

Cotton v Wayne Area Transp. Serv., Inc.
2014 NY Slip Op 33398(U)
December 29, 2014
Supreme Court, Wayne County
Docket Number: 77108/2014
Judge: Dennis M. Kehoe
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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

WILLIE COTTON,

Plaintiff,

-vs-

WAYNE AREA TRANSPORTATION SERVICE,
INC. (WATS)/ROCHESTER GENESEE
REGIONAL TRANSPORTATION AUTHORITY
(RGRTA),

Defendants

DECISION
AND
ORDER

Index No. 77108

2014

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Attorney for Plaintiff

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Laurie A. Giordano, Esq.
Attorneys for Defendants

The Defendants have moved for an Order pursuant to CPLR §3211(a)(8) and §3211(a)(7), dismissing the Plaintiff's action for lack of personal jurisdiction over the Defendants and for failure to state a cause of action. The Plaintiff has opposed the motion in its entirety.

In this action, the Plaintiff seeks damages for personal injuries he allegedly incurred on February 8, 2013 in the County of Wayne as a permitted passenger on a bus owned and/or operated by the Defendants. The Plaintiff maintains that as he was exiting the bus, he fell "due to a misplaced transportation securing strap" located on the floor of the bus, as

a result of which he was physically injured. In his Complaint, the Plaintiff alleges that the accident was caused “solely by the wrongful, careless and negligent acts and omissions of Defendants....”.

As to the alleged lack of personal jurisdiction over the Defendants, counsel for the Defendants conceded at oral argument that, in addition to the “courtesy letter” initially sent to the Loss Prevention Manager by counsel for the Plaintiff, the Defendants were subsequently properly served with copies of the Summons and Complaint. Therefore, personal jurisdiction is not an issue, and that portion of the Defendants’ motion to dismiss is denied.

The Defendants also argue that the Complaint should be dismissed for failure to state a cause of action. Specifically, the Defendants maintain that the Plaintiff’s Complaint is defective on its face, due to the Plaintiff’s failure to allege that he suffered a “serious injury”, as required by CPLR §3016(g). The Defendants contend that the Complaint must be dismissed for failure to plead with the particularity required by statutory law.

CPLR §3016(g) provides in part that “for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, the Complaint shall state that the plaintiff has sustained a serious injury”, as

required by Insurance Law §5104(a). (emphasis added). However, in his opposing affidavit, counsel for the Plaintiff contends that the accident was caused by the fact that the Plaintiff allegedly fell as he was exiting the bus due to “a misplaced transportation strap on the floor of the bus”.

Therefore, it is the Plaintiff’s position that the accident did not arise from the “use or operation” of the bus. The Plaintiff relies on language in Cividanes v City of New York, 20 NY3d 925(2012), in which the Court of Appeals reiterated the requirement that the use or operation of a vehicle must be a “proximate cause” or an “instrumentality” that produced the plaintiff’s injury.

Counsel for the Defendants maintains that the Plaintiff has failed to state a cause of action because he does not allege sufficient facts in his Complaint to support a claim that his injuries arose from the use or operation of a vehicle. However, in his response, counsel for the Plaintiff appears to argue that Plaintiff’s claim does not arise from the use or operation of the bus; rather the Complaint seems to be grounded on a theory of ordinary negligence. The Plaintiff relies on a number of decisions such as Cividanes, in which the courts have held that the vehicle was not a proximate cause of the injury. However, in those cases, the claimant was

injured due to external factors, in a manner unrelated to the vehicle itself. (such as a passenger stepping into a hole outside a bus while departing the vehicle). (See Cividanes, supra).

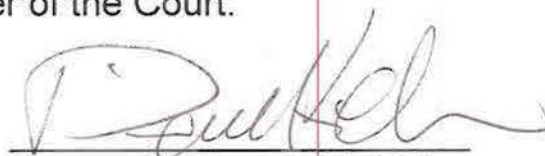
While it is true that not every injury occurring in or near a vehicle is covered by the phrase “use or operation”, if an accident arises out of the “inherent nature of the vehicle” and if “the vehicle itself produces the injury”, then the “use or operation” requirement would appear to invoke the application of the No-Fault statute. (See, e.g., Empire Insurance Co. v Schliessman, et al, 306 AD2d 512 (2nd Dept, 2003)). In this action, the Complaint provides few details regarding the circumstances surrounding the accident. However, discovery has yet to be conducted, and those details will emerge as the action progresses. At this early stage, the Defendants will suffer no prejudice by allowing the Plaintiff to amend his Complaint pursuant to CPLR §3025 by adding a second cause of action alleging serious injury.

In summary, the Court denies the Defendants’ Motion to Dismiss in its entirety. However, the Plaintiff is directed to file and serve an Amended Complaint, setting forth a second cause of action in the alternative, alleging a serious injury in accordance with CPLR §3016(g). As stated above, after

discovery is completed and additional facts are made available, further motions may prove to be appropriate. Also, the Plaintiff is directed to delete the sum certain requested as relief in the "Wherefore" clause in the Complaint.

This Decision constitutes the Order of the Court.

Dated: December 29, 2014
Lyons, New York



Honorable Dennis M. Kehoe
Acting Supreme Court Justice

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SUPREME AND COUNTY COURT