

**Mack v New York City Tr. Auth.**

2023 NY Slip Op 30742(U)

March 10, 2023

Supreme Court, New York County

Docket Number: Index No. 452644/2017

Judge: Denise M. Dominguez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

REGINALD MACK, Plaintiff, - v - NEW YORK CITY TRANSIT AUTHORITY, MARCUS ALEXANDER ZALAYA Defendant. INDEX NO. 452644/2017 MOTION DATE MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, Defendants NEW YORK CITY TRANSIT AUTHORITY and bus operator MARCUS ALEXANDER ZALAYA's motion is granted in part and denied in part.

Background

This personal injury matter arises out of a motor vehicle incident on February 18, 2016 that occurred in the roadway in front of 362 West 125th Street in Manhattan between Plaintiff and Defendant's vehicle. At that time, Plaintiff REGINALD MACK alleges that he sustained personal injuries when a bus, bearing bus #4227, owned and operated by the Defendants, struck the driver's side door of his vehicle as he exited.

The Plaintiff's complaint was filed in the Supreme Court, Kings County on March 16, 2017 (NYSCEF Doc. #18). The Defendants joined issue by the filing an answer on or about April 18, 2017 (NYSCEF Doc. #19). On or about April 15, 2017, Defendants filed a motion to change venue. By Order of Judge Reginald A. Boddie dated September 15, 2017, the motion was granted (NYSCEF Doc. #2).

Defendants now move: 1) for summary judgment pursuant to CPLR §3212; 2) alternatively, for leave to amend their answer pursuant to CPLR §3025(b) to assert the affirmative

defense of the Plaintiff's bankruptcy filing; and 3) to dismiss the complaint pursuant to CPLR §3211(a)(3) as the Plaintiff lacks the legal capacity.

In support of the motion, the Defendants submit an affirmation in support with corresponding exhibits including the surveillance camera footage from the bus (NYSCEF Doc. #15, 18, 19, 20, 21, 22, 23, 24), a statement of material facts (NYSCEF Doc. #16), a memorandum of law (NYSCEF Doc. #17), supporting affidavits (NYSCEF Doc. #25, 26) and a reply affirmation (NYSCEF Doc. #34). In opposition to the motion, the Plaintiff submits an affirmation in opposition with corresponding exhibits (NYSCEF Doc. #30, 31, 32). A response to the Defendants' statement of material facts and an affidavit from the Plaintiff are annexed to the affirmation in opposition and are not separately filed.

This court issued an Amended Decision and Order dated August 3, 2022, denying the Defendants' motion without prejudice in light of a procedural defect as the statement of material facts did not adhere to 22 NYCRR 202.8-g[d]. However, the Order directed that the parties to refile amended statements of material facts with proper citations for consideration. As an amended statement of facts (NYSCEF Doc. #39) having been filed on behalf of the Defendants, and as an amended response to the Defendants' statement of material facts has been filed on behalf of Plaintiff (NYSCEF Doc. #42), this court will now entertain the motion on its merits.

#### *Discussion*

CPLR §3212 provides any party in any action, including in a negligence action, to move for summary judgment. (CPLR §3212 [a], *Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853 [1974]). The party seeking summary judgment has the high burden of establishing entitlement to judgment as a matter of law with evidence in admissible form (*see* CPLR §3212 [b], *Voss v Netherlands Ins. Co.*, 22 N.Y.3d 728, 734, 8 N.E.3d 823 [2014], *Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81, 790 N.E.2d 772 [2003], *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324–25, 501 N.E.2d 572, 574 [1986], *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once this showing has been made, the burden shifts to the opposing party to show with evidentiary proof in admissible form that material issues of fact exist requiring a trial (*Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 574 [1986]).

In addition, pursuant to Vehicle and Traffic Law §1214, “no person shall open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so, and can be done without interfering with the movement of other traffic....” (VTL§1214; *see*

also, *Smith v. City of New York*, 179 A.D.3d 500, 501, 114 N.Y.S.3d 220 [1<sup>st</sup> Dept 2020]; *Tavarez v. Castillo Herrasme*, 140 A.D.3d 453, 31 N.Y.S.3d 871 [1st Dept. 2016]).

Upon review, Defendants have met their *prima facie* burden of establishing a right to judgment as a matter of law.

Plaintiff asserts that Defendant MARCUS ALEXANDER ZALAYA was negligent in the operation of the subject bus. Specifically, that Defendant MARCUS ALEXANDER ZALAYA operated the bus at an excessive speed and that he failed to be vigilant and alert.

At the time of his August 12, 2019 deposition, Defendant MARCUS ALEXANDER ZALAYA testified that the accident occurred as he was driving along 125<sup>th</sup> Street in Manhattan. In the location of the accident, there is a bus lane, in which he was driving, a regular traffic lane to his left and a parking lane to his right. He observed the Plaintiff's parked vehicle on the right side of the roadway for possibly five seconds prior to the accident. However, he did not observe the operator in the vehicle and never observed the door of the vehicle open. Defendant MARCUS ALEXANDER ZALAYA submitted an affidavit in support of the motion. In his affidavit, based upon his review of the video surveillance video from bus #4227, Defendant MARCUS ALEXANDER ZALAYA avers that he was operating the bus at 11mph at the time of the accident and that the Plaintiff began to open his driver's side door approximately one second before the bus was adjacent to the Plaintiff's vehicle. (NYSCEF Doc. #26).

In addition, the video surveillance footage (authenticated with the affidavit of Jazmin Orea, a Video Data Manager for Safefleet, which contracts with Defendants) shows that just prior to the accident, bus #4227 was operating completely in the designated (painted red along the roadway) bus lane along 125<sup>th</sup> Street with little traffic directly in front of the bus, but with steady traffic in the regular traffic lane to the left of the bus lane. The video also shows several vehicles parked in the parking lane adjacent to the bus lane. At 15:37:56 (the time stamp on the video footage), just as the front of the bus reaches the rear of the Plaintiff's vehicle (a small SUV which is parked to the right of the bus in the parking lane), the driver's side door begins to open. The Plaintiff's driver's side door comes into contact with the front passenger side door of the bus between 15:37:57 and 15:37:58. Thus, showing that Plaintiff opened his driver's side door into moving traffic just as Defendant's bus was driving by his vehicle. It should be noted however that the video does not clearly show any part of the Plaintiff's body extending out of his vehicle prior to the

accident. The video also provides the rate of speed of the bus; at the time the bus is adjacent to the Plaintiff's vehicle, it is traveling at 11 mph.

Thus, in light of the evidence provided and the relevant case law, Defendants' papers establish that Defendant, MARCUS ALEXANDER ZALAYA's operation of the bus was not negligent (see CPLR 3212; VTL§1214; *Smith v. City of New York*, 179 A.D.3d 500; *Tavarez v. Castillo Herrasme*, 140 A.D.3d 453).

In opposition, Plaintiff alleges that the Defendant was negligent for striking his open driver's side door, which had been open for 10 seconds prior to the impact, and that he was halfway out of his vehicle at the time of the impact. Yet, Plaintiff's deposition testimony and affidavit are contradicted by the video surveillance footage. Rather, the video footage supports Defendant MARCUS ALEXANDER ZALAYA's deposition testimony, that the Plaintiff opened his driver's side door just as the bus was traveling past the vehicle.

Plaintiff also argues that the accident occurred because of Defendant MARCUS ALEXANDER ZALAYA's negligence in operating the bus at an excessive rate of speed. Yet this argument is unavailing as the video surveillance footage shows that the bus was traveling at only 11mph at the time of the accident. Plaintiff further argues that the Defendant failed to be vigilant, alert and observant of his surroundings. This argument is also unavailing as the video surveillance footage shows the Plaintiff actually opened his door just as the bus was passing his vehicle, and not 10 seconds before the bus reached his vehicle, leaving Defendant MARCUS ALEXANDER ZALAYA no time to react prior to the impact (see *Smith*, 179 A.D.3d at 501; *Batista v. Metro. Transportation Auth.*, 210 A.D.3d 487, 488, 178 N.Y.S.3d 45, 46 [1<sup>st</sup> Dept 2022]). Moreover, the Plaintiff has not offered any evidence as to what Defendant MARCUS ALEXANDER ZALAYA could have done to avoid the accident. (See *Batista* 210 A.D.3d at 488). Thus, Plaintiff's opposition does not raise material issues of fact warranting a trial (see *Alvarez*, 68 N.Y.2d 320).

Accordingly, the Defendants NEW YORK CITY TRANSIT AUTHORITY and MARCUS ALEXANDER ZALAYA's motion for summary judgment is granted.

As the Defendant's motion for summary judgment, dismissing the Plaintiff's complaint, is granted, that aspect of the Defendant's motion which seeks alternative relief for leave to amend their answer to assert the affirmative defense of bankruptcy and to dismiss the complaint as the Plaintiff lacks the legal capacity is denied as moot.

It is hereby,

ORDERED that the motions for summary judgment of Defendants NEW YORK CITY TRANSIT AUTHORITY and MARCUS ALEXANDER ZALAYA are granted and the complaint is dismissed against them; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of Defendants NEW YORK CITY TRANSIT AUTHORITY and MARCUS ALEXANDER ZALAYA dismissing the claims made against them in this action.

3/10/2023

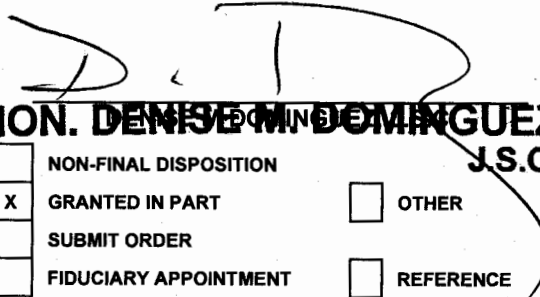
DATE

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE:

  
**HON. DENISE M. DOMINGUEZ**  
 J.S.C.

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE