Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No.:710082/2019

CAROLINE PERSAUD,

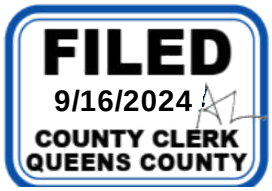
Motion Date:7/8/2024

Plaintiff, Motion Cal. No.: 11

-against-

Motion Sequence No.: 5

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, METROPLITAN TRANSIT AUTHORITY, BRIARWOOD REALTY LLC, BOARD MANAGERS OF THE GREENBRIAR CONDOMINIUM, THE GREENBRIAR CONDOMINIUM,



Defendants.

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The following efiled papers numbered 80-92, 100-108, 110-111, 113 submitted and considered on this motion by Defendants New York City Transit Authority (hereinafter "NYCTA") and Metropolitan Transit Authority (hereinafter "MTA", and collectively as "Defendants") seeking an Order pursuant to Civil Practice Law and Rules ("CPLR") 3212 granting the defendants NYCTA and MTA summary judgment and dismissal of the complaint of the Plaintiff Caroline Persaud (hereinafter "Persaud"), and any cross-claims of any other party, on the grounds that neither the NYCTA nor the MTA owed any duty to the plaintiff herein with respect to the ownership, operation, inspection, maintenance, management, and control of the curb that plaintiff claims to have fallen on; an Order pursuant to Public Authorities Law §1263 et. seq. granting defendant MTA summary judgment on the grounds that the MTA is not a proper party to the instant action as a matter of law; for motion costs; and the cross-motion by Persaud seeking an order: Denying the defendants, NYCTA and MTA, motion for summary judgment and dismissal of the complaint of the plaintiff; and Granting Persaud partial summary judgment as to liability against NYCTA on the grounds that the NYCTA breached their duty of care with respect to the ownership, operation, inspection, maintenance, management, and control of its buses by failing to allow the plaintiff a safe place to alight; Granting Persaud partial summary judgment as to liability against the City of New York (hereinafter "City") on the grounds that the City breached their duty of care with respect to maintaining the curb where the plaintiff in reasonably safe condition.

Motion Sequence 5	Papers Numbered
Notice of Motion-Affirmation in Support-Affidavits-Exhibits.....	EF 80-92
Notice of Cross-Motion-Affirmations in Support to Cross-Motion and in Opposition to Motion-Affidavits-Exhibits.....	EF 100-108
Affirmation in Opposition to Cross-Motion and in Further Support of Motion.....	EF 110-111
Affirmation in Reply-Affidavits-Exhibits.....	EF 113

Relevant Factual and Procedural Background

This action stems from an incident on April 1, 2018, when Persaud was exiting a Q44 bus at the bus stop located at Main Street and Manton Street, Queens, New York. Persaud claims that as she exited the bus through the rear door, she stepped directly onto a defective curb and fell, sustaining injuries to her right ankle. Persaud alleges that the defective curb caused her fall immediately after she alighted from the bus, without taking any additional steps.

Persaud initiated the lawsuit against NYCTA, MTA, and other parties, asserting that the Defendants were responsible for maintaining the area where she fell, as well as ensuring a safe disembarkation from the bus. On June 10, 2019, Persaud filed the Summons and Verified Complaint, followed by Answers from the relevant parties including the Defendants NYCTA and MTA.

NYCTA and MTA moved for summary judgment, arguing that they owed no duty to maintain or repair the curb where Persaud claims to have fallen. They further contended that under the Administrative Code of the City of New York §7-210, the City—not the NYCTA or the MTA—was responsible for the upkeep of sidewalks, curbs, and bus stop areas. Additionally, the MTA argued that it was not a proper party to the action as a matter of law, citing the Public Authorities Law §1263, which distinguishes the MTA's role from the operations of the NYCTA.

Persaud opposed the Defendants' motion and filed a cross-motion seeking partial summary judgment on liability, asserting that the NYCTA breached its duty to provide a safe area for her to disembark from the bus. Persaud's cross-motion also sought judgment against the City of New York for failing to maintain the curb in a reasonably safe condition.

In response, the Defendants argued that Persaud's alighting claim, namely the claim that she was not provided a safe place to alight from the bus, should be denied because it was not explicitly included in the original Complaint. They contended that although the Notice of Claim and Bill of Particulars referenced the issue of alighting, the Complaint itself did not allege this specific cause of action. The Defendants maintained that it is well-established in law that a plaintiff cannot add a

new theory of liability that was not originally asserted in the Complaint.

Persaud countered this argument by pointing to Paragraph 85 of her Complaint, which stated that the Defendants failed to create a safe place for the public, including herself, to egress and ingress. She argued that this sufficiently covered the claim of negligent failure to provide a safe place to alight from the bus.

Additionally, the Defendants reiterated that the NYCTA bus operator could not be held responsible for inspecting the area outside the rear doors before passengers alighted, as their vantage point at the front of the bus did not allow them to do so. They argued that NYCTA internal rules and guidelines requiring the identification and reporting of dangerous conditions could not be used to establish a heightened standard of care above the common law duty.

The Defendants also pointed to conflicting testimony from Persaud regarding how she fell. At different points in her deposition, Persaud mentioned that she both “fell out of the bus” and also that she “took three steps before falling”, raising issues of fact that the Defendants contended must be determined by a jury.

In response to the Defendants' arguments, Persaud maintained that her cross-motion was timely, that the Complaint adequately pled the alighting claim, and that she was entitled to partial summary judgment as the NYCTA breached its duty of care to provide a safe location for her to exit the bus. She also argued that the defective curb had existed for many years, as evidenced by Google Maps images, giving the Defendants constructive notice of the condition.

Law and Application

CPLR §3212 provides:

> (a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.
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> (b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is

> submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof 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. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion...
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> (f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

The New York City Administrative Code §7-210 provides:

> a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
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> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

> c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two-or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

On a summary judgment motion, "[t]he movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*see Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Rev 5, LLC v Congregation Beth Elohim*, 229 AD3d 820 [2d Dept 2024]). "The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*see Morejon v New York City Tr. Auth.* 216 AD3d 134, 136 [2d Dept 2023]*; citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *see also Chuqui v Cong. Ahavas Tzookah V'Chesed, Inc.*, 226 AD3d 960, 962 [2d Dept 2024]; *Antonyuk v Brightwater Towers Condo Homeowners' Ass'n, Inc.*, 147 AD3d 711, 712 [2d Dept 2017]). "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (*see Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; citing *Derise v Jaak 773, Inc.*, 127 AD3d 1011 [2d Dept 2015]).

As an initial matter, this Court notes that MTA is not the proper party, as it is well settled that MTA is a separate entity from NYCTA and its duties does not include the ownership, operation, maintenance, or control of any public buses, subway, roadway or facility (*see* Public Authorities Law §1263; *Fiero v City of New York*, 190 AD3d 822 [2d Dept 2021]). Further, Persaud does not offer any dispute in her opposition. Hence, the branch of Defendants' motion for summary judgment seeking to dismiss Persaud's complaint as against MTA is granted.

Next, "NYCTA is entitled to summary judgment dismissing the claims against it because the City of New York, not NYCTA, is responsible for maintaining bus stops, bus shelters, and appurtenant areas" (*see Little v New York City Tr. Auth.*, 132 AD3d 738, 739 [2d Dept 2015]; citing *Davila v New York City Tr. Auth.*, 66 AD3d 952, 953 [2d Dept 2009]; *Otonoga v City of New York*, 234 AD2d 592, 593 [2d Dept 1996]; *Gall v City of New York*, 223 AD2d 622, 623 [2d Dept 1996]). "It is beyond cavil that responsibility for bus stops within the City of New York, including the sidewalks and curbs attendant thereto, rests solely with the City of New York and/or the owner or lessee of the abutting property (*see Coppersmith v City of New York*, 194 AD2d 586, 586 [2d Dept 1993]; *Panso v Triboro Coach Corp.*, 172 AD2d 813, 814 [2d Dept 1991]; *Gold v City of New York*, 141 AD2d 502, 503 [2d Dept 1988]; *Friedman v Gearrity*, 33 AD2d 1044 [2d Dept 1970]). Here, NYCTA established that they are not responsible for the maintenance of the defective curb which

allegedly caused Persaud's injuries. The New York City Administrative Code §7-210 further supports this finding. However, Persaud also argues that she was not provided a safe place to alight from the bus, and NYCTA countered by pointing out that such arguments were not specifically mentioned in the original complaint.

Under the relation-back doctrine, a plaintiff may "interpose a claim or cause of action which would otherwise be time-barred, where the allegations of the original complaint gave notice of the transactions or occurrences to be proven and the cause of action would have been timely interposed if asserted in the original complaint" (*see Carlino v Shapiro*, 180 AD3d 989, 990 [2d Dept 2020]; citing *Moezinia v Ashkenazi*, 136 AD3d 990, 992 [2d Dept 2016]; *Caffaro v Trayna*, 35 NY2d 245, 250 [1974]; *Cady v Springbrook NY, Inc.*, 145 AD3d 846, 846 [2d Dept 2016]; *Pendleton v City of New York*, 44 AD3d 733, 736 [2d Dept 2007]). "A new legal theory of recovery may be asserted, so long as it arises from the same transactions alleged in the original complaint, but the doctrine is unavailable where the original allegations did not provide the defendants notice of the need to defend against the allegations of the amended complaint" (*see Id* at 990; citing *Pendleton v City of New York*, 44 AD3d at 736 [2d Dept 2007]; *Cady v Springbrook NY, Inc.*, 145 AD3d at 847 [2d Dept 2016]). Here, this Court finds that the "fail to create a safe place for the public, pedestrians, patrons and/or customer, including the plaintiff to egress and ingress" language at paragraph 85 of Persaud's complaint gave sufficient notice to the defendants of "the transactions or occurrences to be proven". The doctrine of relation-back is applicable here as Persaud's new cause of action based on her not being provided a safe place to alight from the bus, arises out of the same transactions alleged in her original complaint. Hence, NYCTA's argument that Persaud's cause of action should be denied since it was not specifically mentioned in the original complaint is without merit.

Next, "[A] common carrier owes a duty to an alighting passenger to stop at a place where the passenger may safely disembark and leave the area" (*see Delisser v New York City Tr. Auth.*, 211 AD3d 907, 909 [2d Dept 2022]; *Watson v New York City Tr. Auth.*, 172 AD3d 957, 958 [2d Dept 2019]*; Garcia v City of New York*, 138 AD3d 924, 925 [2d Dept 2016]; *Miller v Fernan*, 73 NY2d 844, 846 [1988]; *Blye v Manhattan and Bronx Surface Tr. Operating Auth.*, 72 NY2d 888, 889 [1988]*; Smith v Sherwood*, 16 NY3d 130, 133 [2011]; *Fagan v Atl. Coast Line R. Co.*, 220 NY 301, 306 [1917]; *Barravecchio v New York City Tr. Auth.*, 83 AD3d 630, 632 [2d Dept 2011]), "and towards that end to exercise reasonable and commensurate care in view of the dangers to be apprehended" (*see Id*, at 909; citing *Fagan v Atl. Coast Line R. Co.*, 220 NY 301, 306 [1917]; *Guzman v New York City Tr. Auth.*, 162 AD3d 749, 750 [2d Dept 2018]). "Whether the defendant breached its duty to provide a passenger a safe place to alight from the bus depends on whether the bus operator could or could not have observed the dangerous condition from the operator's vantage point" (*see Id* at 909; citing *Watson v New York City Tr. Auth.*, 172 AD3d 957, 958 [2d Dept 2019]; *Lovato v New York City Tr. Auth.*, 50 AD3d 969, 971 [2d Dept 2008]). Here, this Court finds that triable issues of fact exists as to whether the bus operator could or could not have observed the defect and whether Persaud is was provided with a safe place to alight. The record is devoid of any evidence that can establish whether the bus operator could or could not have observed the defected curb from his vantage point at the time of the accident. The duty lies upon NYCTA to establish prima facie that the bus operator could not have seen the defect through the rear doors, and they

failed to do so. Hence, NYCTA's branch of motion for summary judgment seeking to dismiss Persaud's complaint as against NYCTA is denied.

With regards to Persaud's Cross-Motion for partial summary judgment as to liability against NYCTA and the City of New York (hereinafter "City"), this Court first finds that it is timely as it was made in response to defendants' still pending, timely summary judgment motion on nearly identical grounds (*see Lewinski v City of New York*, 229 AD3d 456, 458 [2d Dept 2024]; citing *Munoz v Salcedo*, 170 AD3d 735, 736 [2d Dept 2019]). "In such circumstances, the issues raised by the untimely cross motion are already properly before the motion court and, thus, the nearly identical nature of the grounds may provide the requisite good cause to review the merits of the untimely cross motion" (*see Id*, 229 AD3d 456, 458 [2d Dept 2024]; citing *Homeland Ins. Co. of New York v Natl. Grange Mut. Ins. Co.*, 84 AD3d 737, 738 [2d Dept 2011]). However, this Court also finds that Persaud failed to establish the exact dimensions of the alleged defect, and that Persaud did not simply fall out of the bus or that she didn't took three steps, choosing her own path before she fell.

Despite the photos submitted, there are no affirmations or testimony for the exact dimensions of the alleged defect. "Summary judgment should not be granted to a defendant on the basis of a mechanistic disposition of a case based exclusively on the dimension[s] of the ... defect, and neither should summary judgment be granted in a case in which the dimensions of the alleged defect are unknown and the photographs and descriptions inconclusive" *(see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 84 [2015]; citing *Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). Further, in Persaud's testimony, Persaud mentioned that she both "fell out of the bus" and also that she "took three steps before falling", raising factual issues as to how the accident occurred.

ORDERED, that the branch motion of Defendants motion for summary judgment seeking to dismiss the complaint as against the MTA is granted; and it is further

ORDERED, that the remaining branch of Defendants motion seeking summary judgment to dismiss the complaint as against the NYCTA is denied; and it is further

ORDERED, that Plaintiff's Cross-Motion is denied.

Dated: September 13, 2024

Hon. Chereé A. Buggs, JSC

FILED
9/16/2024
COUNTY CLERK
QUEENS COUNTY