

Furtick v New York City Tr. Auth.

2023 NY Slip Op 32939(U)

August 23, 2023

Supreme Court, New York County

Docket Number: Index No. 156200/2019

Judge: Denise M. Dominguez

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

-----X INDEX NO. 156200/2019

JACOB FURTICK,

MOTION SEQ. NO. 004

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN
AND BRONX SURFACE TRANSIT OPERATING
AUTHORITY, MTA BUS COMPANY, METROPOLITAN
TRANSPORTATION AUTHORITY, AND JOHN DOE
REPRESENTING THE UNKNOWN BUS DRIVER

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 138, 139, 140, 141, 142, 143, 144, 145, 146

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

Upon review of the above listed documents, Defendants NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and MTA BUS COMPANY’s (“TRANSIT”) motion for leave to renew pursuant to CPLR §2221(e), and upon renewal, seek dismissal of the complaint pursuant to CPLR 3211 and summary judgment pursuant to CPLR §3212, is granted.

This personal injury matter arises out of a September 14, 2018 incident, that according to the authenticated police report, occurred at approximately 11:30 p.m. on West 49th Street between 8th Avenue and 9th Avenue in Manhattan, when Plaintiff alleges that the back wheel well of an unidentified passing bus came into contact with the handlebar of the bicycle he was riding, causing him to fall off of his bike and rendering him unconscious.

Plaintiff served TRANSIT with a notice of claim dated January 7, 2019 (NYSCEF Doc. 111). Plaintiff commenced this action by the filing of the summons and complaint on June 21, 2019. (NYSCEF Doc. 1, 114). TRANSIT joined issue by the filing of its answer on July 10, 2019. (NYSCEF Doc. 15,115). By Order of Judge Lisa Ann Sokoloff, dated August 22, 2019, Plaintiff was permitted to serve an amend notice of claim. (NYSCEF Doc. 112, 113).

TRANSIT's Motion to Renew

TRANSIT's initial post-note of issue motion for summary judgment was *denied without prejudice* by Order of this Court dated June 2, 2022 as TRANSIT's statement of material facts did not include proper and sufficient citations as per 22 NYCRR 202.8-g[d] and Part 21 rules (NYSCEF Document #104). TRANSIT now moves for an Order pursuant to CPLR §2221(e) to renew and submits a statement of materials facts that is in compliance with Court and Part rules. TRANSIT also submits newly discovered facts, based on filings in the Plaintiff's subsequent action against New York Waterway, commenced after the filing of the initial motion¹. "Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion (*see* CPLR §2221[e]), courts have discretion to relax this requirement and to grant such a motion in the interest of justice." (*Mejia v. Nanni*, 307 A.D.2d 870, 871, 763 N.Y.S.2d 611, 612 [1st Dept. 2003]; *see Pasanella v. Quinn*, 126 A.D.3d 504, 505, 5 N.Y.S.3d 413, 414 [1st Dept. 2015]). Upon review, and in the interest of justice, although the evidence submitted in support of TRANSIT's motion to renew primarily consists of TRANSIT's efforts to cure procedural deficiencies in the initial motion, TRANSIT also includes evidence of newly discovered facts that were not available to TRANSIT at the time of the filing of its initial motion. Thus, this Court grants the motion to renew and will address the motion to dismiss and for summary judgment.

In support of the motion, TRANSIT submits an affirmation in support (NYSCEF Doc. 109) multiple exhibits including the notice of claim, pleadings, transcripts, affidavits from NYPD investigating officers and filings in the Plaintiff's subsequent action against New York Waterway (NYSCEF Doc. 111-132), a statement of material facts (NYSCEF Doc. 110) and a reply affirmation. In opposition to the motion, Plaintiff submits an affirmation in opposition with exhibits including an affidavit from the Plaintiff (NYSCEF Doc. 141, 145, 143, 144) and a statement of material facts (NYSCEF Doc. 145).

Background

At his 50-h hearing, the Plaintiff testified that prior to the accident, he rode his bike from his home on 187th Street in the Bronx; he took 3rd Avenue from 187th Street to 125th Street, and then rode along Lexington Avenue to 49th Street. His intended destination was West 47th Street

¹ Captioned *Jacob Furtick v. New York Waterway*, Supreme Court, Bronx County, Index No. 808740/2021E (NYSCEF Doc. 131, 132).

between 10th and 11th Avenues. The accident occurred at 11:30 p.m. on West 49th Street between 8th and 9th Avenues. Plaintiff testified that as a bus drove by him, the back wheel came into contact with the handlebar of his bike, causing him to fall off the bike, rendering him unconscious. Plaintiff believes that the bus was a TRANSIT bus because the bus had blue and white stripes. The Plaintiff testified that he did not recall anything after the accident and did not speak to anyone at the scene because he was unconscious until he reached the hospital. (NYSCEF Doc. 120).

At his deposition, the Plaintiff's testimony regarding his movements prior to the accident had chanced. Plaintiff testified that after he finished work at M&P Foods on 47th Street between 10th and 11th Avenues, he rode his bicycle to pick up a take-out order and went to Columbus Circle to meet his brother. However, as his brother was not at Columbus Circle, the Plaintiff headed back to M&P Foods. The accident occurred at either 11:15 p.m. or 11:30 p.m. as the Plaintiff was riding west on West 49th Street between 8th and 9th Avenues. The Plaintiff described the bus as being blue and white and having a blue stripe down the middle. Plaintiff testified that although he recalls seeing the bus next to him, he does not remember the contact with the bus or anything that occurred after the accident until he regained consciousness at the hospital. (NYSCEF Doc. 121).

NYPD conducted an investigation of the accident. The police accident report and complaint report were prepared by Officer Maris Garcia (who was subsequently promoted to Sergeant) using standard operating procedures for responding to/investigating an accident scene. The reports prepared by Sgt. Garcia, along with her memo book, are authenticated by Sgt. Garcia in an affidavit and are annexed thereto. (NYSCEF Doc. 123). Sgt. Garcia avers that when investigating an accident, it is her duty to "accurately record the date, time, location and the happening of the events" and to record her findings in the police accident report. Based upon her memo book entries, when Sgt. Garcia arrived at the accident scene at 11:58 p.m. she identified other NYPD personnel, surveyed the scene and spoke with a bystander/witness who was not willing to provide their name. Although the Plaintiff was still at the scene, he was sedated and Sgt. Garcia was not able to obtain any information from him. The bystander/witness advised Sgt. Garcia that the Plaintiff (identified in the report as "C/V") was on his bicycle, did not see the bus and hit the back wheel of the bus, causing the Plaintiff to fall to the ground and become unconscious. Based on her standard procedures, Sgt. Garcia would have asked the bystander/witness to provide a description of the bus. If the bystander/witness had been able to provide a description, Sgt. Garcia would have

included the description in the reports. No description of the bus is included in the report. Sgt. Garcia based the 11:30 p.m. accident time reflected in the report on the 911 call/"ICAD" system.

NYPD's investigation into the subject incident did not end with the completion of the police accident report and complaint report. NYPD Sergeant Mark Amundson, a Field Intelligence Officer for the Intelligence Bureau, sought to secure any security/surveillance video that may concern the incident. As per Sgt. Amundson's affidavit, he arrived at the scene at approximately 2:00 a.m. (NYSCEF Doc. 125). His activities at the scene are documented on "DD5s" which he prepared, and which are annexed to his affidavit. Sgt. Amundson avers that he obtained the information regarding the nature of the accident, (i.e. involving a bicyclist and a bus), as well as the time of the accident, (which he notes as approximately 11:28 p.m.) from the 911 call reports and other responding officers. Sgt. Amundson also avers that part of his investigation was to identify and locate whether any surveillance camera footage could be obtained depicting the accident. He secured video footage from various NYPD Argus Cameras in the general area of the accident between 11:27 p.m. and 11:29 p.m. Based upon his review of the footage, Sgt Amundson avers that a New York Waterway bus travels west on West 49th Street, crossing 7th at 11:27:20 p.m. That same bus crosses Broadway at 11:27:30 p.m. and crosses 8th Avenue at 11:27:40 p.m. Copies of the video footage are annexed to the Sgt. Amundson Affidavit. Based on this Court's review of the video footage, a bus that appears to be a New York Waterway bus, and has a blue stripe down the middle, is depicted at the time and place as indicated in Sgt. Amundson's affidavit.

TRANSIT also submits the affidavit of Fedele Rella, General Superintendent of Manhattan Road Operations ("Rella Affidavit") (NYSCEF Doc. 124). As part of his duties, Rella can track the schedules of Bus Operators which are documented on reports known as "Paddle Reports" (annexed to the affidavit). He can also track buses via a GPS system known as "Bus Trek" (which are reflected on "Bus Query Reports" (annexed to the affidavit), this enables him to track buses from approximately 30 seconds to 2 minute intervals and within less than a 2 block radius. Based Rella's review of the Bus Query Reports reflecting GPS data, and the Paddle Reports concerning the time and location of the subject accident, bus #3911 was traveling route M50, west along West 49th Street, approaching the intersection of 8th Avenue at 11:15:35 p.m. It crossed to the west side of 9th Avenue by 11:17:43 p.m. Rella further avers that his investigation concluded based upon the Operators Daily Trip Sheet (which are also annexed to the affidavit), that the bus operator of bus #3911 at that time was Peddy Pelissier ("Pelissier").

Pelissier, the operator of bus #3911 on the date and time of the accident, testified at a January 12, 2021 deposition. (NYSCEF Doc. 142). Pelissier testified that he did not recall being involved in any accident on September 14, 2018, had no knowledge of the accident, was never advised on the night of the accident that his bus had been involved and that the first time he learned of the accident was on the day of his deposition.

TRANSIT's Motion for Summary Judgment

Both TRANSIT's prior motion and the within motion sought to dismiss the complaint pursuant to CPLR §3211 and/or for summary judgment pursuant to CPLR §3212. As the motion was duly noticed as one for summary judgment, was filed post-note of issue and as Plaintiff duly opposed the motion as one for summary judgment, the parties treated the motion as one for summary judgment, and so will this Court. (*See* CPLR 3211(c); *Wiesen v. New York Univ.*, 304 A.D.2d 459, 460, 758 N.Y.S.2d 51, 52 [1st Dept 2003]).

TRANSIT argues that it cannot be held liable for the subject accident as the evidence shows that none of its buses could have been involved in the subject accident, and that in fact, the evidence shows that it is more likely that a New York Waterway bus caused the subject accident as evidenced by the investigation conducted by the New York City Police Department ("NYPD"). Upon review, TRANSIT has met its *prima facie* burden and the Plaintiff fails to raise any material issues of fact in opposition.

Plaintiff's complaint asserts claims sounding in negligence against TRANSIT as the owner of an unidentified bus on the route M50 at the time of the subject accident and as the employer of the unknown operator of the unidentified bus.

Pursuant to New York Vehicle and Traffic Law §388 and §128, owners of motor vehicles involved in accidents are vicarious liability for the negligent acts of permissive drivers of such vehicles. Where a defendant has shown that they were not the owner of the vehicle involved in the accident, dismissal of the complaint is warranted. (*See James v. R & G Hacking Corp.*, 39 A.D.3d 385, 835 N.Y.S.2d 61 [1st Dept 2007]).

Upon review, there is no admissible evidence establishing what bus may have been involved in the accident. The police accident report and complaint report, prepared by then Officer Maris Garcia do not include a license plate, bus number or even general description of the bus involved in the accident as same could not be ascertained at the scene from the Plaintiff (who was

unconscious) or from any bystanders. The video surveillance secured as a result of NYPD's investigation identifies a bus that appears to be a New York Waterway bus as having traversed West 49th Street around the time of the accident. Even the Plaintiff's own description of the bus is limited to the basic description of the bus being blue and white with a blue stripe. Such a description is not dissimilar to that of the New York Waterway bus seen in the video footage secured by NYPD (NYSCEF Doc. 125). In opposition to the motion, the Plaintiff *for the first time*, claims to now recall the accident and claims that he knows the bus was an "MTA" bus because he is familiar with who an MTA bus looks. (NYSCEF Doc. 142). However, the Plaintiff does not offer any further details of this bus that he now recalls seeing. He provides no description of the bus, such as the license plate number, bus number, route number, advertisements/signage on the bus, whether it appeared to be local bus or express bus or even its size (i.e. whether it was an "standard" or articulated bus). The affidavit does not raise a triable issue of fact by offering any admissible evidence showing that, in light of all of the evidence from the NYPD investigation, and Plaintiff's own prior statements, that the bus was in fact a TRANSIT bus.

In opposition to the motion, the Plaintiff speculates that although the New York Waterway bus may be seen in the video several minutes before 11:30 p.m., this is irrelevant because the accident occurred at 11:15 p.m., closer in time to when bus #3911 traveled along West 49th Street. Although a significant point of contention in this matter is the time of the Plaintiff's alleged accident, this discrepancy is one created by the Plaintiff himself. The police accident report, annexed to the notice of claim, reflects that the accident occurred at 11:30 p.m. The Plaintiff himself offered testimony at his June 10, 2019 50-h hearing that the accident occurred at 11:30 p.m., and at his January 8, 2021 deposition, the Plaintiff testified that the accident occurred at 11:15 p.m. or at 11:30 p.m. Although the notice of claim, complaint and bill of particulars in the subject action assert that the accident occurred at 11:15 p.m., this Court takes particular note that after the deposition of Pelissier, who denied that bus #3911 was involved in an accident, and while TRANSIT's initial motion was pending, the Plaintiff filed a separate action in the Supreme Court, Bronx County against New York Waterway (the presumptive owner of the bus seen in the video). Therein, the Plaintiff in the verified complaint (filed on June 25, 2021) asserts that the New York Waterway bus struck him while he was riding his bicycle at 11:30 p.m. (NYSCEF Doc. 131). These same claims are also asserted in the verified bill of particulars served in that action (dated February 14, 2022) (NYSCEF Doc. 132). It thus appears that the time of the accident as alleged

by Plaintiff is contingent on which time may presumably be more advantageous to him. The time of the accident is duly and consistently noted in the reports from the NYPD investigation as occurring at 11:30 based upon the 911 call reporting the accident. (NYSCEF Doc. 123, 125). Plaintiff's affidavit, submitted in opposition to the motion, averring that the accident occurred at 11:15 p.m. is contradicted by his own sworn testimony in this action, is contradicted by his admissions in pleadings in the New York Waterways action², and appears to be offered to create an issue of fact.

Summary judgment is appropriate where no material triable issue of fact existed concerning the ownership and operation of the bus. (*see Peele v. Manhattan & Bronx Surface Transit Operating Auth.*, 160 A.D.2d 602, 603, 554 N.Y.S.2d 246, 246 [1st Dept 1990]; *See also Rodriguez v. Sit*, 169 A.D.3d 406, 91 N.Y.S.3d 694, 695 [1st Dept 2019], *citing Woods v. Craig*, 41 A.D.3d 1260, 1261, 837 N.Y.S.2d 478, 479 [4th Dept. 2007] which held that the defendant was entitled to summary judgement because it was established that "...although [the defendant] owned a vehicle that was the same make as the vehicle involved in the accident and was similar in color and model to that vehicle, he was neither operating his vehicle at the time and location of the accident.... Thus, defendants established that [the defendant] was not the owner or the operator of the vehicle that caused the accident.")

TRANSIT has established that its bus which would have been traveling along West 49th Street in the general area of the accident, between 11:15 and 11:10 p.m. was #3911. TRANSIT has also established that bus #3911 was not involved in the subject accident; none of the NYPD investigation reports identified the bus, the operator of #3911 testified that there was no accident along the route and there is evidence secured by NYPD that shows a New York Waterways bus was traveling on West 49th Street immediately prior to the 911 calls reporting the accident. Moreover, there is in fact no admissible evidence showing that any TRANSIT bus was involved in the subject accident. The Plaintiff's only description of the bus was blue and white with a blue stripe, which is also a very similar description of the New York Waterway bus observed on the footage obtained by NYPD. Accordingly, TRANSIT has met its *prima facie* burden for summary

² (*See Performance Comercial Importadora E Exportadora Ltda v. Sewa Int'l Fashions Pvt. Ltd.*, 79 A.D.3d 673, 915 N.Y.S.2d 44 [1st Dept 2010]; *Bogoni v. Friedlander*, 197 A.D.2d 281, 291, 610 N.Y.S.2d 511 [1st Dept 1994]; *Glea Sec., LLC v. AGC Networks, Inc.*, 194 A.D.3d 610, 144 N.Y.S.3d 356 [1st Dept 2021]).

judgment by establishing that it could not be negligent for the subject accident and the Plaintiff has not raised a material question of fact.

This Court does not reach TRANSIT's other arguments submitted in its motion concerning its position that the Plaintiff himself may have caused and/or contributed to the happening of the accident due to his Blood Alcohol Level as documented upon arrival at Bellevue Hospital on the night of the accident. (NYSCEF Doc. 128, 129, 130).

Accordingly, it is hereby

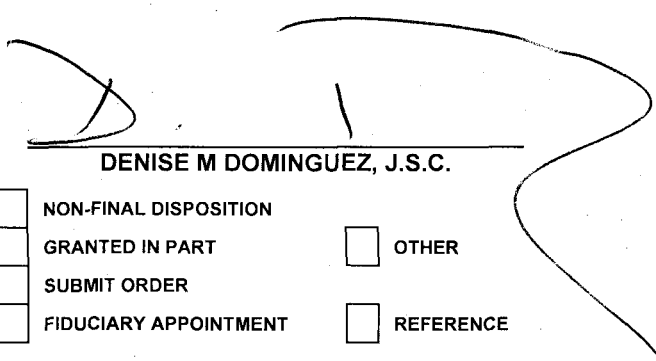
ORDERED that TRANSIT's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

ORDERED that counsel for Defendants shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).

8/23/2023
DATE



DENISE M DOMINGUEZ, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE