

**Campbell v City of New York**

2024 NY Slip Op 32098(U)

June 20, 2024

Supreme Court, New York County

Docket Number: Index No. 157187/2019

Judge: Hasa A. Kingo

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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. HASA A. KINGO PART 05M

Justice

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JOAN MARIE CAMPBELL,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, ACCESS-A-RIDE, DALE MANAGEMENT CORP., MV TRANSPORTATION INC., MTA/NEW YORK CITY TRANSIT-PARATRANSIT, MARTIN FRIEDMAN, MICHAEL J. SABIO

Defendant.

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INDEX NO. 157187/2019

MOTION DATE 01/19/2024, 01/12/2024

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 102, 103, 104, 105, 106, 107, 108, 109, 112, 113, 114

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 110, 111, 115, 116, 117, 118

were read on this motion to/for DISMISSAL

Upon the foregoing documents, Defendant Martin Friedman ("Friedman") moves for summary judgment to dismiss Plaintiff Joan Marie Campbell's ("Plaintiff") complaint and all cross-claims against him. Defendant the City of New York (the "City") moves to dismiss Plaintiff's complaint and all cross-claims for failure to state a cause of action under CPLR § 3211(a)(7). Plaintiff opposes both motions. For the reasons stated herein Friedman's motion is denied and the City's motion is granted.

BACKGROUND

On August 7, 2018, Plaintiff was injured during a motor vehicle collision that occurred while she was a passenger in a vehicle operated by Defendant Michael J. Sabio ("Sabio") (NYSCEF Doc No. 25, amended verified complaint ¶¶ 27, 35, 51, 62, 81, 83). Sabio is a driver with the Access-A-Ride program and was dispatched to transport Plaintiff (NYSCEF Doc No. 106, Plaintiff deposition tr at 31-2). As Sabio was traveling on the Franklin D. Roosevelt East River Drive (the "FDR"), he collided into the rear of Friedman's vehicle, which was stopped in the northbound left lane (NYSCEF Doc No. 107, Friedman affidavit at 1). Police were called to the scene of the accident and an accident report was generated (id. at 2; NYSCEF Doc No. 105, police accident report). Plaintiff commenced this action to recover for the injuries she sustained.

On October 4, 2018, Plaintiff served a notice of claim pursuant to General Municipal Law § 50-e (NYSCEF Doc No. 87, notice of claim). Thereafter, on July 23, 2019, Plaintiff commenced this negligence action (NYSCEF Doc No. 1, verified complaint). The City joined issue by service of its answer on October 2, 2019 (NYSCEF Doc No. 90, verified answer). On October 14, 2019, Defendants New York City Transit Authority (“NYCTA”), Metropolitan Transportation Authority (“MTA”), Metropolitan Transit Authority i/s/h/a Access-a-Ride, New York City Transit Authority i/s/h/a MTA/New York City Transit-Paratransit, and Metropolitan Transportation Authority i/s/h/a MTA/New York City Transit-Paratransit (collectively referred to as “Transit Defendants”) joined issue by service of their answer (NYSCEF Doc No. 16, verified answer). Defendants Dale Management Corp. (“Dale”) and MV Transportation, Inc. (“MV”) joined issue by service of their answer on November 22, 2019 (NYSCEF Doc No. 21, verified answer). On October 5, 2021, Plaintiff appeared for a hearing pursuant to General Municipal Law § 50-h, and was then deposed on October 2, 2023 (NYSCEF Doc No. 106, Plaintiff deposition tr).

On January 24, 2022, Plaintiff served an amended summons and complaint naming Sabio and Friedman as defendants (NYSCEF Doc No. 25, amended verified complaint). On March 29, 2022, the Transit Defendants moved for summary judgment to dismiss Plaintiff’s complaint, which was denied on March 27, 2023 (NYSCEF Doc No. 27, notice of motion; NYSCEF Doc No. 60, decision and order Kim, J.). On July 28, 2022, Friedman filed a pre-answer motion to dismiss the complaint (NYSCEF Doc No. 42, notice of motion). Friedman’s motion was denied on March 28, 2023, and Friedman joined issue by service of his answer on April 12, 2023 (NYSCEF Doc No. 61, decision and order Kim, J.; NYSCEF Doc No. 66, verified answer).

To date, Sabio has not appeared in this action. On July 20, 2023, Plaintiff moved for default judgment against Sabio, which was granted on September 20, 2023 (NYSCEF Doc No. 69, notice of motion; NYSCEF Doc No. 79, decision and order Kim, J.).

## DISCUSSION

### I. Friedman’s Motion for Summary Judgment (Motion Seq. 004)

Friedman moves for summary judgment to dismiss Plaintiff’s complaint and all cross-claims against him because he did not breach a duty or proximately cause Plaintiff’s injuries. In support of his motion, Friedman submits pleadings, testimony, a copy of the police accident report, and an affidavit by Friedman. Friedman avers that as the front vehicle struck from the rear, he did not breach a duty or proximately cause Plaintiff’s injuries and is entitled to judgment as a matter of law (NYSCEF Doc No. 104, Ferrara affidavit ¶ 40). Plaintiff opposes the motion on the grounds that the police report is inadmissible, and Friedman’s affidavit is insufficient (NYSCEF Doc No. 112, Eisen affidavit at 3-4). Specifically, Plaintiff avers that Friedman’s affidavit does not explain the manner in which Friedman stopped, the speed at which he was traveling prior to stopping, or the reason that Friedman stopped (*id.* at 5).

Pursuant to CPLR § 3212(b), a motion for summary judgment “shall be granted if, upon all the papers and proofs submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party” (CPLR § 3212[b]). “The proponent of a motion for summary judgment must demonstrate that there are no

material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). To be a “material issue of fact” it “must be genuine, bona fide and substantial to require a trial” (*Leumi Financial Corp. v Richter*, 24 AD2d 855 [1st Dept 1965]). The movant’s burden is “heavy,” and “on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013][internal quotation marks and citation omitted]). “A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010][internal quotation marks and citation omitted]).

To maintain a cause of action in 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” (*Pasternack v Lab’y Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]). “A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that [it] was not at fault in the happening of the subject accident” (*Rodriguez v Palacio*, 199 AD3d 728, 732 [2d Dept 2021]). It is well-established that “the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway” (Vehicle and Traffic Law § 1129). “A rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the driver of the rear vehicle and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate, nonnegligent explanation for the accident” (*Urena v GVC Ltd.*, 160 AD3d 467, 467 [1st Dept 2018]). The lead driver however, “also has a duty ‘not to stop suddenly or slow down without proper signaling so as to avoid a collision’” and there may be issues of fact as to “why a lead driver’s car stopped suddenly in the first place” (*Baez-Pena v MM Truck & Body Repair, Inc.*, 151 AD3d 473, 477 [1st Dept 2017]; *Carhuayano v J & R Hacking*, 28 AD3d 413, 414 [2d Dept 2006]; *Berger v New York City Hous. Auth.*, 82 AD3d 531 [1st Dept 2011]). In *Tutrani v Cnty. of Suffolk*, the Court of Appeals held that an officer’s abrupt stop in the travel lane of a busy highway “set into motion an eminently foreseeable chain of events that resulted in collision” that was “not so remote in time so as to preclude recovery as a matter of law” (*Tutrani v Cnty. of Suffolk*, 10 NY3d 906, 907 [2008]).

Here, Friedman has not made out a *prima facie* case of entitlement to judgment as a matter of law. Friedman’s affidavit does not demonstrate as a matter of law that his actions were not a proximate cause of the ensuing accident (*Tutrani*, 10 NY3d at 907). A jury could find that Friedman’s stop created a foreseeable chain of events that resulted in the rear-end collision which caused Plaintiff’s injuries and as such there are material issues of fact (*Eisen v Katcher*, 201 AD3d 464, 465 [1st Dept 2022]; *Newell v Bronston*, 183 AD3d 441 [1st Dept 2020]). Moreover, there can be more than one proximate cause of an accident and Friedman has not foreclosed this issue in this instance and on such record (*Bell v Angah*, 146 AD3d 734 [1st Dept 2017]).<sup>1</sup> As such, Friedman has not met his burden and the motion for summary judgment is denied.

## II. The City’s Motion to Dismiss (Motion Seq. 005)

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<sup>1</sup> The parties dispute the admissibility of the police report proffered by Friedman. Were the court to consider such evidence, it does not demonstrate Friedman’s entitlement to judgment as a matter of law.

The City moves to dismiss Plaintiff's complaint and all cross-claims for failure to state a cause of action against it because the City does not owe Plaintiff a legal duty of care. The City contends that Plaintiff's allegations arise out of the City's ownership, control, and maintenance of the subject vehicle and administration of the Access-A-Ride program (NYSCEF Doc No. 85, Lynch affirmation ¶¶ 23, 24). Because the City did not own, control, or maintain the subject vehicle and does not administer, oversee, or control the Access-a-Ride program Plaintiff has not stated a valid cause of action against it (*id.*). In support of the motion, the City proffers pleadings, testimony, a police accident report, an affidavit by Nathaniel Kozer, the Fleet Safety Supervisor for the New York City Department of Citywide Administrative Services, the 1993 Memorandum of Understanding regarding the Access-A-Ride program (the "MOU"), and an affidavit by Christopher Horng, the Deputy Assistant Director at the New York City Mayor's Office of Management and Budget. On October 6, 2023, the City conducted a search of vehicle records for the license plate T757390C (*id.* ¶ 11).<sup>2</sup> The record search revealed that the City did not own, lease, operate, manage, maintain, or control the vehicle that was involved in the collision (*id.*; NYSCEF Doc No. 97, Koszer affidavit ¶ 3). Additionally, pursuant to the MOU, the Access-A-Ride program is administered by NYCTA, who assumed operation of program in July of 1993 (NYSCEF Doc No. 29, statement of material facts ¶ 7; NYSCEF Doc No. 98, Horng affidavit ¶¶ 5, 8). NYCTA is an affiliate and subsidiary of the MTA, separate and distinct from the City (NYSCEF Doc No. 33, Roberts affidavit ¶ 3; NYSCEF Doc No. 85, Lynch affirmation ¶¶ 13, 25).

Plaintiff opposes the City's motion because it is premature. Plaintiff contends that there have not been any depositions in this matter and the City's motion improperly relies on a notice to admit, a deed, and an affidavit (NYSCEF Doc No. 110, Eisen affirmation at 5).

On a motion to dismiss brought under CPLR § 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994][citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt Street Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *aff'd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]) and "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). When evidentiary material is submitted in support of a motion to dismiss for failure to state a cause of action, and the motion has not been converted to one for summary judgment, "the criterion is whether the proponent of pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

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<sup>2</sup> No one is contesting that T757390C is the license plate of the vehicle that Sabio drove on August 7, 2018.

To state a cause of action in negligence, a plaintiff must plead facts that, if proven, would demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom (*Pasternack*, 27 NY3d at 825). “Absent a duty of care to the person injured, a party cannot be held liable in negligence” (*Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept 1988]).

Here, the City moves to dismiss Plaintiff’s complaint and all cross-claims against it because the City did not own, maintain, operate, or control the subject vehicle and the City does not oversee or administer the Access-A-Ride program, including its operators. The City proffers an affidavit from Nathaniel Koszer regarding the record search that was performed. The search demonstrates that the City did not own, operate, or control the subject vehicle at the time of the accident. The MOU and authenticating affidavit submitted by the City establishes that NYCTA, a subsidiary of the MTA, administers the Access-A-Ride program, and not the City.<sup>3</sup> Thus the City’s uncontroverted evidence utterly refutes Plaintiff’s allegations, which arise solely from the City’s ownership, maintenance, and control over the subject vehicle and the Access-A-Ride program (NYSCEF Doc No. 25, amended verified complaint ¶¶ 15, 18, 28, 36, 37, 51, 52, 53, 81, 82; NYSCEF Doc No. 87, notice of claim). Contrary to Plaintiff’s claims, the City has not improperly relied on a notice to admit or a deed. Nor would a deed be relevant in this motor vehicle action. Notably, the Transit Defendants do not oppose the City’s motion and concede that NYCTA is a subsidiary of the MTA responsible for administering the Access-A-Ride program (NYSCEF Doc No. 28, Hanna affirmation ¶ 20; NYSCEF Doc No. 29, statement of material facts ¶ 7; NYSCEF Doc No. 33, Roberts affidavit ¶ 3). Accordingly, because the City does not have a relationship with the subject vehicle or the Access-A-Ride program, Plaintiff does not have a cause of action against it and the motion to dismiss is granted.

Therefore, it is hereby

ORDERED that defendant Martin Friedman’s motion for summary judgment (Motion Seq. 004) is denied; and it is further

ORDERED that defendant the City of New York’s motion to dismiss the complaint and all cross-claims herein (Motion Seq. 005) is granted and the complaint and all cross-claims are dismissed in their entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; 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 of defendant the City of New York and that all future papers filed with the court bear the amended caption; and it is further

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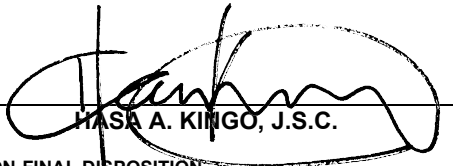
<sup>3</sup> NYCTA is a public benefit corporation created pursuant to Section 1201 of the Public Authorities Law, and the MTA was created by the New York State Legislature pursuant to Section 1263 of the Public Authorities Law.

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk’s Office, 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); and it is further

ORDERED that the Clerk of the Court is directed to transfer this matter to the inventory of a general IAS part due to the dismissal of all claims and cross-claims as against defendant the City of New York.

This constitutes the decision and order of the court.

<u>6/20/2024</u> DATE		 HASA A. KINGO, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <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