

Feliciano v Metropolitan Transp. Auth.

2023 NY Slip Op 33908(U)

October 30, 2023

Supreme Court, New York County

Docket Number: Index No. 450195/2023

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. 450195/2023

DELILAH FELICIANO,

MOTION SEQ. NO. 001

Plaintiff,

- v -

THE METROPOLITAN TRANSPORTATION AUTHORITY,
THE CITY OF NEW YORK, THE NEW YORK CITY TRANSIT
AUTHORITY, MABSTOA, MTA BUS COMPANY, BRYANT
BROWN

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

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 an August 10, 2021 motor vehicle collision that occurred on West 145th Street near its intersection with Convent Avenue in Manhattan between a vehicle operated by the Plaintiff DELILAH FELICIANO and a bus (number 5277 and license plate number AU2695) alleged to have been owned/operated by the Defendants. (NYSCEF Doc. 36, 37).

The Plaintiff's notice of claim asserts that the CITY was negligent based upon its control, maintenance, management, ownership and/or operation of the subject bus. (NYSCEF Doc. 36).

The Plaintiff's summons and complaint, filed on August 10, 2022, asserts claims sounding in negligence against the CITY based upon the claim that the CITY owned, maintained, controlled, operated and/or leased the subject bus (NYSCEF Doc. #1).

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 subject bus 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 [1st 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 subject bus.

“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, maintenance, control and operation of the subject bus.

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 the bus at the time of the accident. The CITY relies upon the answer of Defendants THE METROPOLITAN TRANSPORTATION AUTHORITY, THE NEW YORK CITY TRANSIT AUTHORITY, MABSTOA, MTA BUS COMPANY and BRYANT BROWN. Specifically, that section of the answer which admits that “defendant NEW YORK CITY TRANSIT AUTHORITY owned a bus numbered 5277, operated by MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY employee BRYANT BROWN, who operated said bus within the scope of his employment and with the permission of NEW YORK CITY TRANSIT AUTHORITY.” The CITY also submits copies of the Title and Registration for the subject bus, reflecting license plate AU2695, which reflect both the title and registered owner as New York City Transit Authority (NYSCEF Doc. 41).

No opposition to the motion has been submitted by either the Plaintiffs or, significantly, Defendants THE NEW YORK CITY TRANSIT AUTHORITY or MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY.

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 as it is clear that the CITY did not own the subject bus involved in this accident. (*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 subject bus involved, 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).

10/30/2023

DATE

CHECK ONE:

CASE DISPOSED

X

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

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

X

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE