

Spencer v City of New York
2016 NY Slip Op 30986(U)
May 31, 2016
Supreme Court, New York County
Docket Number: 154173/2014
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

ROBERT SPENCER,

INDEX NO. 154173/2014

Plaintiff,

MOTION DATE 5/20/16

MOTION SEQ. NO. 002

- v -

**THE CITY OF NEW YORK, THE NEW YORK CITY
TRANSIT AUTHORITY, THE MANHATTAN AND BRONX
SURFACE TRANSIT OPERATING AUTHORITY, THE
METROPOLITAN TRANSIT AUTHORITY, RUNWAY
TOWING CORP. and JOHN DOE (First and last name
being unknown and fictitious),**

Defendants.

The following papers, numbered 12-21, 25, were read on this motion for summary judgment

Notice of Motion —Affirmation — Exhibits A-G

No(s). 12-21

Affirmation in Opposition—Affidavit of Service—Exhibits A-E

No(s). 25

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

Upon the foregoing papers, it is ORDERED that the motion for summary judgment by defendants New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, and Metropolitan Transportation Authority (sued herein as Metropolitan Transit Authority) is granted, and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants, and all cross claims by and against these defendants are dismissed; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

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ORDERED that this action is referred to the General Clerk's Office for reassignment to a City Part, and the preliminary conference in IAS Part 21 on August 8, 2016 is canceled.

Plaintiff alleges that, on July 3, 2013, at approximately 11:00 p.m., he was injured as his vehicle was attempting to drive past a broken down bus, which was hooked up to a tow truck, on East 61st Street, between First and Second Avenue in Manhattan. The notice of claim states, in relevant part:

"While said bus was disabled on the side of the road cars were able to slowly move past it having to move between the bus and the parked vehicles on the right side. Before Claimant could pass the bus a mechanic opened up a side panel of the bus. Said panel was impeding Claimant's lane of traffic. Claimant asked the tow truck operator if he could move the panel so he could pass. The tow truck operator told the Claimant that he had to wait for the mechanic. After a period of time, the tow truck operator instructed the Claimant to proceed. The tow truck operator was standing in such a position that the Claimant could not see if the side panel was moved, never the less [*sic*] the tow truck operator instructed the Claimant to proceed. As the Claimant was attempting to pass the bus Claimant's vehicle was struck on the driver's side mirror and Claimant's left arm by the side panel."

(Wagner Affirm., Ex A [Notice of Claim] ¶ 4.)

The amended verified complaint alleges that Runway Towing Corp. was the owner of the tow truck, and that John Doe, an employee of Runway Towing Corp., "waived the Plaintiff through next to a parked New York City bus which had a service door open which Plaintiff caught

(Continued...)

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his arm on.” (Wagner Affirm., Ex C [Amended Complaint] ¶¶24-29, 41.)

Defendants New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, and Metropolitan Transportation Authority (collectively, the Transit defendants) now move for summary judgment, on the ground that vehicle registration records indicate the disabled bus is registered to the MTA Bus Company. The Transit defendants also submit a copy of a letter dated September 20, 2013, which states, “[T]he above referenced matter involves a claim against MTA Bus Co. although you have mistakenly either named or served the MTA New York City Transit Authority, (NYCTA). NYCTA has no legal relationship with or responsibility for MTA Bus Co.” (Wagner Affirm., Ex B.)

Plaintiff opposes the motion as premature.

The Transit defendants met their prima facie burden of summary judgment. According to complaint, the disabled bus bore a New York license plate number M40915. According to a copy of the MV104-AN, the VIN of the disabled bus was 1M8PDMJA18P058706 (Wagner Affirm., Ex A.) The vehicle title records from the Department of Motor Vehicles undisputedly indicate that the bus with VIN M8PDMJA18P058706 is registered to the MTA Bus Company. (Wagner Affirm., Ex G.)

Under the circumstances, there is no plausible basis to hold the Transit defendants liable for the plaintiff’s injuries. Not only was the disabled bus in the possession of a tow truck company when the incident occurred, but also the fact that the disabled bus is registered to the MTA Bus Company establishes that the Transit defendants did not have a duty to maintain or repair the disabled bus. In addition, plaintiff alleges that he attempted to pass the disabled bus at the direction of the tow truck employee.

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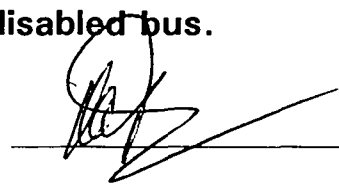
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Although the complaint does allege that the Transit defendants had contracted with the towing company, "[t]he moving party need not specifically disprove every remotely possible state of facts on which its opponent might win the case." (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009].) Here, it is highly implausible that the Transit defendants would have called the tow truck company that they had allegedly hired to tow a bus that they did not own (and thus had no duty to repair). Neither is it plausible that an employee of the Transit defendants would have appeared at the scene to respond to a disabled bus that they did not own.

Even assuming, for the sake of argument that the Transit defendants had contracted with Runway Towing Corp., "a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts." (*Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257 [2008].)

Finally, the Court rejects plaintiff's argument that the motion is premature. "The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion." (*Davis v Turner*, 132 AD3d 603 [1st Dept 2015].) It appears that plaintiff was aware as early as September 2013 that plaintiff's claim involved the MTA Bus Company; plaintiff had ample time to conduct a search of DMV records to determine the identity of the registered owner of the disabled bus.

Dated: 5/31/16
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