| **Handy v Transdev Servs., Inc.** |
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| 2021 NY Slip Op 32062(U) |
| August 5, 2021 |
| Supreme Court, Nassau County |
| Docket Number: 603190/2021 |
| Judge: Helen Voutsinas |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NASSAU – IAS/TRIAL PART 19**
**Present: Hon. Helen Voutsinas, J.S.C.**

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**ADRIAN HANDY,**

***Plaintiff,***

Index No.: 603190/2021
Motion Seq. Nos.: 001, 002

-against-

**TRANSDEV SERVICES, INC., TRANSDEV NORTH AMERICA, INC., NASSAU INTER-COUNTY EXPRESS, NASSAU COUNTY and "JOHN DOE",**

***Defendants.***

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The following papers were read on these motions:

Notice of Motion, Affirmation and Affidavit in Support, Exhibits and Memorandum of Law..... 1
Notice of Cross Motion, Affirmation, Exhibits..... 2
Affirmation in Reply and in Opposition to Cross Motion..... 3

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Upon the foregoing papers, defendants Transdev Services Inc., Transdev North America, Inc., Nassau Inter-County Express and Nassau County move for an Order pursuant to CPLR §3211, dismissing the complaint on various grounds including failure to commence the action within the applicable statute of limitations period. Plaintiff Adrian Hardy cross moves for an Order, compelling defendants to provide the name and last known address of the operator of NICE bus #1941 on May 6, 2018, the date of the underlying accident, and for an Order pursuant to CPLR §3025 permitting plaintiff to amend his summons and complaint to name the operator as a party defendant. The motions are decided as hereinafter provided.

Factual and Procedural Background

This is an action for personal injuries allegedly suffered by plaintiff on May 6, 2018 while he was a passenger on a bus owned by Nassau County and operated by Transdev Services, Inc. Plaintiff alleges that he entered the bus at Conklin Street and Oakview Avenue, Farmingdale, and while he was paying his fare, defendant "John Doe", the bus operator, pulled away and suddenly braked, resulting in plaintiff coming into contact with the windshield and suffering injuries.

Defendants move, pre-answer, to dismiss the complaint pursuant to CPLR §3211, on several separate grounds. First, they contend that the action was not commenced within the applicable statute of limitations of one (1) year and ninety (90) days. Second, defendants argue that a notice of a claim was never served upon Transdev Services, Inc. and Transdev North

America, Inc. (collectively, the "Transdev defendants"). Third, defendants contend that Nassau Inter-County Express ("NICE") is merely a brand name of a transit system and cannot be sued as corporation or entity. Finally, as to "John Doe", defendants argue that plaintiff has failed to substitute an individual defendant before the expiration of the applicable statute of limitations. In support of their motion, defendants submit their attorney's affirmation and the affidavit of Aubrey Greenridge, the Director of Risk, Compliance, and Security for Transdev Services, Inc.

In opposition, while plaintiff essentially concedes that the action may be barred by the statute of limitations as against the "municipal defendants", plaintiff argues that defendants Transdev Services Inc. and Transdev North America, Inc. are private corporations, and that the applicable statute of limitations as to them is three (3) years. Plaintiff also contends that the Transdev defendants were served with a notice of claim.

As to plaintiff's cross motion, he argues that plaintiff does not have access to the name of the Transdev employee that was operating the bus involved in the underling incident. He asks the Court to compel defendants to provide the name of the operator and to allow plaintiff to amend his summons and complaint to name the operator as a party defendant. Plaintiff further requests that the Court allow plaintiff to serve the amended summons and complaint upon the operator by serving his employer, one of the Transdev defendants.

Discussion and Ruling

The Court shall first address defendants' motion. On the record presented, it is undisputed that Nassau County (the "County") owns the bus at issue and that Transdev Services, Inc., a private corporation operates the County's buses on the County's behalf as part of the County's public transportation system. It is further undisputed that NICE is the brand name for the transit system - it is not a legal entity, corporation or subdivision of any municipality.

Pursuant to General Municipal Law ("GML") §50-i[1][c], any personal injury action against a municipality must be "commenced within one year and ninety days after the happening of the event upon which the claim is based . . . ." Strict compliance with the statute is mandated, and dismissal is required, not discretionary, when an action is not timely commenced. (*Pierson v. City of New York*, 56 NY2d 950, 955 [1982]).

Here, the date of the underlying incident was May 6, 2018, and the action was not commenced until March 16, 2021. Plaintiff does not argue against dismissal as to Nassau County and even "concedes that there could be an issue re [sic] the Statute of Limitations and the municipal defendants . . . . (Affirmation of Myrna L. Archer, Esq. dated April 30, 2021, at par. 8). The Court finds that the action is not timely and must be dismissed as against Nassau County. As will discussed further below, the action is not timely as to any of the defendants and must be dismissed in its entirety.

Plaintiff does not dispute or offer any opposition to defendants' argument that NICE is not a corporation or municipal subdivision, but only a brand name for the transit system, and that the action cannot be maintained as against NICE. The Court finds that the action must be dismissed

as against Nassau Inter-County Express. (*See Art & Fashion Group Corp. v. Cyclops Prod., Inc.*, 120 AD3d 436, 439 [1st Dept 2014]).

With regard to the Transdev defendants, the law is clear that the statutory notice of claim requirement applies not only to the County, but also to a private corporation, such as Transdev Services, Inc., that operates County-owned buses in fulfillment of the County's statutory duty to operate a public transit system. (*Coleman v. Westchester Street Transportation Co., Inc.*, 57 NY2d 734 [1982]); *Kossifos v. Liberty Lines Transit, Inc.*, 277 AD2d 205 [2d Dept 2000]). Here, Nassau County Local Law §10-2011 imposes upon the County the obligation to operate a public bus system, and authorizes the County to contract with a private corporation to manage, operate and maintain the system. The imposition of such statutory duty gives rise to an obligation on the part of the County to indemnify the private corporation for any damages recovered against it in the discharge of that duty. (GML §50-b[1], and therefore, a notice of claim is required [GML §50-e[l][b]; *Coleman*, 57 NY2d at 735).

Plaintiff does not dispute that he was required to serve a notice of claim upon the Transdev defendants. Rather, he argues that he did in fact serve a notice of claim upon said defendants. Plaintiff asserts that his attorneys mailed a No-Fault application (Form NF-2) with accompanying cover letter, each dated June 5, 2018, and that they also mailed a form "Notice of Intention to Make a Claim" dated May 29, 2018 and accompanying cover letter dated June 5, 2018. The latter form is expressly made [p]ursuant to Article 52 and/or the pertinent Section of Article 18 of the Insurance Law" and states, under "Reason for application": "Uninsured car"' "Uninsured Automobile Endorsement" and "Underinsured Benefits". Both forms and accompanying cover letters were sent under a global cover letter dated June 5, 2018 which states "[e]nclosed please find claimants [sic] applications for No-Fault Benefits and Supplemental Under/Insured Motorist Benefits each under separate cover letter.

The Second Department has held that any document purporting to be a notice of claim specifically "advise [defendant] of the claimant's intent to commence a tort action against it." (See *Zydyk v. New York City Transit Authority*, 151 AD2d 745, 746 [2d Dept 1989]). It is well settled that a No-Fault application (NF-2) form is not a notice of claim pursuant to GML §50-e. (See *Astree v. New York City Transit Authority*, 31 AD3d 589 [2d Dept 2006]; *Richardson v. New York City Transit Authority*, 210 AD2d 38, 39 [1st Dept 1994).

The Court finds that the letters and forms sent by plaintiff do not constitute an actual notice of claim under GML §50-e. Cover letters and insurance forms do not constitute a notice of claim pursuant to §50-e if they do not advise of intent to file a "tort action" as opposed to a mere insurance claim. (See *Zydyk*, 151 AD2d at 745-746; *Kossifos*, 277 AD2d at 205).

Moreover, plaintiff's argument that the letters and insurance forms mailed to Transdev on June 5, 2018 were sufficient to serve as a notice of claim is belied by the actual notice of claim that plaintiff did serve upon the County. That notice was, which was signed and dated May 31, 2018, just a few days before the letters and insurance forms sent to Transdev, was entitled "Notice of Claim", was addressed to the County, Metropolitan Transit Authority; "John Doe" Driver of NICE Bus #1941 c/o Nassau Inter-County Express, Nassau Inter-County Express and Village of Farmingdale", and contained four (4) paragraphs corresponding to the four (4) requirements of a

notice of claim pursuant to GML §50-e. In further contrast to the letters and forms sent to Transdev, the "Notice of Claim" also stated: "You are hereby notified that unless the same is adjusted and paid within the time provided by law from the date of presentation to you, it is the intention of the undersigned to commence an action thereon."

Even assuming, arguendo, that the Transdev defendants had been served with a notice of claim in compliance with GML §50-e, the action is nevertheless barred by the applicable statute of limitations. As discussed above, the statute of limitations period imposed by GML §50-i[1][c] is one year and ninety days. Based upon the same reasoning underlying the requirement that a notice of claim be served upon the Transdev defendants pursuant to GML §50-e, the shortened statute of limitations period proscribed by GML §50-i[1][c] likewise applies to an action brought against the Transdev defendants. (See generally *Altro v Conrail*, 129 Misc 2d 1061, 1062 [App Term 1985], affd, 130 AD2d 612 [2d Dept 1987]; see also *Singer v. Liberty Lines*, 183 AD2d 820 [2d Dept 1992]; *Stekolschik v. Star Cruiser Transp., Inc.*, 8 Misc 3d 1023(A)[Sup Ct, Kings County 2005]). Since this action was commenced almost three (3) years after the date of the incident, it is time barred as against not only the County, but as against all of the defendants.

The complaint must also be dismissed against "John Doe", the alleged driver of the bus in question, because the identity of this unknown defendant has not been substituted into the caption prior to the expiration of the one year and ninety day statute of limitations period. While CPLR §1024 permits a plaintiff to commence an action against an unknown party, he must show that diligent and timely efforts were made to identify the correct party in interest prior to the expiration of the applicable statute of limitations. (See *Justin v. Orshan*, 14 AD3d 492 [2d Dept 2005]); *Opiela v. May Industries Corp.*, 10 AD3d 340 [1st Dept 2004]; *Scoma v. Doe*, 2 AD3d 432 [2d Dept 2003]; *Nationwide Associates, Inc. v. Brunne*, 216 AD2d 547 [2d Dept 1995]). A Plaintiff may amend a caption to name intended defendants, in place of "John Doe", when plaintiff can demonstrate he conducted a diligent inquiry into the actual identity of the intended defendant before the expiration of the statutory period. (§1024; See *Goldberg v. Boatmax*, 41 AD3d 255 [1st Dept 2007]).

Plaintiff has made no showing of any efforts whatsoever, let alone diligent efforts, since the May 2018 incident, to determine the identity of the operator of the bus. As the statute of limitations has expired, plaintiff can no longer name the operator in the complaint. As such, plaintiff's cross motion to compel defendants to provide the name of the operator and for leave to amend his pleadings to name the operator as a party defendant, must be denied.

Based upon all of the foregoing, defendants' motion to dismiss pursuant to CPLR §3211 is **GRANTED**, plaintiff's cross motion is **DENIED,** and the complaint is **DISMISSED**.

This constitutes the Decision and Order of the Court.

Dated: August 5, 2021
Mineola, NY

Helen Voutsinas
Justice of the Supreme Court

ENTERED
Aug 09 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE