

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

2023 NY Slip Op 33283(U)

September 21, 2023

Supreme Court, New York County

Docket Number: Index No. 160932/2018

Judge: Denise M. Dominguez

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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*

-----X INDEX NO. 160932/2018  
SHEIKH HOSSAIN, SURAIYA HOSSAIN, MOTION SEQ. NO. 001

Plaintiffs,

- v -

THE NEW YORK CITY TRANSIT AUTHORITY, MABSTOA,  
MTA, THE CITY OF NEW YORK, THE MTA BUS  
COMPANY, FURKAT777 INCORPORATED, JOHN DOE

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISSAL.

Upon review of the above listed documents, Defendant THE CITY OF NEW YORK's (the "CITY") unopposed motion to dismiss the complaint pursuant to CPLR §3211(a)(7) is granted.

This personal injury matter arises out of a January 23, 2018, two-vehicle motor vehicle collision that occurred on 1<sup>st</sup> Avenue (cross street not identified) in Manhattan. The Plaintiffs SHEIKH HOSSAIN and SURAIYA HOSSAIN were passengers in a vehicle bearing New York State license plate T672947C (although the operator has not been identified, it is claimed to have been an "Access-a-Ride" vehicle), when it came into contact with another vehicle (which does not appear to have been identified). (NYSCEF Doc. 1, 21).

The Plaintiffs' summons and complaint, filed on November 21, 2018 (NYSCEF Doc. #1) asserts claims sounding in negligence against the CITY based upon the claim that the CITY owned, leased and controlled the T672947C vehicle and employed its, yet to be identified, operator.

The CITY now moves pre-note of issue, to dismiss the complaint pursuant to CPLR §3211(a)(7) asserting that there is no viable claim against them as they do not owe the Plaintiffs a legal duty of care as they did not own the T672947C vehicle involved in the subject accident.

Where a motion to dismiss a cause of action has been pursued pursuant to CPLR §3211(a)(7), the motion "may be made at any subsequent time or in a later pleading". (CPLR §3211(e), *see*

*Han v. New York City Transit Auth.*, 203 A.D.3d 511, 164 N.Y.S.3d 602, 604 [1<sup>st</sup> Dept. 2022]). Upon review, the Defendants motion to dismiss the Plaintiffs' complaint pursuant to CPLR §3211(a)(7) was properly filed pursuant to CPLR §3211(e).

“On a motion to dismiss a complaint pursuant to CPLR 3211, we must liberally construe the pleading and ‘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.’” (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v. Matthew Bender & Co., Inc.*, 37 N.Y.3d 169, 175, 171 N.E.3d 1192, 1196, reargument denied, 37 N.Y.3d 1020, 175 N.E.3d 909 [2021], *quoting Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]). “Dismissal under CPLR 3211(a)(7) ‘is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery’.” (*Id. Quoting Connaughton*, 29 N.Y.3d at 142). The opponent of a CPLR §3211 motion to dismiss is not required to submit an affidavit or evidence in opposition, and may stand on the pleadings. (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 357 N.E.2d 970 [1976]).

Upon review, based upon the evidence submitted in support of the within motion the CITY has shown that there is no viable claim against it arising out of the subject accident pursuant to CPLR §3211(a)(7) as they did not own the T672947C vehicle.

“To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting there from”. (*Solomon by Solomon v. City of New York*, 66 N.Y.2d 1026, 1027, 489 N.E.2d 1294, 1294 [1985]).

In evaluating a motion to dismiss for a failure to state a cause of action, “[i]nitially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail. When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate.” (*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 274–75, 372 N.E.2d 17, 20–21 [1977]). “Affidavits submitted by a respondent will almost never warrant dismissal under CPLR 3211 *unless* they

‘establish conclusively that [petitioner] has no [claim or] cause of action’.” (*Lawrence v. Miller*, 11 N.Y.3d 588, 595, 901 N.E.2d 1268, 1271 [2008] quoting *Rovello*, 40 N.Y.2d at 636 *supra*).

In the complaint, the Plaintiffs claim that the CITY was negligent based upon its alleged ownership, control and operation of the T672947C vehicle.

In support of its motion to dismiss the complaint for failure to state a cause of action, the CITY argues that it did not owe a legal duty of care to the Plaintiff as it did not own, lease, operate, manage, maintain or control a vehicle bearing New York plate T672947C at the time of the accident. The CITY submits an affidavit from Nathaniel Koszer (“Koszer Affidavit”) a Fleet Safety Supervisor for the CITY’s Department of Citywide Administrative Service (NYSCEF Doc. 29). Therein, the Koszer Affidavit avers that a search was conducted of the CITY’s records of vehicles owned and/or leased on January 23, 2018, and that vehicle T672947C was not identified.

The CITY also argues that it is not responsible for any actions of “Access-a-Ride” vehicles or operators as it does not administer or manage the “Access-a-Ride” program, which the Plaintiffs claim they were utilizing at the time of the accident. In support of this position, the CITY submits an affidavit from Stephen Malmberg, (“Malmberg Affidavit”) an Assistant Director at the New York City Mayor's Office of Management and Budget (NYSCEF Doc. 30). Therein, the Malmberg Affidavit authenticates the May 28, 1993 agreement between the CITY and the Metropolitan Transportation Authority with respect to the “Access-a-Ride” program (annexed to the affidavit). The Malmberg Affidavit avers that, pursuant to such agreement, the “Access-a-Ride” program is administered/managed by the New York City Transit Authority at the time of the accident.

No opposition to the motion has been submitted by either the Plaintiffs or the Defendants THE NEW YORK CITY TRANSIT AUTHORITY, MABSTOA and MTA.

Although Plaintiffs are allowed to “stand on the pleadings” and are not required to submit opposition, even giving the Plaintiffs every favorable inference, the facts as alleged in this matter do not fit within any cognizable legal theory as against the CITY. (*See Rovello, Himmelstein, supra*).

As the CITY has established with admissible, and uncontroverted, evidence that it did not owe the Plaintiffs a legal duty of care as it did not own the vehicle involved and did not manage the “Access-a-Ride” program, there can be no cause of action “cognizable at law” sounding in negligence against the CITY. Accordingly, the CITY’s motion to dismiss the complaint pursuant to CPLR §3211(a)(7) is granted.

Accordingly, it is hereby

ORDERED that Defendant THE CITY OF NEW YORK's motion to dismiss the complaint pursuant to CPLR §3211(a)(7) is granted and the complaint and any cross-claims are dismissed in their entirety as against said Defendant, and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for Defendant THE CITY OF NEW YORK 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), who are directed to mark the court's records to reflect the change in the caption herein; 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).

9/21/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

HON. DENISE M. DOMINGUEZ

J.S.C.