

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

2018 NY Slip Op 32976(U)

October 30, 2018

Supreme Court, Richmond County

Docket Number: 151219/2017

Judge: Thomas P. Aliotta

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND: PART TR-2

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CINDY MCDONALD,

HON. THOMAS P. ALIOTTA

Plaintiff,

**DECISION AND ORDER**

- against -

Index No.: 151219/2017  
Motion No.: 3225-001

NEW YORK CITY TRANSIT AUTHORITY, NEW  
YORK CITY TRANSIT a/k/a NYC TRANSIT,  
METROPOLITAN TRANSPORTATION AUTHORITY,  
MTA BUS COMPANY and "JOHN DOE" being an  
employee and bus operator for NEW YORK CITY  
TRANSIT AUTHORITY, NEW YORK CITY TRANSIT  
a/k/a NYC TRANSIT, METROPOLITAN  
TRANSPORTATION AUTHORITY and/or MTA BUS  
COMPANY, whose identity is currently unknown,

Defendants.

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Recitation, as required by CPLR 2219(a) of the following papers numbered were fully  
submitted on the day 17<sup>th</sup> day of October 2018.

	<b>Papers Numbered</b>
Defendants Notice of Motion, Affirmation and Exhibits .....	1, 2
Plaintiff's Affirmation in Partial Opposition .....	3
Defendants Reply Affirmation.....	4
Affirmation/Affidavit of Service (NYSCEF DOC. 2, 3, 4 and 5) .....	5-8

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Upon the foregoing papers, defendants' motion, *inter alia*, to dismiss the complaint as  
against defendants, NEW YORK CITY TRANSIT AUTHORITY, NEW YORK CITY  
TRANSIT a/k/a NYC TRANSIT, and "JOHN DOE", based upon plaintiff's failure to appear at a

hearing pursuant Public Authorities Law 1212[5] or in the alternative, to compel plaintiff to appear for such hearing is denied.<sup>1</sup>

This is an action for personal injuries allegedly sustained by plaintiff on March 4, 2016 at approximately 8:05 P.M. It is alleged that plaintiff was a passenger aboard bus #7016 owned by defendants, NEW YORK CITY TRANSIT AUTHORITY, NEW YORK CITY TRANSIT a/k/a NYC TRANSIT, and "JOHN DOE", and operated by "JOHN DOE" (hereinafter "NYCTA").

A Notice of Claim was timely filed on May 27, 2016 (Ex. "A"). Plaintiff appeared for a hearing pursuant to Public Authorities Law 1212[5] on July 8, 2016. The hearing was recorded by an electronic sound recording and a transcript was produced through a transcription service (Ex. "D"). Thereafter, plaintiff filed the summons and verified complaint on May 30, 2017 (Ex. "B") and served same on all defendants on June 7, 2017 (NYSCEF DOC. 2-5). Defendants served their answer on August 22, 2017 (Ex. "C").

Defendant, NYCTA, now moves this Court seeking to dismiss the complaint for plaintiff's failure to appear at what can only be described as a "do over" of the statutory hearing since admittedly the electronic sound recording device failed to adequately capture the testimony on July 8, 2016. The transcript is riddled with the notation of "inaudible" resulting in incomplete questions and answers. It is defendants' position that their investigation and defense of this "blind accident"<sup>2</sup> will be prejudiced absent a second opportunity to conduct a statutory hearing.

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<sup>1</sup> Defendants, METROPOLITAN TRANSPORTATION AUTHORITY and MTA BUS COMPANY, also moved to dismiss the complaint pursuant to CPLR 3211[a][7] and 3212. Plaintiff's Affirmation in Partial Opposition consented to the dismissal and only opposed the balance of the motion as against the "NYCTA" defendants.

<sup>2</sup> Defendants' Reply Affirmation, paragraphs 9 and 10.

However, plaintiff argues that the inadequacy of the transcript is through no fault of her own and as she has complied with the statutory mandate, plaintiff should not be compelled to appear for a second hearing two years later. The Court agrees.

This is a case of first impression as conceded by both parties. The Court finds that the facts of this case are akin to when the statutory hearing is indefinitely postponed, and by reason of the municipality's inactions, the hearing is not rescheduled prior to the expiration of the statute of limitations (*October v. Town of Greenburgh*, 55 AD3d 704 [2d Dept. 2008] and *Billman v. City of Port Jervis*, 71 AD3d 932 [2d Dept. 2010]). Here, once the recording was transcribed and it became apparent that the transcript could not aid defendants' early investigation of this claim, they were under an affirmative duty to reschedule the hearing at "the earliest possible date available" (*October v. Town of Greenburg*, 55 AD3d 704-705 and *Billman v. City of Port Jervis*, 71 AD3d 933). It is noted that this action was commenced on May 30, 2017, which was ten months after the initial hearing and approximately three days prior to the expiration of the statute of limitations. Defendants have not offered proof that the transcript was forwarded to plaintiff with a demand for a further hearing prior to the commencement of this litigation and that plaintiff failed to respond or comply.

Accordingly, it is hereby

ORDERED, that defendants motion to dismiss this action as against METROPOLITAN TRANSPORTATION AUTHORITY and MTA BUS COMPANY is granted on consent; and it is further

ORDERED, that the caption of this action is hereby amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND  
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CINDY MCDONALD,

Plaintiff,

- against -

NEW YORK CITY TRANSIT AUTHORITY, NEW  
YORK CITY TRANSIT a/k/a NYC TRANSIT, and  
"JOHN DOE" being an employee and bus operator  
for NEW YORK CITY TRANSIT AUTHORITY,  
NEW YORK CITY TRANSIT a/k/a NYC TRANSIT,  
whose identity is currently unknown,

Defendants.

-----X

and it is further


ORDERED, that defendants shall serve a copy of this Order with Notice of Entry upon  
plaintiff, and the Clerk of the Court and the Calendar Clerk who shall amend their records  
accordingly; and it is further

ORDERED, that defendants' motion to dismiss this action as against the remaining  
defendants, NEW YORK CITY TRANSIT AUTHORITY, NEW YORK CITY TRANSIT a/k/a  
NYC TRANSIT, and "JOHN DOE" based upon plaintiff's failure to appear for a hearing  
pursuant to Public Authorities Law 1212[5] is denied; and it is further

ORDERED, that defendants' motion to compel plaintiff to appear for a second hearing pursuant to Public Authorities Law 1212[5] is denied.

This constitutes the decision and order of the Court.

ENTER:



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HON. THOMAS P. ALIOTTA, J.S.C.

Dated: October 30, 2018