

**Emmanuel v Metropolitan Transp. Auth.**

2022 NY Slip Op 32791(U)

August 8, 2022

Supreme Court, Kings County

Docket Number: Index No. 519424/2019

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 8th day of August 2022

HONORABLE FRANCOIS A. RIVERA

**DECISION AND ORDER**

-----X  
JEAN W. EMMANUEL,

Index No. 519424/2019

Plaintiff,

Cal. No.: 23 & 24; MS. No.: 1 & 2

-against-

Oral Argument: 6/30/2022

METROPOLITAN TRANSPORTATION AUTHORITY,  
MTA BUS COMPANY and ISHMAEL RIVERS,

Defendants.  
-----X

By notice of motion filed on October 25, 2021, under motion sequence number one, defendants MTA Bus Company and The Metropolitan Transportation Authority (hereinafter collectively "the moving defendants") have jointly moved pursuant to CPLR 3212 for an order granting summary judgment in their favor and dismissing the complaint on the basis that the plaintiff has not suffered a serious injury as define under Insurance Law 5102(d). Defendant Metropolitan Transportation Authority has also moved for an order granting summary judgment in its favor and dismissing the complaint as asserted against it on the additional basis that it is an improper party.

By notice of motion filed on November 12, 2021, under motion sequence number two, plaintiff Jean W. Emmanuel, moved pursuant to CPLR 3212 for an order granting summary judgment in his favor on the issue of liability.

The plaintiff has claimed, inter alia, that on February 19, 2019, at approximately 10:45 a.m., he was driving his Ford Transit van at or near the intersection of Stratford Street and Cortelyou Avenue, Brooklyn, New York, and was stopped and waiting behind several cars for the traffic light to change. While stopped he was struck in the rear by an MTA bus operated by Ishmael Rivers and bearing New York State License Plate No. AT8989 (hereinafter the subject accident). The plaintiff claimed that the collision was due to the bus driver's negligent operation of the bus and that it caused him to sustain serious injuries to his cervical and lumbar spine and to his left ankle.

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The plaintiff has opposed the moving defendants' motion to dismiss the complaint on the basis that the plaintiff did not suffer a serious injury as defined under Insurance Law 5102(d). The plaintiff, however, has not oppose that branch of defendant Metropolitan Transportation Authority's motion to dismiss the complaint on the basis that it is an improper party. In particular, the Metropolitan Transportation Authority contend that is an improper defendant because it neither owns, operates, maintains, or controls the BM2 bus in question, nor employs the bus driver involved in the subject accident. Accordingly, the motion by defendant Metropolitan Transportation Authority to dismiss the complaint as asserted against it is granted as the plaintiff's claim against defendant Metropolitan Transportation Authority are deemed abandoned by the failure to oppose that branch of the Metropolitan Transportation Authority's motion (*see Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2nd Dept 2019], citing *Pita v Roosevelt Union Free Sch. Dist.*, 156 AD3d 833, 835 [2nd Dept 2017]; *see also Kronick v L.P. Thebault Co.*, 70 AD3d 648, 649 [2nd Dept 2010], citing *Genovese v Gambino*, 309 AD2d 832, 833 [2nd Dept 2003]).

Upon review of the relevant motion papers considered on a motion sequence number one, numbered twenty-four through forty-one and sixty-three through and including seventy-three filed in the NYSCF system and reviewing the relevant motion papers considered on plaintiff's motion sequence number two, numbered forty-two through sixty-two and seventy -four and seventy-five filed in the NYSCF system, as applied to the remaining moving defendants the Court finds as follows.

On September 4, 2019, the plaintiff commenced the instant action for damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on February 19, 2019. Plaintiff's sworn deposition and 50h hearing testimony has made a prima facie showing of negligence by the operator of the bus involved the subject accident.

In support of motion sequence number one, the defendants submitted the affirmed medical reports of Dr. Warren E. Cohen, MD, a neurologist; and Dr. John L. Xethalis, MD, an orthopedist. Dr Cohen examined the plaintiff on July 28, 2021 and submitted an affirmed report in which he offered an opinion regarding the results of the examination. Dr. Xethalis, examined the plaintiff on August 27, 2021, and submitted an affirmed report of his opinion and findings regarding plaintiff's alleged injuries. In examining the plaintiff's lumbar spine, both doctors conducted a straight leg raise test of the plaintiff. Neither doctor, however, compared his findings to what is normal (*see Shirman v Lawal*, 69 A.D.3d 838 [2nd Dept 2010]). By not doing so, the defendants failed to eliminate triable issues of fact regarding the plaintiff's claim, set forth in the bill of particulars, that he sustained a serious

injury to, inter alia, his lumbar spine (see *Gonzalez v. Krumholz*, 192 A.D.3d 1086 [2nd Dept 2021]). Consequently, the defendants have failed to meet their burden without regard to the sufficiency of the plaintiff's opposition papers (*Mobley v. J. Foster Phillips Funeral Home, Inc.*, 178 AD3d 916, 917 [2nd Dept 2019], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In support of motion sequence number two, plaintiff's sworn testimony established the following. The plaintiff was operating a motor bearing license plate 68751MD at or near the intersection of Stratford Street and Cortelyou Avenue, Brooklyn, New York, and was stopped and waiting behind several cars for the traffic light to change. While stopped he was struck in the rear by an MTA bus bearing New York State License Plate no.AT8989 and operated by defendant Ishmael Rivers. The evidence presented establishes that the operator of the bus violated New York state Vehicle and Traffic Law section 1129 (a). A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*Yassin v. Blackman*, 188 A.D.3d 62, 68 [2nd Dept 2020]).

Although the plaintiff submitted a statement of material facts as required by Uniform Court Rule 202.2-8-g, the moving defendants did not provide a counter statement of material facts. Section 202.8(g)(c) of the Uniform Civil Rules states: "Each numbered paragraph in the statement of material facts required to be served by the moving party will be deemed to be admitted unless specifically controverted by a correspondingly numbered paragraph in the statement required to be served by the opposing party."

Due to defendants' failure to comply with Section 202.8(g)(c), the Court deems every statement provided in plaintiff's statement of material facts as admitted by defendants, thereby further supporting the plaintiff motion. Consequently, the plaintiff has met its burden and the moving defendants have not provide a non-negligent explanation for the collision or raised a triable issue of fact.

#### CONCLUSION

The branch of the joint motion by defendants MTA Bus Company and the Metropolitan Transportation Authority, under motion sequence number one, for an order pursuant to CPLR 3212 granting summary judgment in their favor and dismissing the complaint on the basis that the plaintiff has not suffered a serious injury as define under Insurance Law 5102(d) is denied.

The branch of the motion by defendant Metropolitan Transportation Authority, under motion sequence number one, for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the complaint as asserted against it on the basis that it is an improper party is

granted.

The motion by plaintiff Jean W. Emmanuel under motion sequence number two, for an order pursuant to CPLR 3212, granting summary judgment in the plaintiff's favor on liability is granted.

The foregoing constitutes the decision and order of this Court.

ENTER:

*Francois A. Rivera*  
J.S.C.

**FRANCOIS A. RIVERA**

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