

Blumenthal v Metropolitan Transp. Auth.
2019 NY Slip Op 30813(U)
April 1, 2019
Supreme Court, New York County
Docket Number: 159220/2017
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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INDEX NO. 159220/2017

TODD BLUMENTHAL,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

METROPOLITAN TRANSPORTATION
AUTHORITY,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 60

were read on this motion to/for Jsummary judgment.

By notice of motion, defendant moves pursuant to CPLR 3211(a)(7) and/or 3212 for an order summarily dismissing the complaint and all cross claims against it. Plaintiff opposes and, by notice of cross motion, moves for orders striking the MTA’s amended answer for failure to provide discovery, permitting him to amend his notice of claim and pleadings *nunc pro tunc* to add as a defendant Metro North Commuter Railroad, permitting him to amend his claims against defendant to add claims for misrepresentation and design defect, and disqualifying defendant’s counsel as he may be a fact witness. Defendant opposes the cross motion.

I. BACKGROUND

On April 27, 2017, plaintiff served defendant with notice of his claim against it, identifying his claim as having arisen on or about March 12, 2017, when he slipped and fell on ice “on the ramp of the platform of the Harlem Valley-Wingdale Metro North Railroad Station located at Route 22, Harlem Valley State Hospital, County of Dutchess.” (NYSCEF 23).

On or about October 11, 2017, plaintiff filed and served his summons and complaint, naming only defendant, and alleging that it owned the platform and ramp at issue. (NYSCEF 24). On or about November 28, 2017, defendant served plaintiff with an amended verified answer and denied therein that it owned, maintained, or controlled the ramp, and asserted as one of its affirmative defenses that the complaint failed to state a claim against it. (NYSCEF 26).

Before discovery commenced, plaintiff filed a note of issue, which the parties subsequently stipulated to vacate (NYSCEF 17), and they proceeded with discovery. On January 8, 2019, plaintiff filed a new note of issue. (NYSCEF 61).

By affidavit dated June 25, 2018, defendant's Senior Real Estate manager asserts that the defendant and Metro North are separate entities, that Metro North is and was solely responsible for the operation and maintenance of the ramp and station and for repairs and removal of snow and ice, and that while the MTA leases the station, it has no responsibility for control or operation of the station. (NYSCEF 31).

II. MTA'S MOTION

A. Contentions

Defendant denies owning the premises, identifies Metro North as the owner, and denies being estopped from moving to dismiss on that ground. It observes that it denied ownership, maintenance, and control of the ramp in its amended answer and that plaintiff does not state a claim against it, but that plaintiff took no action with respect thereto. It thus contends that it put plaintiff on notice at the beginning of the case that it was not the proper defendant. (NYSCEF 22).

Plaintiff contends that defendant concealed the true identity of the premises by conducting a 50-h hearing and a deposition and participating in discovery, and deliberately

waited until after the one-year-and-90-day deadline had expired to raise for the first time that it is not the proper defendant. He complains that despite numerous court orders, defendant provided no discovery, thereby withholding from him information that would have assisted him in identifying the correct owner. Plaintiff argues that notice on defendant is *de facto* notice on Metro North and that if he adds Metro North as a defendant, it is likely that counsel for defendant will represent Metro North. (NYSCEF 37).

B. Analysis

Defendant establishes that it does not own, control or maintain the ramp and station at issue, and that Metro North does, and plaintiff raises no triable issue in response. Defendant thus may not be held liable here, and Metro North must be sued separately. (*See e.g., Mayayev v Metropolitan Transp. Auth. Bus*, 74 AD3d 910 [2d Dept 2010] [MTA and its subsidiaries must be sued separately; they are not responsible for each other's torts]; *Cusick v Lutheran Med. Ctr.*, 105 AD2d 681 [2d Dept 1984] [MTA's functions limited to financing and planning, and do not include operation, maintenance and control of facilities]).

In *Polsky v Metropolitan Transp. Auth.*, the Court granted the MTA's motion to dismiss the complaint and denied the plaintiff's cross motion to amend his notice of claim and pleadings *nunc pro tunc* to add the New York City Transit Authority as a defendant instead of the MTA. While the MTA's motion was made after the note of issue had been filed and long after the statute of limitations had expired, it was held that its denial of ownership in its answer, along with the fact that NYCTA had handled the claim, should have alerted plaintiff that he had sued the wrong party and that the MTA was not estopped from denying ownership. (37 AD3d 243 [1st Dept 2007]).

And in *Delacruz v Metropolitan Transp. Auth.*, the Court held that the MTA was not equitably estopped from claiming it was not the proper defendant, where it provided the plaintiff with several indications that he had sued the wrong party, including denying ownership or control of the subject station in its answer. (45 AD3d 482 [1st Dept 2007]).

Here, defendant denied ownership and control in its answer and included as an affirmative defense that plaintiff had failed to state a claim against it. (*See Yong v City of New York*, 41 AD3d 212, 213 [1st Dept 2007] [MTA's denial in answer "clearly put plaintiff on notice that proper party may not have been discovered"]; *see also Gonzalez v City of New York*, 94 AD3d 448 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013] [equitable estoppel did not apply as City denied allegations in answer and plaintiff had time after receipt of answer to seek leave to file late notice of claim naming correct defendant]).

It is the duty of counsel for a plaintiff to ascertain that she has sued the correct entity; the defendant has no duty to alert the plaintiff that it has sued the wrong party. (*See e.g., Matter of Lemma v Off Track Betting Corp.*, 272 AD2d 669 [3d Dept 2000] [leave to file late notice of claim should have been denied as plaintiff showed no reasonable basis for belief that defendant was proper party, and no excuse for failing to identify or serve correct party until months after defendant's answer should have alerted him to mistake]; *see also Devivo v Town of Carmel*, 68 AD3d 991 [2d Dept 2009] [petitioner did not set forth reasonable excuse for delay as failure to ascertain owner of property was due to lack of diligence in investigating matter]).

While plaintiff complains that defendant provided no discovery which may have helped reveal the proper defendant, plaintiff did not move to compel discovery, and indeed, has since filed a note of issue certifying that all discovery is complete. Plaintiff also fails to cite any authority for the proposition that by participating in discovery conferences, defendant waived its

right to assert that it is not the proper defendant. Nor is there any citation for the argument that counsel’s representation of Metro North in other matters thereby put Metro North on notice of the instant lawsuit, or that Metro North may be considered a *de facto* defendant.

III. PLAINTIFF’S CROSS MOTION

In light of this result, and absent service of the cross motion on Metro North, plaintiff’s cross motion to amend his notice of claim and pleadings to assert a claim against Metro North, *nunc pro tunc*, is denied. (See *Polsky*, 37 AD3d at 243; see also *LoCicero v Metropolitan Transp. Auth.*, 288 AD2d 353 [2d Dept 2001] [motion to add proper party defendant should have been denied as made after expiration of statute of limitations and as proposed defendant not served with motion papers]).

By filing his note of issue, plaintiff waives any claim that defendant owes him outstanding discovery. (*Marte v City of New York*, 102 AD3d 557 [1st Dept 2013]). The remainder of plaintiff’s arguments need not be addressed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant’s motion to dismiss is granted, and the complaint is dismissed in its entirety; and it is further

ORDERED, that plaintiff’s cross motion is denied.


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BARBARA JAFFE, J.S.C.

4/1/2019
DATE

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<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input type="checkbox"/>	NON-FINAL DISPOSITION	
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<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: