

Kass v Beethoven Transit Inc.
2016 NY Slip Op 30704(U)
April 13, 2016
Supreme Court, New York County
Docket Number: 451702/2015
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

FRIMETTE KASS and HENRY SHRAIBMAN,

INDEX NO. 451702/2015

Plaintiff,

MOTION DATE 1/20/16

MOTION SEQ. NO. 001

- v -

**BEETHOVEN TRANSIT INC., MOHAMMAD H.R. KHAN,
S and U TRANSPORTATION INC., DISHOD A.
SHAROPOV, MTA NEW YORK CITY TRANSIT A/K/A
NEW YORK CITY TRANSIT AUTHORITY and THE CITY
OF NEW YORK,**

Defendants.

The following papers, numbered 3-10; 12; 16-19 were read on this motion to dismiss.

- Notice of Motion—Affirmation—Exhibits A-F; Affirmation of Service **█ No(s). 3-10; 12**
- Affirmation in Opposition **█ No(s). 16**
- Reply Affirmation—Exhibits A-B **█ No(s). 17-19**

Upon the foregoing papers, it is ORDERED that this motion to dismiss the complaint against defendant THE CITY OF NEW YORK is GRANTED, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further

ORDERED that all cross claims by and against defendant the City of New York are dismissed, and the action is severed and continued against the remaining defendants; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Plaintiffs Frimette Kass and Henry Shraibman allege that on July 24, 2013 at approximately 12 p.m., plaintiff Frimette Kass was a passenger in an Access-A-Ride vehicle owned by defendant S and U

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

Transportation Inc., bearing New York State registration number T623635C, and operated by defendant Dilshod A. Sharopov, when said vehicle was struck by a taxi, bearing New York State registration number 1W39A, owned by defendant Beethoven Transit Inc. and operated by defendant Mohammad H.R. Khan, at the intersection of University Place and East 12th Street. (City Affirm. Ex. A [Notice of Claim] ¶ 3; Ex. B [Complaint] ¶¶ 15-21.)

In plaintiffs' notice of claim, plaintiffs' allege that "[t]he accident was caused by the negligent operation, maintenance and control of the Access-A-Ride vehicle and resulted in serious personal injuries to the claimant." (City Affirm. Ex. A [Notice of Claim] ¶ 3.) However, the complaint alleges that the City of New York and the New York City Transit Authority (NYCTA) are liable for "contracting with entities negligent in their ownership and control of motor vehicles, to wit Defendants, S and U and DILSHOD A. SHARAPOV through the access-a-ride program." (City Moving Affirm. Ex. B [Complaint] ¶ 29.)

The City moves to dismiss the Complaint as against the City and all cross-claims against the City pursuant to CPLR 3211(a) (1) and (a) (7), arguing that the City is neither the record owner nor a registrant of the subject Access-a-Ride vehicle. (City Moving Affirm. ¶ 4-7.) The City provides Department of Motor Vehicles records purporting to show that the owner of the subject Access-A-Ride vehicle was an individual named Roman Zamulinsky, and that the registrant of said vehicle was S and U Transportation Inc. (City Moving Affirm. Ex. E [DMV Records].)

The City points out that the complaint alleges a theory of liability based on the City's "contracting with entities negligent in their ownership and control of motor vehicles." (City Moving Affirm. ¶ 10; Ex. B [Complaint] ¶ 29), but that these allegations were not contained in the notice of claim, which alleges only that "[t]he accident was caused by the negligent operation, maintenance and control of the Access-A-Ride vehicle", (City Affirm. Ex. A [Notice of Claim] ¶ 3).

Plaintiffs respond that their theory for why the City is liable is not that it was the owner or registrant of the subject Access-A-Ride vehicle, but that the City was negligent "in the oversight, screening,

training, monitoring, selection, contracting and usage of the Access-A-Ride paratransit carrier in question, namely Defendant, S&U Transportation Inc.” (Pl. Affirm. ¶ 7.) Thus, plaintiffs argue that:

“A question of fact exists as to what control is held by the movant, City of New York, relating to the particular passenger carrier involved in the instant occurrence, namely: Defendant, S&U Transportation Inc. in which the Plaintiff was a passenger at the time of the accident, including but not limited to the movant’s oversight, screening, training, monitoring, selection, contracting and usage of the carrier in question.”

(*Id.* ¶ 8.)

In reply, the City argues that S and U Transportation is a distinct legal entity from the City, and that Roman Zamulinsky is not an employee or agent of the City. (City Reply Affirm. ¶ 5.)

The City’s motion to dismiss is granted. The documentary evidence conclusively establishes a defense to the plaintiff’s claims against the City as a matter of law. The City has provided DMV records proving that it was neither the record owner nor the registrant of the subject Access-A-Ride vehicle. (*See City Moving Affirm. Ex. E [DMV Records].*) Therefore, City had no duty pertaining to the “operation, maintenance and control” of the subject vehicle.

The City’s motion to dismiss must also be granted because of the variance in the theory of liability in the complaint from that included in the notice of claim.

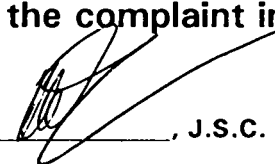
“Causes of action for which a notice of claim is required, that are not delineated in the plaintiff’s original notice of claim, may not be interposed because [t]he addition of such causes of action which were not referred to, either directly or indirectly in the original notice of claim, would substantially alter the nature of the plaintiff[’]s claims.”

(Garcia v O'Keefe, 34 AD3d 334, 335 [1st Dept 2006] [internal quotation marks and citations omitted]; see also Rice v New York City Hous. Auth., 149 AD2d 495, 497 [2d Dept 1989].)

Here, the notice of claim alleges that "[t]he accident was caused by the negligent operation, maintenance and control of the Access-A-Ride vehicle" (City Affirm. Ex. A [Notice of Claim] ¶ 3 [emphasis supplied].) By contrast, the complaint alleges that the City "breached its duties owed to the Plaintiff's in contracting with entities negligent in their ownership and control of motor vehicles. . . through the access-a-ride program"; and, that the City "owed a duty to the Plaintiffs to use reasonable care in entering into, overseeing, training, monitoring and supervising of entities participating in the access-a-ride program." (Complaint ¶¶ 29, 58 [emphasis supplied].)

The theory in the notice of claim, which implied liability based on ownership or control of a vehicle, shifted to a theory in the complaint based on allegations of negligent hiring, negligent supervision, and negligent retention of an independent contractor. The allegations of the notice of claim did not furnish the predicate facts to give the City notice of the very different claim that plaintiff was alleging in the Complaint. (See Brown v New York City Tr. Auth., 172 AD2d 178, 180 [1st Dept 1991] [dismissing claims against City because the notice of claim only furnished the predicate for a theory of liability relating to the condition of a bus stop sign, rather than a failure of the defendant to provide plaintiff with a safe path to the bus].) Therefore, the Court may not consider the additional theories alleged in the complaint in opposition to the City's motion to dismiss.

Dated: April 13, 2016
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

DOMINICK J. GILLILAND
J.S.C.