<sup>th</sup> Street, and that when the light turned green, he proceeded to attempt a left-hand turn onto West End Avenue. (Coffey Affirmation, Ex 2 [Lloyd EBT] at 59, 64.) Defendant bus operator stated that he looked both left and right as he made the left-hand turn and that he did not see anyone in the crosswalk. (*Id.* at 64.) He then testified that he looked again to the right to make sure no one was coming up on that side of the bus and that "after [he] completely cleared the crosswalk, [his] bus is three-quarters already into the turn on West End

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<sup>1</sup>Plaintiff's deposition testimony is inconsistent at times. When asked which corner of West End Avenue she was standing on, she could not answer the question clearly. She said both that she was on the southwest corner and that she was on the southeast corner. (Plaintiff's EBT at page 21.)

Avenue, when [he] looked back to [his] left the lady popped up right in front of the center of the bus.” (*Id.* at 65.) Lloyd further testified that “[w]hen [he] turned [his] head back the lady was in front of the bus in the middle of the street crossing on an angle to go to the west side of West End Avenue.” (*Id.* at 67.) When asked where plaintiff was when defendant bus operator first saw her he responded that “she was in front of [the] bus, the center of the front of [the] bus approximately a whole car length away from the crosswalk...[s]he was south of the crosswalk.” (*Id.* at 69.)

Defendant bus operator asserts that he did not see plaintiff until she was already directly in front of the bus and that he did not see her because she walked into the roadway from between two parked cars outside the boundaries of the crosswalk. (*Id.* at 68-69.) He testified that he did try to avoid making contact with plaintiff and that he “tried to veer more to the left to avoid making contact because she was crossing from left to right, so [he] tried to turn even harder to the left to avoid making contact, but [he] couldn’t go but so far left because...there was a parked car at the corner.” (*Id.* at 70.) He also testified that he slowed down in an effort to avoid hitting plaintiff. (*Id.* at 73.)

Plaintiff alleges that she sustained serious injuries as a result of the accident. She was admitted to St. Luke’s Hospital and was there for about four days. (Plaintiff’s EBT at page 28.) She had a laceration on her head, and complained of dizziness and back and neck pain. (*Id.* at page 29.) Plaintiff alleges that she suffered traumatic brain injury, involving bleeding on her brain and loss of cognitive function. (*Id.* at pages 30, 36, 39.) She alleges that she continues to get headaches and has continuing pain in her back. (*Id.* at page 49.)

## I

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) If plaintiff fails to make such a showing, the motion must be denied. (*Id.*) “Where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do.” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980].)

“Under Vehicle and Traffic Law § 1111, the pedestrian has the right of way when crossing with the pedestrian light in a crosswalk.” (*Rudolf v Khan*, 4 AD3d 408, 409 [2<sup>nd</sup> Dept 2004]; *see also Pire v Otero*, 123 AD2d 611, 612 [2<sup>nd</sup> Dept 1986] [the defendant had a duty to yield the right of way to a pedestrian who was crossing with the light in her favor in a crosswalk].) Additionally, according to Section 4-03(a)(1)(i) of the New York City Department of Transportation Rules “[v]ehicular traffic facing [green] signals may proceed straight through or turn right or left...But vehicular traffic, including vehicles turning right or left, shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk.” (N.Y.C. Traffic Rules, 34 RCNY § 4-03 [a] [1] [i].) Section 4-03 (c) (1) of the New York City Department of Transportation Rules provides that “[p]edestrians facing [WALK] signal may proceed across the roadway in the direction of the signal in any crosswalk. Vehicular traffic shall yield the right of way to such pedestrians.” (34 RCNY §4-03 [c].) Additionally, according to New York City Department of Transportation Rules § 4-04 (c) (3) “[n]o pedestrian

shall cross a roadway except at a crosswalk on any block in which traffic control signals are in operation at both intersections bordering the block.” (34 RCNY § 4-04 [c] [3].)

Thus, to establish prima facie entitlement to summary judgment, plaintiff must establish “that she was crossing the street, within the crosswalk, with the light in her favor, when she was struck.” (*Gonzalez v ARC Interior Constr.*, 83 AD3d 418, 419 [1<sup>st</sup> Dept 2011].) Plaintiff must also present proof that “[s]he had looked for approaching traffic before [s]he began to cross.” (*Rosenblatt v Venizelos*, 49 AD3d 519, 519 [2<sup>nd</sup> Dept 2008].)

## II

At her deposition, plaintiff testified that, “[i]t is a green light, I just cross. Look on my right, left, there is no car so I cross.” (Plaintiff’s EBT at page 29.) The non-party witness, Mr. Jaron Argiz, stated in his affidavit that

“I observed a woman who was later identified as Narcita Marte, crossing the street west-bound towards Riverside Drive from the south-east corner of West End Avenue & West 87<sup>th</sup> Street towards the south-west corner of West End Avenue & West 87<sup>th</sup> Street. Ms. Marte had the green/walk signal and was walking within the cross-walk...as Ms. Marte was crossing the street and while she was within the cross-walk I observed a New York City Transit Authority bus attempt to make a left-hand turn from West 87<sup>th</sup> Street into the south-bound lane of West End Avenue. I observed the New York City Transit Authority bus strike Ms. Marte as she was crossing the street, with the green/walk signal and while she was within the cross-walk.” (Argiz Affidavit ¶¶ 5-8.)

Plaintiff sufficiently met her burden of going forward on this motion. Her allegations sufficiently set forth a prima facie case for summary judgment in her favor on liability.

In opposition to plaintiff’s motion, defendants rely on Lloyd’s deposition testimony that plaintiff was not in the crosswalk when the bus struck her. At his deposition, the bus operator first testified that “she crossed from behind a parked vehicle...not in the crosswalk. No one was there when I turned. When I turned my head back the lady was in front of the bus in the middle

of the street crossing on an angle.” (Lloyd EBT at 67.) However, when asked if he saw plaintiff emerge from between the two parked cars, defendant bus operator said that he did not see her “because [he] was looking left.” (*Id.* at 69.) When asked when the first time he saw plaintiff was, defendant bus operator replied that “[s]he was in front of my bus, the center of the front of my bus approximately a whole car length away from the crosswalk.” (*Id.*) Defendants contend that because plaintiff was allegedly not in the crosswalk when she was struck, there is a triable issue of fact and summary judgment must be denied.

The bus operator’s testimony that plaintiff was not in the crosswalk when she was struck raises a triable issue of fact. Though the bus operator did not see plaintiff until right before the bus came into contact with her, the bus operator states that she was outside the boundaries of the crosswalk when he saw her. (*Id.*) This testimony directly contradicts plaintiff’s testimony that she was within the boundaries of the crosswalk at the time of contact. It also contradicts the non-party witness’s affidavit that plaintiff was within the boundaries of the crosswalk. If plaintiff was not in the crosswalk when the defendants’ bus struck her, then she could not have had the right of way.

In *Kaminsky v M.T.A., N.Y. City Tr. Auth.* (79 AD3d 411, 412 [1<sup>st</sup> Dept 2010]), the Appellate Division affirmed a Supreme Court decision that denied the plaintiff’s motion for partial summary judgment on the issue of liability. The Appellate Division stated that “[t]he bus operator testified that upon making his turn he scanned the intersection, checked his side-view mirror and observed no pedestrians crossing the street. This testimony was sufficient to raise a triable issue of fact as to whether plaintiff had the right-of-way when the accident occurred.” (*Kaminsky*, 79 AD3d at 412.) In this case, like *Kaminsky*, the bus operator testified that he did

not observe any pedestrians in the crosswalk when he started to make his left-hand turn. Thus, the bus operator's testimony is sufficient to raise a triable issue of fact.

In *Gonzalez v ARC Interior Constr.* (83 AD3d 418 [2011], *supra*), the plaintiff alleged that a truck owned by the defendant struck her as she was walking through an intersection with the light in her favor. She asserted that she had looked both ways before entering the roadway. The defendant asserted that he was making a left turn into the intersection with the light in his favor and that he had observed no pedestrians in the intersection. He claimed that he did not see the plaintiff until contact was made. However, in that case it was not contested that the plaintiff was within the boundaries of the crosswalk when she was struck by the defendant's vehicle. This case is distinguishable because there is conflicting testimony as to whether plaintiff was in the crosswalk when she was struck by defendants' bus. Plaintiff has not established, as a matter of law, that she was in the crosswalk when she was struck.

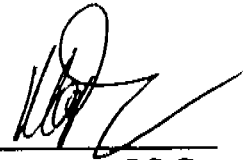
Similarly, *Maloney v New York City Transit Authority* (Sup Ct, NY County, July 15, 2011, Stallman, J., index No. 109440/09 motion seq. 002), is distinguishable. In that case, plaintiff alleged that she was struck by a NYCTA bus as she was crossing Central Park South in the crosswalk with the light in her favor. In that case, however, it was also uncontested that the plaintiff was crossing the roadway within the boundaries of the crosswalk with the light in her favor. In this case, however, there is conflicting testimony as to where the accident took place, i.e. where plaintiff and the bus were located at the time of contact, and thus there is conflict as to who may have had the right of way. In sum, it cannot be said as a matter of law, that either party was negligent or that either party caused the accident. These issues must await exploration at trial.

**CONCLUSION**

Accordingly, it is hereby ORDERED that the motion is denied.

ENTER

Dated: September 20, 2011  
New York, NY

  
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J.S.C.

**HON. MICHAEL D. STALLMAN**

**FILED**

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