

**Fernandez v Leo**

2023 NY Slip Op 34501(U)

December 20, 2023

Supreme Court, New York County

Docket Number: Index No. 157846/2022

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. 157846/2022

SEAN FERNANDEZ,

MOTION SEQ. NO. 001

Plaintiff,

- v -

AMOS CHANFONG LEO, CHANFONG LEO, NEW YORK  
CITY TRANSIT AUTHORITY, METROPOLITAN  
TRANSPORTATION AUTHORITY

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

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

were read on this motion to/for JUDGMENT - SUMMARY

Upon review of the above listed documents, Defendants NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY's ("TRANSIT") unopposed motion pursuant to CPLR § 3211, and for summary judgment pursuant to CPLR §3212, to dismiss the complaint and all cross claims, is granted.

The underlying incident concerns a motor vehicle accident that occurred on May 23, 2022 at approximately 2:10 p.m. at or near 200 East 72nd Street, in Manhattan. It is alleged that the Plaintiff, SEAN FERNANDEZ, who was operating a motorcycle at the time, sustained injuries and property damage, when a vehicle, owned and operated by Defendant AMOS CHANFONG LEO ("LEO"), bearing New York State License plate number SAY321GO, made a "u-turn" and struck the Plaintiff. (NYSCEF Doc. 24).

TRANSIT 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 Plaintiff a legal duty of care as they did not own any of the vehicles involved in the subject accident. TRANSIT also moves for summary judgment pursuant to CPLR §3212.

"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, 635, 357 N.E.2d 970, 972 [1976]).

In contrast, although the party seeking summary judgment pursuant to CPLR §3212 has the high burden of establishing entitlement to judgment as a matter of law with evidence in admissible form (*see* CPLR §3212 [b], *Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853 [1974], *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]), “[o]nce this showing has been made... the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action”. (*Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 574 [1986]).

Upon review, based upon the evidence submitted in support of the within motion, and the lack of any opposition having been submitted, TRANSIT has shown that there is no viable claim against the Defendants arising out of the subject accident pursuant to CPLR §3211(a)(7) as TRANSIT did not own vehicle operated by Defendant LEO, and as LEO was not employed by, or an independent contractor of TRANSIT. TRANSIT has also established a *prima facie* right to judgment as a matter of law pursuant to CPLR §3212, warranting a dismissal of the Plaintiffs’ complaint and all cross-claims.

In support of its motion, TRANSIT submits an affirmation in support, the notice of claim, the pleadings, the Plaintiff’s bill of particulars and an Affidavit of Ronald Roberts, Principal Associate for TRANSIT (“Roberts Affidavit”) and a statement of facts (NYSCEF Doc. 21, 22, 24, 25, 26, 27, 28, 29). There is no opposition to the motion from Plaintiff or any of the Defendants.

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*).

“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 therefrom”. (*Solomon by Solomon v. City of New York*, 66 N.Y.2d 1026, 1027, 489 N.E.2d 1294, 1294 [1985]).

The Plaintiff served a notice of claim, dated May 25, 2022, on TRANSIT (NYSCEF Doc. 24). Plaintiff’s notice of claim describes the nature of the claim against TRANSIT based upon an unspecified “business relationship” between TRANSIT and LEO. It is also claimed that the accident was due to TRANSIT’s negligence in the ownership, operation, management, maintenance, and control of the subject vehicle and the negligent hiring and retention LEO.

The Plaintiff commenced this action by the filing of the summons and complaint on September 13, 2022 (NYSCEF Doc. 1). The Plaintiff’s complaint asserts that LEO was the title holder, registered owner and operator of the subject vehicle, which was being operated as an “Access-a-Ride” vehicle. It is also alleged that LEO was an independent contractor of TRANSIT, was operating the subject vehicle “in furtherance of the business” of TRANSIT. There does not appear to be any negligent hiring or retention claim asserted in the complaint as against TRANSIT. TRANSIT joined issue by the filing of an answer on November 28, 2022, denying that LEO was an independent contractor for TRANSIT (NYSCEF Doc. 4). Defendant LEO joined issue by the filing of an answer on March 20, 2023, admitting the ownership of the SAY321GO vehicle (NYSCEF Doc. 7). On or about March 22, 2023, Defendant LEO served a response to the

Plaintiff's notice to admit, which denied that LEO was an independent contractor for TRANSIT and denied that he was operating his vehicle as an "Access-A-Ride" vehicle (NYSCEF Doc. 8, 9).

In support of its motion, TRANSIT argues, in part, that it did not owe a legal duty of care to the Plaintiff as it did not own, operate, maintain, manage or control the SAY321GO vehicle involved in the subject accident. TRANSIT submits the Roberts Affidavit, which avers that a search was conducted of the New York State Motor Vehicle Registration/Owner database to determine the registered owner of the SAY321GO vehicle, and that the search revealed that LEO was the owner of the subject vehicle; the abstract of the title and registration is annexed to the affidavit. The Roberts Affidavit avers that a search was also conducted which determined that LEO was not an employee, agent, servant or independent contractor of TRANSIT at the time of the accident, nor was LEO affiliated with the "Access-A-Ride" program. (NYSCEF Doc. 29).

Moreover, it is uncontroverted that LEO has admitted ownership of the subject SAY321GO vehicle and has denied being an independent contractor of TRANSIT or operating the vehicle in the "Access-a-Ride" program. (NYSCEF Doc. 7, 8, 9).

Although the Plaintiff is allowed to "stand on the pleadings" and is not required to submit opposition to a motion to dismiss, even giving the Plaintiff every favorable inference, the facts as alleged in this matter do not fit within any cognizable legal theory as against TRANSIT. (*See Rovello, Himmelstein, supra.*). Additionally, as this motion was also noticed as one for summary judgment, it was incumbent upon the Plaintiff to submit opposition, if the Plaintiff objected to the requested relief, to raise a material issue of fact. Again, no opposition has been submitted by Plaintiff, or LEO, contradicting TRANSIT's position or raising a material issue of fact.

As TRANSIT has established with admissible, and uncontroverted, evidence that it did not owe the Plaintiff a legal duty of care, there can be no cause of action "cognizable at law" sounding in negligence against the Defendants. TRANSIT has also met its *prima facie* burden, establishing that it is not negligent. Accordingly, the TRANSIT Defendants' motion to dismiss the complaint and all cross-claims is granted.

Accordingly, it is hereby

ORDERED that Defendants NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY's motion to dismiss and for summary judgment is granted and the complaint and all cross-claims are dismissed against said Defendants; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor Defendants NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY, dismissing the claims and cross-claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued against the remaining Defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal against Defendants NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that as neither the NEW YORK CITY TRANSIT AUTHORITY nor METROPOLITAN TRANSPORTATION AUTHORITY are parties in this action any longer, this action, and any pending motions, is transferred to an IAS part; and it is further

ORDERED that within 20 days from the entry of this order, Defendants NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY shall serve a copy of this order with notice of entry upon all parties and 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).

12/20/2023  
DATE

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

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