Alvarez v City of New York
2019 NY Slip Op 33843(U)
November 4, 2019
Supreme Court, Richmond County
Docket Number: 151566/2019
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART TR-2
---X
IRMA ALVAREZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY, PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendants.
---X

DECISION AND ORDER

Index No.: 151566/2019
Motion No.: 3904-002

Recitation, as required by CPLR 2219(a) of the following papers numbered "1" through "5" were considered on this motion fully submitted on October 23, 2019:

	Papers Numbered
Defendants' Notice of Motion, Affirmation and Exhibits (NYSCEF DOC. NO. 22-26)	1, 2
Plaintiff's Affirmation in Opposition with Exhibits (NYSCEF DOC. NO. 27-32)	3
Defendants' Reply Affirmation with Affidavit Attached (NYSCEF DOC. NO. 36, 37, 39)	4
Plaintiff's Letter Dated October 24, 2019 Requesting the right of Sur-Reply (NYSCEF DOC. NO. 40)	5

Upon the foregoing papers, defendants, NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY's motion to dismiss the complaint

pursuant to CPLR § 3211 is granted and that portion of the motion for summary judgment pursuant to CPLR § 3212 is moot.

This is an action for personal injuries allegedly sustained on or about March 9, 2019, at the St. George Ferry Terminal Lower Level while plaintiff was entering the Staten Island Rapid Transit station at or near the turnstile (See Complaint, ¶55). It is alleged that plaintiff "slipped/tripped and fell due to a substance on the ground/floor" (See Notice of Claim, ¶3).

PROCEDURAL BACKGROUND

Plaintiff initially commenced this action against the named defendants, but the action was discontinued against the Port Authority of New York and New Jersey on September 3, 2019 in response to defendant's motion to dismiss this action for lack of subject matter jurisdiction. At this juncture NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY (hereinafter "NYCTA/MTA") have also moved to dismiss this action pursuant to CPLR § 3211 for the failure to state a cause of action, or in the alternative, CPLR § 3212 for summary judgment.

ARGUMENTS OF COUNSEL

First, it is argued that the MTA, a public benefit corporation, is an umbrella organization that oversees New York City's mass transportation system and, therefore, is never a proper party to an action involving allegedly negligent conduct in the operations of the transit system. In support, NYCTA/MTA argues that, "[I]t is well settled, as a matter of law that the 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 Medical Center, et al.*, 105 AD2d 681 [2d Dept. 1984); *Matter of Abrams v. New York City Transit Authority*, 48 AD2d 69 [1st Dept. 1975] *aff'd*, 39 NY2d 990 [1976]). It is further argued that

Public Authorities Law § 1266 [5] subjects each subsidiary to suit in accordance with Public Authorities Law § 1276 (*Rampersaud v. MTA*, 73 AD3d 888 [2d Dept. 2010]). Next, it is argued that NYCTA, as subsidiary Manhattan and Bronx Surface Transit Operating Authority ("MABSTOA"), operates all subway transportation and most of the public bus transportation within New York City, except the Staten Island Railway. Defendants request the Court to take judicial notice of this fact from their website http://web.mta.info/mta/compliance/pdf/. Accordingly, plaintiff has failed to state a cause of action based upon existing law, or in the alternative, that based upon the facts put forth, summary judgment is appropriate.

In opposition to that portion of the motion seeking dismissal pursuant to CPLR § 3211, plaintiff argues that defendants' position is "patently false" because "the MTA admitted to partaking in video monitoring and surveillance of the situs. In support of this position, plaintiff attaches a letter received in response to a F.O.I.L. request (Plaintiff's Ex. "C). The MTA's letter granted plaintiff's request for a copy of the surveillance video of the railway terminal on the date of the accident. This letter further states that video was being retrieved by the MTA police department which is assigned to the Staten Island Railway. Finally, plaintiff argues that defendants' reliance on *Cusick v. Lutheran Medical Center, supra.* is misplaced. Plaintiff argues that *Cusick* stands for the proposition that the MTA is not liable in the instances where their function is solely limited to financing (*Lewis v. Metro Transp. Auth.,* 99 AD2d 246 [1st Dept. 1984]). As to summary judgment, plaintiff argues that defendants have failed to satisfy their evidentiary burden by failing to annex the answer served by the City of New York, and only submitted the NYCTA/MTA's answer verified by an attorney.

Defendants' reply was due to be submitted to the Court by October 23, 2019 but not e-filed until October 24, 2019. Annexed thereto was the affidavit of Bob Dostogir, Director of

Information Technology for Staten Island Rapid Transit Operating Authority. This affidavit attaches a copy of the NYCTA/MTA's Request for Playback Video Recording dated April 11, 2019 and another request dated April 23, 2019. The affidavit attests that,

> 5. Although SIRTOA is a subsidiary of the Metropolitan Transportation Authority ("MTA"), neither the MTA or the MTA Police Department ("MTAPD") operate, control, manage or maintain SIRTOA's surveillance operations or equipment.
>
> 8. No MTA personnel or MTAPD personnel control, maintain, operate or manage any of the video surveillance equipment throughout the SIRTOA railway system.
>
> 9. Only the persons in my department, all of whom are SIRTOA personnel, control, maintain, operate, and manage the surveillance video cameras throughout the SIRTOA railway system, and disseminate surveillance videos upon legal request and with my express permission and consent.

On October 24, 2019, plaintiff's attorneys addressed a letter to the Court which requested the Court to reject the reply as late, or in the alternative, afford plaintiff the right of sur-reply. The basis of this request was that defendants "provided documentary evidence for the first time in the reply."

DISCUSSION

"When a party moves to dismiss a complaint pursuant to CPLR § 3211 [a][7], the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" and not "whether a plaintiff can ultimately establish its allegations" (*Sokol v. Leader,* 74 AD3d 1180, 1180-1181 [2d Dept. 2010]). Further, "the court is required to accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*New York Tile Wholesale Corp. v. Thomas Fatato Realty Corp.*, 153 AD3d 1351, 1353 [2d Dept. 2017]). The Court may "consider evidentiary material submitted by

a defendant in support of a motion to dismiss pursuant to CPLR § 3211 [a][7]," but is not required to do so and the Court may grant such a motion even if the extrinsic evidentiary material is disregarded (*Kevin Kerveng Tung, P.C. v. JP Morgan Chose & Co.,* 105 AD3d 709, 710 [2d Dept. 2013]). Specifically, affidavits submitted in connection with a CPLR § 3211[a][7] motion are only accepted for evidentiary purposes if the motion is converted to summary judgment (see generally *Sokol v. Leader,* 74 AD3d 1181).

With this in mind, defendants, NYCTA/MTA's, motion pursuant to CPLR § 3211 [a][7] is granted rendering that portion of the motion for summary judgment (CPLR § 3212) moot.

Plaintiff's reliance on *Lewis v. Metropolitan Transportation Authority,* is factually and legally misplaced. In *Lewis,* the plaintiff fell on the platform of the Long Island Railroad ("LIRR") which is outside the City of New York and not part of New York City Transit Authority or the Staten Island Railway. The decision speaks to the standard of care owed by common carriers in general and dismissed the action based upon plaintiff's failure to prove that defendants had notice of or caused and created the dangerous condition, without addressing the issue of the MTA's liability vis-à-vis its subsidiaries. However, in *Noonan v. Long Island Railroad,* 158 AD2d 392 [1st Dept.], the same appellate court analyzed the relationship between the MTA, its subsidiaries and, specifically, the LIRR:

> It is undisputed that the property and equipment on which plaintiff claims to have been injured are owned, operated and maintained by the LIRR. The LIRR is a wholly owned subsidiary corporation of defendant MTA, established pursuant to Public Authorities Law § 1266. Section 1266(5) specifies that the MTA's subsidiary corporations are distinct entities and shall be individually subject to suit and provides that "the employees of any such subsidiary corporation, except those who are also employees of [the MTA] shall not be deemed employees of the [MTA]". Furthermore, each subsidiary is responsible for the maintenance and repair of its own facilities, and the functions of the MTA do not include the

> operation, maintenance and control of any facility (see, *Cusick v. Lutheran Medical Center*, 105 AD2d 681).

The Court notes that *Cusick* was decided by the Second Department nine months after the *Lewis* decision. The *Cusick* decision still remains the law today (*Revella v. Metro North Commuter Railroad,* 172 AD3d 462, 463 [1st Dept. 2019] and *Soto v. New York City Transit Authority,* 19 AD3d 579, 481 [2d Dept. 2005]).

Therefore, defendants MTA/NYCTA have established that accepting the allegations of plaintiff's accident as true, the facts do not fit within a legally cognizant theory of law that establishes a duty was owed by the MTA or NYCTA (one of its separate subsidiaries) to plaintiff at the St. George Terminal (*New York Tile Wholesale Corp. v. Thomas Fatato Realty Corp.,* 153 AD3d 1353). The presence of the MTA police does not defeat defendants' motion since statutory and case law specifically preclude the imposition of liability, vicariously or otherwise, against the MTA and its independent subsidiary NYCTA for liability premised upon the acts of another independent subsidiary such as defendant, Staten Island Rapid Transit Operating Authority. The answers by all defendants are irrelevant to a determination that plaintiff's complaint standing alone fails to state a cause of action and that portion of the motion seeking relief pursuant to CPLR § 3212 is moot.

The Court also finds that plaintiff has not incurred any prejudice by the one-day late submission of the reply since both parties waived oral argument. Further, defendants' affidavit does not present new evidence but rather, it responds to plaintiff's argument that the presence of MTA police established control over the accident location by the MTA. With regard to a CPLR § 3211 [a][7] motion, plaintiff was not under an obligation to put forth evidentiary material in opposition because the burden of proof never shifts (*Sokol v. Leader,* 74 AD3d 1181) unlike a motion pursuant to CPLR § 3212. However, once plaintiff went outside the pleadings by setting

forth an argument not raised in defendants' initial motion in an attempt to set forth new factual allegations not recited in the complaint, defendants were entitled to respond thereto. The affidavit's evidentiary weight, if any, would only be considered were the Court to reach that portion of the motion pursuant to CPLR § 3212. Accordingly, it is hereby

ORDERED, that defendants, NEW YORK CITY TRANSIT AUTHORITY AND METROPOLITAN TRANSPORTATION AUTHORITY's, motion pursuant to CPLR § 3211 [a][7] is granted; and it is further

ORDERED, that defendants, NEW YORK CITY TRANSIT AUTHORITY AND METROPOLITAN TRANSPORTATION AUTHORITY's, motion pursuant to CPLR § 3212 is denied as moot; and it is further

ORDERED, that this action is dismissed against defendants, NEW YORK CITY TRANSIT AUTHORITY AND METROPOLITAN TRANSPORTATION AUTHORITY, in its entirety; and it is further

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C2
---X
IRMA ALVAREZ,

Index No.: 151566/2019

Plaintiff,

-against-

THE CITY OF NEW YORK and STATEN ISLAND
RAPID TRANSIT OPERATING AUTHORITY

Defendants.
---X
and it is further

ORDERED, that the Clerk of the Court shall amend their records to reflect the caption; and it is further

ORDERED, that the Clerk of the Court shall enter judgment in accordance with the terms of this order.

This constitutes the decision and order of the Court.

Dated: NOV 4 , 2019

E N T E R:

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