

Sands v City of New York
2024 NY Slip Op 35194(U)
February 15, 2024
Supreme Court, Queens County
Docket Number: Index No. 704575/2014
Judge: Chereé A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**

IAS PART 30

Justice

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SHADIA SANDS, as Proposed Administrator of the
Estate of D’AJA ROBINSON, and SHADIA SANDS,
individually,

Index No.:704575/2014

Motion Date: 12/4/2023

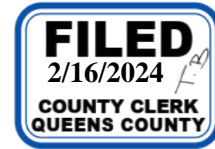
Plaintiff,

Motion Cal. No.:25

-against-

Motion Sequence No.: 5

CITY OF NEW YORK, MTA BUS COMPANY (MBC),
METROPOLITAN TRANSPORTATION AUTHORITY
(MTA), NEW YORK CITY TRANSIT AUTHORITY
(NYCTA) and MANHATTAN AND BRONX SURFACE
TRANSIT OPERATING AUTHORITY (MABSTOA)



Defendants.

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The following papers 122-134, 137, 140-163 submitted and considered by Defendant City of New York, MTA Bus Company, Metropolitan Transportation Authority, New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority (hereinafter collectively as MBC), seeking for an order pursuant to CPLR 3211 and CPLR 3212 for summary judgment and dismissal of Plaintiff Shadia Sands’ (hereinafter Sands) complaint on the issue of liability together with striking from Sands’ Bill of Particulars all allegations in paragraph 8 regarding violations of 42 USC 1983 and the Monell Doctrine, and for such other and further relief as this Court deem just and proper.

<u>Motion Sequence 1</u>	<u>Papers Numbered</u>
Notice of Motion-Affirmation in Support- Affidavits-Exhibits.....	EF 122-134, 137, 140
Affirmation in Opposition-Affidavits-Exhibits.....	EF 141-162
Affirmation in Reply-Affidavits-Exhibits.....	EF 163

Relevant Factual and Procedural Background

This lawsuit stems from an incident that occurred on May 18, 2013, where D'Aja Robinson, a passenger on a Q6 bus operated by Christian Dossou, was fatally shot by Kevin McClinton. The shooting took place outside the bus specifically targeting the right-side rear of the vehicle, resulting in Robinson's immediate death. McClinton was later arrested, tried, and convicted for this crime. The legal action commenced with a Notice of Claim served on August 16, 2013, against multiple defendants including the City of New York, MTA Bus Company, Metropolitan Transportation Authority, New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority. The motion seeks to dismiss all claims against the City of New York, MABSTOA, and the New York City Transit Authority on the grounds of no connection to the incident and to dismiss the complaint against MTA Bus Company based on the precedent that a common carrier cannot be held responsible for the unforeseeable criminal actions of third parties.

In support, MBC claims government immunity, asserting that the MTA Bus Company and other defendants do not owe a duty to protect passengers from unforeseeable criminal acts by third parties. It highlights that: (1) Sands must demonstrate a special relationship with the public entity to bypass governmental immunity; (2) Governmental immunity applies when actions involve professional judgment, even if poor; (3) The bus operator had neither actual nor constructive knowledge of the gunman's presence or intent, rendering any duty to prevent the attack non-existent; and (4) The MTA Bus Company's duty to protect passengers from third-party assaults hinges on establishing a special relationship, which is absent in this case. The examination before trial of the bus operator, Christian Dossou (hereinafter Dossou), revealed details about the incident, including the timing, the location, and the immediate reactions to the shooting. Dossou's testimony indicated a lack of any forewarning or unruly behavior that could have anticipated the shooting, and his response to open the doors for passenger safety when the shooting began is reasonable. Regarding Sands' Monell Claim, MBC argues that it is not properly pleaded in the Complaint and thus should be considered void. It emphasizes the lack of an official policy, custom, or evidence of deliberate indifference in the training of bus operators that could establish a Monell claim. MBC seeks to strike from the Bill of Particulars all allegations regarding violations of the Monell Doctrine and related constitutional violations, alongside any other relief deemed proper by the court.

The opposition argues that the governmental immunity defense does not apply because the case concerns the negligent operation of the bus, a proprietary function, rather than a failure to provide police or security services. Dossou's actions (or inactions) are operational acts for which Transit can be held liable. Instead of driving away from the threat when aware of the gunman outside, the bus driver stopped the bus, engaged the brake, lowered the bus, and opened the door, which placed passengers in danger. Dossou then exited the bus through the driver's side window, leaving the passengers exposed to the shooter. Sands argues that driving away from the threat would not have increased the danger to the bus driver or passengers and asserts that Dossou's failure to do so constituted a negligent operation of the bus. This contention is supported by Carl Berkowitz, Ph.D.'s expert affidavit, who claims that if Dossou simply drove away, the bus will be out of the gun's range, and the passenger including D'Aja Robinson would be out of harm's way. Nicholas Casanova, a passenger seated near D'Aja Robinson testified that D'Aja Robinson was struck by the third or fourth shot, and that each shot was 1-2 seconds apart. Shaquana Almonds (hereinafter

Almonds), friend of D'Aja Robinson who was seated behind her at the time of the incident, opined that Dossou's mistake was not a failure to confront the shooter, but rather that he did not simply drive away. Sands also highlighted a significant lack of training for bus drivers in handling active shooter situations or violent incidents outside the bus. Dossou testified to receiving no training on how to respond to gunfire or threats outside the bus. This lack of training, according to the opposition, contributed to the Dossou's failure to act reasonably during the incident. Sands contends that material issues of fact exist, such as the bus driver's knowledge of the shooter's location, the opportunity to drive away, and whether the driver's failure to act constituted negligence. These issues should be decided by a jury, making summary judgment inappropriate. The opposition distinguishes this case from those cited by the defendants, including *Falcone v Manhattan and Bronx Surface Tr. Operating Auth.*, 166 AD2d 271 [1st Dept 1990], by arguing that those cases involved different circumstances, such as sudden, unanticipated attacks inside a bus. In contrast, this case involved a clear warning (the shout of warning before the gun shots) and opportunity to act, which Dossou failed to utilize by not driving away from the danger. Sands invokes the Monell Doctrine, arguing that Transit is liable for failing to train its employees adequately, resulting in a constitutional violation—the loss of life. The lack of training on how to respond to active shooter situations indicates a deliberate indifference to the constitutional rights of individuals, establishing a direct causal link between the failure to train and the constitutional violation.

In reply, MBC contends that the expert affidavit of Carl Berkowitz, Ph.D. (Hereinafter Berkowitz), should be disregarded due to non-compliance with the CPLR 3101(d)(1) requirement for expert disclosure. The defendants argue that there was no prior notice of intent to call Berkowitz as an expert at trial, which undermines the procedural integrity of his testimony, that experts retained solely to oppose summary judgment motions should not be considered. MBC criticizes the late introduction of Berkowitz as an expert and his affidavit's lack of reference to the documents reviewed to form his conclusions, labeling his assertions as speculative. Regarding Sands' Monell claim, MBC points out that the plaintiff did not amend the complaint to include a Monell claim within the statute of limitations, which is one year in New York. This procedural lapse is a reason to dismiss the Monell-related arguments. MBC further argue that the plaintiff's opposition lacks sufficient allegations to meet the pleading requirements for a Monell claim under 42 USC §1983. MBC highlights the absence of specific allegations regarding municipal policy or custom leading to constitutional deprivation, rendering the Monell claim baseless. MBC reiterates that liability under 42 USC §1983 cannot be based on a theory of respondeat superior. It emphasizes the need for a plaintiff to demonstrate a direct causal link between an official municipal policy or custom and the alleged constitutional violations, which the defendants argue the plaintiff has failed to do. MBC then challenged the relevance of Shaquana Almonds' affidavit. It notes that Almonds was only 16 years old at the time of the incident and therefore not an expert in bus operations or related procedures. MBC contends Almonds' attempts to analyze the bus operator's actions as speculative and possibly biased, given her personal connection to the incident. They argue that her opinion on the cause of her friend's death, offered a decade after the incident, lacks credibility and evidentiary support. The reply also contest the probative value of a Department of Homeland Security handout submitted by the plaintiff, criticizing it for being uncertified and undated.

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.

(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...

“The proponent of a summary judgment motion 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 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]). “The failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*see Id at* 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]; *Antonyuk v Brightwater Towers Condo Homeowners' Ass'n, Inc.*, 147 AD3d 711, 712 [2d Dept 2017]; *Bartels v City of New York*, 125 AD3d 583, 587 [2d Dept 2015]). “Once a prima facie showing has been made, however, 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” (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; citing *Zuckerman v City of New York*, 49 NY2d at 562 [1980]). “If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied” (see *Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; citing *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]; *St. Clair v City of New York*, 266 AD2d 277 [2d Dept 1999]). “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]). “Moreover, the court’s function on a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist” (see *Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; citing *Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011]).

Governmental immunity arises “when the conduct complained of ‘involves the exercise of professional judgment,’ even if the judgment was poor” (see *Kadymir v New York City Tr. Auth.*, 55 AD3d 549, 551 [2d Dept 2008]). Where, as here, the public entity serves a dual proprietary and governmental role, the analysis involves determining where along the spectrum of proprietary and governmental functions the defendant’s alleged negligence falls into (*Id.*, at 549). To determine where along the continuum the alleged negligence lies, “[i]t is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability, not whether the agency involved is engaged generally in proprietary activity or is in control of the location in which the injury occurred” (see *Weiner v Metro. Transp. Auth.*, 55 NY2d 175, 182 [1982]). Here, this court finds that Sands’ argument that it is the MBC proprietary function in negligently operating the bus that caused the wrongful death of D’Aja Robinson to be without merit. MBC and Dossou is acting in a governmental capacity and made a discretionary decision to stop the bus, open the doors and evacuate the passengers. Further, there is no negligence operation of the bus as Sands claimed. Despite the affidavits of Berkowitz and Almonds, opining that if Dossou simply drove away, both Dossou and Robinson, as well as the other passengers will be out of harms way, this court finds that such opinion is speculative, especially when Berkowitz and Almonds’ opinion are not based on reviewing of the records or substantive research. Dossou is not required to act in the best possible way in such an emergency situation to avoid negligence, he acted reasonably under the circumstances, and there is no negligence in deciding to stop the vehicle and open the doors to evacuate the passengers when gunshots suddenly occurred.

“If it is determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a ‘special duty’ to the injured party” (see *Ortiz v City of New York*, 171 AD3d 1198, 1199 [2d Dept 2019]). “The core principle is that to sustain liability against a municipality, the duty breached must be more than that owed the public generally” (*Id.* at 1199). “It is the plaintiff’s obligation to prove that the government defendant owed a special duty of care to the injured party because duty is an essential element of the negligence claim itself” (see *Ortiz v City of New York*, 171 AD3d 1198, 1200 [2d Dept 2019]). To establish a special relationship, plaintiffs were required to show that there was: “(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2)

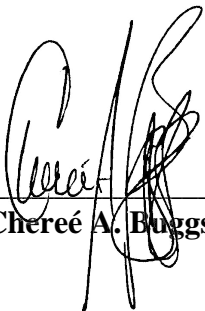
knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (see *Valdez v City of New York*, 18 NY3d 69, 80 [2011]). "Respondent [transit company] owed no special duty to appellant to prevent third-party attacks" (see *Weiner v Metro. Transp. Auth.*, 55 NY2d 175, 178 [1982]). Here, This court finds that Sand failed to prove all of the requirements of special relationship. There is no promises or actions that signify the assumption of the municipality, the bus driver had no knowledge of the shooting that happened and had no direct contact with Plaintiffs and Plaintiffs cannot justifiably rely upon the municipality's affirmative undertaking. After reviewing of the records, this court finds that contrary to Sands' contentions, the attack is sudden and unanticipated. The mere seconds between the shout of warning and the subsequent gunshots constitutes neither actual nor constructive notice for MBC or Dossou. Instead, the unexpected attack from a third party constitutes a superceding and intervening cause relieving defendant from liability as a matter of law (see *Falcone v Manhattan and Bronx Surface Tr. Operating Auth.*, 166 AD2d 271 [1st Dept 1990]; citing *Marenghi v New York City Tr. Auth.*, 151 AD2d 272, 274 [1st Dept 1989], *affd*, 74 NY2d 822 [1989]). Hence, Sands failed to prove that there exists a special relationship between Robinson and MBC, and MBC had no duty to protect Robinson from an unexpected third-party attacker by providing police protection.

Regarding Sands' Monell claim based on *Monell v Dept. of Social Services of City of New York*, 436 US 658, 658 [1978] and 42 U.S.C. § 1983, case law states that "the government itself cannot be liable ... under 42 U.S.C. § 1983 unless an official government policy, custom or widespread practice caused the violation of the plaintiff's constitutional rights" (see *Crooks v City of New York*, 189 AD3d 769, 771 [2d Dept 2020]). Here, this court finds that Sands failed to demonstrate a direct causal link between MBC's official municipal policy or custom and the alleged constitutional violations. Accordingly, it is hereby

ORDERED, that Defendant MBC's motion to summary judgment is granted in its entirety, Plaintiff Sands' complaint on the issue of liability is dismissed, and Sands' Bill of Particulars regarding violations of 42 USC 1983 is stricken.

This constitutes the decision and order of the court.

Dated: February 15, 2024



Hon. Chereé A. Buggs, JSC

