

**Moctezuma v New York City Tr. Auth.**

2017 NY Slip Op 32449(U)

November 16, 2017

Supreme Court, New York County

Docket Number: 152659/2014

Judge: Lisa A. Sokoloff

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

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JESUS MOCTEZUMA,

Plaintiffs,

DECISION AND ORDER

-against-

Index No.: 152659/2014

NEW YORK CITY TRANSIT AUTHORITY,  
MANHATTAN AND BRONX SURFACE TRANSIT  
AUTHORITY, METROPOLITAN  
TRANSPORTATION AUTHORITY, NYEMA  
RIVERA, JOEL GENAO and STEPHANIE MELO,

Mot. Seq. 2

Defendants.

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*Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:*

Papers	Numbered	NYCEF #
TRANSIT Defendant's SJ Motion	<u>1</u>	23
Plaintiff's Affirmation in Opposition	<u>2</u>	39
Co-Defendant's Sur-Reply Affirmation	<u>3</u>	49
Plaintiff's Supplemental Affirmation in Opposition	<u>4</u>	50

LISA A. SOKOLOFF, J.

Plaintiff Jesus Moctezuma commenced this action against Defendants New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority s/h/a Manhattan and Bronx Surface Transit Authority, Metropolitan Transportation Authority, Nyema Rivera (collectively, "TRANSIT"), and Joel Genao and Stephanie Melo (collectively, "Co-Defendants") for personal injuries he sustained in an accident on October 13, 2013, while riding his bicycle on Saint Nicholas Avenue in Manhattan.

TRANSIT moves for an order pursuant to CPLR § 3212 for summary judgment and dismissal of Plaintiff's complaint and all causes of action and Co-Defendants' cross-claims, as a matter of law, asserting that there are no triable issues of material fact.

The Plaintiff was riding his bicycle northbound between West 178th and 179th Streets on Saint Nicholas Avenue, a two-way street with two traffic lanes in each direction in addition to a parking lane, when he came upon Mr. Genao's double-parked car in the right lane of moving traffic. As he was passing Mr. Genao's double-parked car, the driver's side front door opened suddenly, hitting Mr. Moctezuma's forearm, causing him to fall off his bicycle. The Plaintiff testified that the back wheel of a city bus ran over his right leg.

TRANSIT asserts that the parties' examination before trial ("EBT") testimony establish a *prima facie* showing of its entitlement to summary judgment on the issue of liability in that the bus driver, Nyema Rivera, was confronted with an emergency, not of her own creation, and therefore not negligent.<sup>1</sup>

TRANSIT relies on the Court of Appeals decision holding that the emergency doctrine "recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought ..., the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (*Rivera v. York City Transit Authority*, 77 NY2d 322, 327 [1991]) and the Appellate Division decision holding that, a driver is not liable where faced with a sudden and unexpected occurrence that was not of his or her own making (*Cropper v. Stewart*, 117 AD3d 417 [1st Dept 2014]), to support its motion that bus operator Nyema Rivera was confronted with an

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<sup>1</sup> TRANSIT also raises the issue that Co-Defendant's counsel has failed to provide the citations in the transcripts for her recitation of facts or conclusions as to how the accident occurred, and the Court and TRANSIT should not have to search the record to determine how she arrived at her facts and/or conclusions. The Court admonishes both counsel for failing to provide the exact citations and for characterizing instead of quoting the testimony as the court requested.

emergency, not of her own creation, and was therefore not negligent.

A court may grant summary judgment where the moving party has made a *prima facie* showing of entitlement to a judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [NY 1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]); mere conclusions and unsubstantiated allegations are insufficient (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

According to Ms. Rivera's EBT testimony, the bus was moving just before the accident. As the bus was crossing 178<sup>th</sup> street, she saw Plaintiff on his bicycle stopped behind co-Defendants' double-parked car. She honked her horn as she approached the double-parked car and made eye contact with the driver through her windshield. When Ms. Rivera began to move her bus into the left lane of moving traffic, the Plaintiff was still stopped in the right lane of moving traffic behind the co-Defendants' double-parked car. As she went around the vehicle and the cyclist, who were still in the right lane, she honked again, and started to drive into the left lane of traffic, straddling the southbound lane.

According to the EBT testimony of Mr. Genao, while stopped and double-parked, he looked in his sideview and rearview mirrors and saw neither the bus nor the bicyclist at any time before this accident. Though his car windows are slightly tinted, he could see cars through the window, but did not make eye contact with the bus driver, contrary to Ms. Rivera's assertion. Mr. Genao testified that when Plaintiff attempted to dodge the

open car door, the bus was approaching, but later contradicted himself by saying that the first time he saw the bus was when the bicyclist hit the bus while attempting to dodge the open car door. This testimony is in turn contradicted by the bus driver who testified that when Mr. Genao opened his car door, the rear door of the bus, which is past the halfway point on the bus, was by the front of Mr. Genao's car.

The bus driver, Ms. Rivera, stated that when she saw the double-parked car and the bicycle for the first time she was moving and not stopped, but she did not know her speed. Subsequently, she made a contradictory statement that when she first saw the bicyclist and the double-parked car, she was stopped to "make sure" she could pass them. Yet she never mentioned in the accident report or the police report that either the bus or the bicyclist were stopped at any point, or that she honked the horn, though these facts would have been fresh in her mind when these reports were made. Moreover Mr. Genao testified that when he opened his car door, he estimated that the bus was traveling at 20-25 miles per hour. Notably, Ms. Rivera stated that she was unsure of the speed her bus was travelling when she saw the car door open in her side rear-view mirror.

The conflicting testimony of the parties on several key facts, including whether Plaintiff was stopped behind the double-parked car, whether Ms. Rivera stopped before Plaintiff passed the double-parked car, whether she made eye contact with co-Defendant Mr. Genao or honked the bus horn prior to the accident, and the location of the bus at the time of the accident, present issues of fact and credibility that preclude a finding of summary judgment for TRANSIT (*Iwata v Manhattan and Bronx Surface Transit Operating Authority*, 144 AD3d 539 [1st Dept 2016]).

Resolution of these factual questions is necessary to determine whether TRANSIT's bus driver made a safe lane-change or proceeded safely beyond what she

described as a double traffic hazard. Thus, the Plaintiff and co-Defendant have raised sufficient issues of fact whether there was an emergency situation and whether any emergency situation that Ms. Rivera was confronted with was of her own creation. Additionally, "except in the most egregious circumstances, an evaluation of the reasonableness of a defendant driver's reaction to an emergency is normally left to the trier of fact" (*Maisonet v Roman*, 139 AD3d 121, 125 [1st Dept 2016]).

Finally, TRANSIT disagrees with Plaintiff's expert who alleged that Ms. Rivera violated cited four sections of the NYS Vehicle and Traffic Law ("VTL"). TRANSIT argues that the expert's conclusions are based upon an inaccurate reading of the EBT transcripts. A determination of the factual issues is necessary to determine whether the bus driver violated any of these VTL sections and contributed in any manner to the accident.

TRANSIT has failed to establish as a matter of law that Ms. Rivera acted with due care under the circumstances and that her actions did not contribute to the accident (*Tapia v Royal Tours Service, Inc.*, 67 AD3d 894 [2d Dept 2009]). Accordingly, TRANSIT's motion for summary judgment and to dismiss the complaint is DENIED. This constitutes the decision and order of the court which will be mailed to all parties.

Dated: November 16, 2017  
New York, New York

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Lisa A. Sokoloff, J.S.C.