SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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RICHARD WILSON,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, THE CITY OF NEW YORK

Defendants.

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INDEX NO. 160522/2020

MOTION DATE 01/25/2021, 06/04/2021

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Richard L. Wilson on January 29, 2020 at approximately 2:15pm, 50 feet west of the northwest corner of West 54th Street at or near its intersection with Broadway. Plaintiff alleges that he was a wheelchair bound passenger in Access-A-Ride Vehicle Number 5044 bearing Registration Number T777168C, when the operator of the Access-A-Ride negligently untethered plaintiff's wheelchair causing plaintiff to roll out of the vehicle and onto the sidewalk.

Now pending before the court are two motion sequences:

In the first, Motion #001, plaintiff moves by Order to Show Cause ("OTSC") and seeks an order, pursuant to General Municipal Law 50e(6), permitting him to serve an Amended Notice of Claim ("NOC").

In the second, Motion #002, defendant THE CITY OF NEW YORK (the "City") seeks an order, pursuant to CPLR § 3212, granting summary judgment to the City, dismissing plaintiff's complaint and all cross-claims against the City, as the City is not a proper party in this matter. Also pending under this motion sequence number is a cross-motion wherein defendants New York City Transit Authority and Metropolitan Transportation Authority (collectively, "Transit") seek an order dismissing plaintiff's complaint against Transit on the ground that there is no statutory or common law basis to place liability on Transit, as they did not own, operate, maintain, manage, or control the subject vehicle on the date of the accident. Therefore, Transit argues, they are not liable under VTL § 388 for any alleged injuries stemming from the alleged accident.

Upon the foregoing documents, Motion #001 is GRANTED, and Motion #002, including the cross-motion filed by Transit, is DENIED as premature.

Plaintiff's Motion to Amend the NOC

Plaintiff seeks an order, pursuant to General Municipal Law 50e(6), granting him leave to serve an Amended Notice of Claim. No opposition was filed. On November 29, 2021, counsel for the City informed the court in writing that no opposition was intended, and on December 2, 2021, counsel for Transit did the same. Accordingly, this motion is GRANTED as unopposed.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment 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 Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Per the New York Court of Appeals, "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction […] We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83 [NY Ct. of Appeals 1994]).

City's Motion for Summary Judgment

The City argues that the Access-A-Ride vehicle in question (Plate Number T777168C, Vehicle #5044) was operated by driver JASUR BOTIROV (the "Driver") and owned by ASHOT MARITOSYAN (the "Owner"). The City argues that it is not a proper party to this action because the City (i) did not own, maintain or control the subject vehicle in question; (ii) did not employ, instruct, authorize and/or assign the Driver to operate said vehicle; and (iii) did not have any contractual relationship with the Owner. The City also argues that Access-A-Ride is a paratransit bus and taxi program run by co-defendant NYCTA, and that NYCTA did not file opposition papers and does not dispute that the City did not own, operate, or control the subject vehicle.

In support of its argument, the City submitted a certified copy of the Vehicle Title record and the Registration Plate Record for the subject vehicle, (NYSCEF Document #38), as well as the plate history. The City argues that these documents establish that the Owner, and not the City, was the record owner of the subject vehicle at the time of plaintiff's alleged accident. The City also submitted an Affidavit from Latia Riley, a Fleet Analyst for the New York City Department of Citywide Administrative Services, (NYSCEF Document #39), that states, in substantive part:

> 1. I am a Fleet Analyst for the New York City ("City") Department of Citywide Administrative Services.
>
> 2. My duties and responsibilities as Fleet Analyst include the examination and certification title to City automobiles in the County of New York.
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> 3. I have conducted a search of City records of vehicles that the City owned and leased on January 29, 2020. The search revealed that the City did not own, lease, operate, manage, maintain or control any motor vehicle bearing New York registration number T777168C in the County, City and State of New York on January 29, 2020.

In opposition, plaintiff argues that this motion is premature, as neither discovery nor testimony has been exchanged or conducted in this matter. Plaintiff argues that there are open questions of fact as to the interplay between the City, NYCTA, the Owner and the Driver. Specifically, plaintiff argues that there are questions as to whether the Owner or Driver was under a contract with the City to provide Access-A-Ride services; whether the City had any part in administrating, overseeing or implementing the Access-A-Ride program; or whether the City trained, or should have trained, the Access-A-Ride operators. In support of his arguments, plaintiff submitted a printout of the official NYC 311 website for Access A Ride (https://portal.311.nyc.gov/article/?kanumber=KA-02352), which shows that the website states, "Access-A-Ride is operated by private carriers under contract to the City" (NYSCEF Document #72).

In reply, the City argues that the 311 website referred to by plaintiff explicitly identifies co-defendant Metropolitan Transportation Authority ("MTA") as the sponsoring entity; directs interested persons to the MTA's website for further information; and directs individuals to the MTA should they wish to file a complaint or make a report regarding the Access-A-Ride program.

As set forth above, summary judgment will only be granted if there are no material, triable issues of fact, and the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. Here, the language on the 311 website states that "Access-A-Ride is operated by private carriers under contract to the City." This language suggests that there may be some connection between the defendant City and the Access-A-Ride program. Plaintiff has the right to further explore such connection, if any, through discovery. Further, as plaintiff properly argues, the Affidavit of Ms. Riley is not dispositive on the issue of the relationship between the City and the other defendants or how those relationships affect the administration and running of the Access-A Ride program, namely, whether the driver and owner of the vehicle in question were in fact under contract with the City as stated on the 311 website.

Given the very preliminary nature of this case, the court hereby DENIES the City's motion, at this time, as premature.

Transit's Motion to Dismiss

Transit argues that there is no statutory or common law basis to place liability on either of the Transit entities (the New York City Transit Authority or the Metropolitan Transportation Authority), as these defendants did not own, operate, maintain, manage, or control the subject automobile on the date of the accident. Transit argues that pursuant to New York Vehicle and Traffic Law § 388, the only entity other than the operator of an automobile to whom liability can attach for injuries resulting from an automobile accident is the owner of the automobile, and that the Transit entities neither operated nor owned the vehicle and are not, therefore, liable.

In support of their argument, Transit attached a copy of the Certified New York Department of Motor Vehicle Title Record and Registration Plate Record (NYSCEF Document #47), which they argue demonstrates the owner of the vehicle bearing New York License Plate T777168C on the date of the subject accident was the Owner (ASHOT MARITOSYAN). Transit also submitted the sworn affidavit of Ronald Roberts, a Principal Administrative Associate of NYCTA, (NYSCEF Document #48), which stated in part:

> 4. As a Principal Administrative Associate, I have access to the files and records of the NYCTA, as well as the files and records of the MTA.
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> 5. As such, I conducted a diligent and comprehensive search of the NYCTA and MTA records in connection with the above-captioned matter. My search revealed that on January 29, 2020 the Defendant NYCTA and MTA were not the registered or titled owners of a motor vehicle bearing New York State license plate number T777168C according to the State of New York Department of Motor Vehicles.
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> […]
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> 7. Additionally, on January 29, 2020 the subject vehicle owned by ASHOT MARITOSYAN and operated by JASUR BOTIROV was not dispatched by NYCTA or MTA, rather, upon information and belief this vehicle was dispatched by a third-party vendor unknown at this time.
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> 8. Additionally, on January 29, 2020, JASUR BOTIROV was never affiliated, contracted, retained by, nor provided transportation services for NYCTA or MTA.

9. Further, JASUR BOTIROV, the operator of said vehicle on the date of the subject accident was never an agent, employee or servant with authorization or permission from NYCTA or MTA to drive the vehicle.

In opposition, plaintiff argues that this motion is premature, as there has been no discovery or testimony either exchanged or conducted in this matter. Plaintiff argues that there are open questions of fact as to whether the Access-A-Ride program was administrated, overseen or implemented by the Transit entities. In support of his argument, plaintiff submitted a City of New York Budget Report, (NYSCEF Document #67), which states that "Access-a-Ride was operated, through private transportation companies, by the City's Department of Transportation until 1993, when the MTA New York City Transit (NYC Transit) assumed responsibility for the program pursuant to an agreement between the transit agency and the city."

This court finds that there remain open questions of fact sufficient to deny the granting of summary judgment, at this time. While the City maintains that the Transit entities are fully responsible for administering and overseeing the Access-A-Ride program, the printout produced by plaintiff from the NYC 311 website for Access-A-Ride states that "Access-A-Ride is operated by private carriers under contract to the City." Furthermore, while the Transit defendants argue that there is no statutory or common law basis upon liability can be found against them, the Budget Report states that the "MTA New York City Transit (NYC Transit) assumed responsibility for the program pursuant to an agreement between the transit agency and the City. Moreover, the 311 website explicitly identifies the Metropolitan Transportation Authority ("MTA") as the entity responsible for overseeing the Access-A-Ride program. The website directs people to the MTA's website for further information about the Access-A-ride program and directs individuals to the MTA to file complaints or reports regarding the Access-A-Ride program.

Given these discrepancies, this court finds that summary judgment is inappropriate at this time.

Accordingly, it is hereby:

ORDERED that Motion #001, filed by plaintiff, is GRANTED as unopposed; and it is further

ORDERED that Motion #002 filed by defendant City is DENIED as premature, with leave to re-file after discovery has been completed; and it is further

ORDERED that the cross-motion filed by defendants New York City Transit Authority and Metropolitan Transportation Authority (collectively "Transit") is also DENIED as premature, with leave given to Transit to re-file after discovery has been completed; and it is further

ORDERED that this case, including any future motions, is transferred to the Transit part.

1/27/2022
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:	X	INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE