

Rector v Metropolitan Transp. Auth.
2016 NY Slip Op 31034(U)
June 2, 2016
Supreme Court, New York County
Docket Number: 155239/2015
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

DERRICK RECTOR,

INDEX NO. 155239/2015

Plaintiff,

MOTION DATE 4/25/16

- v -

MOTION SEQ. NO. 001

**METROPOLITAN TRANSPORTATION AUTHORITY,
NEW YORK CITY TRANSIT AUTHORITY, EMPIRE
PARATRANSIT CORP. and "JOHN DOE",**

Defendants.

The following papers, numbered 13-21, 24-29, were read on this motion to amend and cross motion for summary judgment.

Notice of Motion —Affirmation — Exhibits A-D —Affidavit of Mailing | No(s). 13-16

Notice of Cross Motion—Affirmation in Opposition and in Support — Exhibits A-B—Affidavit of Service | No(s). 17-21

Affirmation in Partial Opposition and Reply Affirmation — Exhibit A—Affidavit of Mailing | No(s). 24-26

Reply Affirmation — Exhibit A —Affidavit of Service | No(s). 27-29

Upon the foregoing papers, it is ordered that plaintiff’s motion is granted in part as follows:

(1) plaintiff is granted leave to amend the summons and complaint to add Jamel Potts as an additional defendant, and to remove "John Doe" as a defendant, and the supplemental summons and amended complaint, in the form annexed as Exhibit D to the moving papers, shall be deemed served upon defendants Metropolitan Transportation Authority, New York City Transit Authority, and Empire Paratransit Corp. upon service of a copy of this order with notice of entry; and

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

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ORDERED that the caption is hereby amended as follows:

DERRICK RECTOR,

Plaintiff,

- v -

**METROPOLITAN TRANSPORTATION AUTHORITY, NEW
YORK CITY TRANSIT AUTHORITY, EMPIRE PARATRANSIT
CORP. and JAMEL POTTS,**

Defendants.

Plaintiff must serve a copy of this order on the General Clerk's Office (60 Centre Street, Room 119) and the County Clerk, who are directed to mark their records to reflect this amendment; and

(2) the remainder of plaintiff's motion is otherwise denied; and it is further

ORDERED that the cross motion for summary judgment by defendants Metropolitan Transportation Authority, New York City Transit Authority, and Empire Paratransit Corp. is granted, and the complaint is dismissed in its entirety as against defendant Metropolitan Transportation Authority, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants.

On May 26, 2015, plaintiff commenced this action, alleging that, on March 24, 2014, he was a passenger in an Access-A-Ride vehicle, a 2008 Ford sedan with New York State registration 18941LV, which struck parked vehicles and other objects on Third Avenue, near its intersection with East 46th Street in Manhattan. (Jacobson Affirm., Ex A

(Continued...)

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[Verified Complaint ¶¶ 31, 42].) The complaint named “John Doe” as the operator of the vehicle, alleging that he was, among other things, an employee of defendant Empire Paratransit Corp. (*Id.* ¶¶ 30, 37.)

According to e-filed affidavits of service, defendants New York City Transit Authority and the Metropolitan Transportation Authority were served with the pleadings on June 1, 2015. (NYSCEF Doc. Nos. 2 and 3.) There is no efiled affidavit of service upon defendant Empire Paratransit Corp. or defendant John Doe. Defendants Metropolitan Transportation Authority, New York City Transit Authority, and Empire Paratransit Corp. (collectively, the Transit Defendants) purportedly served their answer on June 23, 2015. (Jacobson Affirm. ¶ 5.)

On November 9, 2015, plaintiff’s counsel purportedly served a demand for accident reports (*id.*), and the Transit Defendants served their response on November 23, 2015. (Jacobson Affirm., Ex C.) The response indicates that the driver of the Empire Paratransit Vehicle was Jamel Potts. (*Id.*)

Plaintiff now moves to amend the summons and complaint to add Jamel Potts as an additional defendant and to remove the “John Doe” defendant.¹ Plaintiff also seeks an extension of time to serve all defendants. The Transit Defendants oppose the motion and cross-move for summary judgment dismissing the action as against the Metropolitan Transportation Authority (MTA). Plaintiff oppose the cross motion.

Plaintiff is granted leave to amend the complaint to add Jamel Potts as an additional defendant. The Transit Defendants have not demonstrated any prejudice or surprise, and naming the driver of the

(Continued...)

¹ Plaintiff is not seeking to substitute Jamel Potts in lieu of defendant “John Doe” pursuant to CPLR 1024.

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vehicle as a defendant is not plainly lacking in merit. (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005] [internal citations and quotation marks omitted].)

The Transit Defendants' only argument in opposition to adding Potts as a defendant is that defendant Empire Paratransit Corp. would be vicariously liable for Potts's negligence under respondeat superior. Thus, they argue that adding Potts as an individual defendant is unnecessary. This argument is without merit. "It is ancient law that the servant is liable in damages for his own tortious acts, even though at the time he was engaged in the work of his employer." (*Judson v Fielding*, 227 AD 430, 435 [3d Dept 1929], *affd*, 253 NY 596 [1930].) Defendant Empire Paratransit Corp.'s vicarious liability, if any, is not a defense to Potts's personal liability, if any, as the driver of Access-A-Ride vehicle.

Therefore, the branches of plaintiff's motion for leave to amend to add Potts as a defendant and to remove "John Doe" as a defendant is granted. The Court reminds plaintiff that, "When a new defendant is sought to be added, the supplemental summons must first be filed with the clerk of the court (CPLR 304) and then served upon the new defendant within the post-filing time frame specified by CPLR 306-b." (Vincent C. Alexander, *Practice Commentaries*, McKinney's Cons Laws of NY, Book 7B, CPLR C305:2; *see also* CPLR 305 [a].)

However, the branch of plaintiff's motion for an extension under CPLR 306-b to serve all defendants (*see* *Jacobson Affirm.* ¶ 8) is denied. Plaintiff has not demonstrated that an extension should be granted, either for good cause or in the interest of justice. (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001].)

The Transit Defendants' cross motion for summary judgment

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dismissing the action as against the MTA is granted. "[T]he 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. Ctr.*, 105 AD2d 681, 681 [2d Dept 1984]; see also *Towbin v City of New York*, 309 AD2d 505 , 505 [1st Dept 2003] [MTA neither owns nor operates any buses]; cf. *Sullivan v Atlantic Paratransit of N. Y. C., Inc.*, 52 AD3d 817, 818 [2d Dept 2008] ["Pursuant to the terms of this agreement the NYCTA leased vehicles to Atlantic for one dollar per year. Atlantic was to register the vehicles in its name but title was to remain in the name of the NYCTA".])

Dated: 6/2/16
New York, New York


_____, J.S.C.

MICHAEL D. STALLMAN

1. Check one:.....

2. Check if appropriate:..... MOTION IS:

3. Check if appropriate:.....

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

SETTLE ORDER

SUBMIT ORDER

DO NOT POST

FIDUCIARY APPOINTMENT

REFERENCE