Fernandez v New York City Tr. Auth.
2025 NY Slip Op 34171(U)
October 29, 2025
Supreme Court, New York County
Docket Number: Index No. 450205/2025
Judge: Richard Tsai
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD TSAI PART 21

Justice

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INDEX NO. 450205/2025

HERNAN CHIMBORAZO FERNANDEZ, TOMAS ISAIAS ROMERO SARMIENTO and CRISTIAN PAUL MONTERO SAETEROS,

Plaintiffs,

MOTION DATE 10/06/2025

MOTION SEQ. NO. 001

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY and LUIS CASTILLO JIMENEZ,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 18-31

were read on this motion to/for DISMISS.

In this action, plaintiffs allege that on August 10, 2023, the motor vehicle in which they were traveling was struck by a bus operated by Luis Castillo Jimenez (exhibit A in support of motion [NYSCEF Doc. No. 21], complaint ¶ 21). In their answer, defendants admit that the subject bus was owned by New York City Transit Authority (NYCTA) and operated by Jimenez "in the regular scope of his employment with the permission and consent of" the NYCTA (exhibit B in support of motion [NYSSCEF Doc. No. 22], complaint ¶ 3).

On this motion, defendants move to dismiss the complaint on the grounds that plaintiffs did not serve them with timely notices of claim. Plaintiffs oppose the motion.

DISCUSION

I. Claims against New York City Transit Authority and Metropolitan Transportation Authority

Where an action against the NYCTA and the Metropolitan Transportation Authority (MTA) is founded on a tort (except for wrongful death), Public Authorities Law §§ 1212 (2) and 1276 (2), respectively, require service of a notice of claim upon the NYCTA and MTA prior to the commencement of the action, "within the time limited by and in compliance with all of the requirements of section [50-e] of the general municipal law," i.e., within 90 days after the claim arises (General Municipal Law § 50-e [1] [a]). "Timely service of a notice of claim is a condition precedent to the commencement of an action sounding in tort against the New York City Transit Authority and the Metropolitan Transportation Authority" (*Griffith v New York City Tr. Auth.*, 235 AD3d 870, 870-71 [2d Dept 2025]). "Failure to comply with a statutory notice of claim requirement is a ground

for dismissal pursuant to CPLR 3211(a)(7) for failure to state a cause of action" (*Singh v City of New York*, 189 AD3d 1697, 1699 [2d Dept 2020], *affd* 40 NY3d 138 [2023]).

On this motion, there is no dispute that plaintiffs served notices of claim on NYCTA and MTA on November 22, 2023 (exhibits F and G in support of motion [NYSCEF Doc. Nos. 26-27]), shortly after 90-day deadline for serving the notices of claim, which was November 8, 2023. There is also no dispute that plaintiffs never granted any leave to serve late notices of claim. Therefore, defendants have established their prima facie entitlement to summary judgment dismissing the complaint as against NYCTA and MTA.

However, plaintiffs argue that because they served defendants with notices of claim "a mere 21 days after the expiration of the statutory window" and because "the municipal Defendants in this action have at all times been on actual notice of the motor vehicle collision" and "have actively participated in litigating this matter", including by producing video evidence of the underlying accident, the "untimely NOC ought to be deemed as timely filed and the matter be permitted to continue on the merits" (affirmation in opposition to motion [NYSCEF Doc. No. 31] ¶¶ 31).

Preliminarily, plaintiffs' service of "an admittedly late notice of claim was a nullity, and [their] failure to seek a court order excusing such lateness within the time limited for commencement of the action, i.e., within one year and 90 days after the happening of the accident, requires dismissal of the action" (*Croce v City of New York*, 69 AD3d 488 [1st Dept 2010] [internal citations omitted]).

Plaintiff's arguments are unavailing. In essence, plaintiffs are now requesting the court to deem that the late notices of claim were timely served, nunc pro tunc, under the criteria for granting leave to serve a late notice of claim. However the court no longer has the discretion to grant plaintiffs "leave to file a late notice of claim, as [they] failed to move for that relief before the one year and 90–day statute of limitations expired" (*Lozano v New York City Hous. Auth.*, 153 AD3d 1173, 1174 [1st Dept 2017]; *see also Luka v New York City Tr. Auth.*, 100 AD2d 323, 325 [1st Dept 1984] ["While the court has discretionary power to permit service of a late notice of claim, application therefor must be made prior to the expiration of the period fixed by law within which action must be brought"], *affd* 63 NY2d 667 [1984]).

Similarly unavailing is plaintiff's argument that defendants are estopped from asserting plaintiff's failure to satisfy the notice of claim requirement because they did not plead such as an affirmative defense in their answer (*see Reaves v City of New York,* 177 AD2d 437, 437 [1st Dept 1991] ["the failure to comply is not an affirmative defense to be asserted by defendants"]).

Likewise, defendants are not equitably estopped from bringing this motion. On this point, plaintiffs rely on *Konner v New York City Transit Authority* (143 AD3d 774, 777 [2d Dept 2016]) is inapplicable. In that case, the Second Department—while noting

that "the doctrine of equitable estoppel should be invoked against governmental entities sparingly and only under exceptional circumstances" (*id.* at 776) —held:

> "Nevertheless, under all of the circumstances of this case, the plaintiff's submissions demonstrated that the NYCTA wrongfully or negligently engaged in conduct that misled the plaintiff to justifiably believe that service of the notice of claim upon the MTA was of no consequence, and lulled her into sleeping on her rights to her detriment" (*id.* at 777).

Here, unlike *Konner,* plaintiffs present no evidence that defendants engaged in conduct that either misled plaintiffs into believing that defendants excused the lack of a timely notice of claim, or lulled plaintiffs into not moving for leave to serve a late notice of claim. Engaging in litigation, without more, does not constitute equitable estoppel (*see Lozano*, 153 AD3d at 1174).

Although plaintiffs argue that it would be "a fundamental miscarriage of justice" (affirmation in opposition to motion ¶ 9), "[t]o permit a court to grant an extension after the Statute of Limitations has run would, in practical effect, allow the court to grant an extension which exceeds the Statute of Limitations, thus rendering meaningless that portion of section 50–e which expressly prohibits the court from doing so" (*Pierson v City of New York*, 56 NY2d 950, 955 [1982]).

II. Claims against Jimenez

Defendants argue that the complaint must be dismissed as to defendant Jimenez as well, who was undisputedly acting within the scope of his employment with non-party Manhattan and Bronx Surface Transit Operating Authority (MABSTOA) when the underlying accident occurred (exhibit H in support of motion [NYSCEF Doc. No. 28] ¶ 4), because no notice of claim was served upon MABSTOA, citing *Wolfson v Metropolitan Transportation Authority* (123 AD3d 635, 636 [1st Dept 2014]), (*see* affirmation of defendants' counsel ¶ 18).

Wolfson is not on point. There, the Appellate Division ruled that the motion court had correctly determined that an action should not proceed against a bus operator individually, when the plaintiff had failed to submit evidence of a timely demand for settlement of the plaintiff's claims served upon his employer, the MTA Bus Company, the real party in interest, who would be obligated to indemnify the bus operator (*id.* at 636). Thus, *Wolfson* stands for the proposition that, if the MTA Bus Company was not timely served with a demand for settlement of a claim, then an employee of the MTA Bus Company cannot be sued individually for an incident arising out of the same claim.

Wolfson did not involve service of a notice of claim, but instead involved service of demand for settlement of claims pursuant to Public Authorities Law § 1276 (a). Additionally, *Wolfson* stated, "there is no statutory or legal authority requiring service of a demand on an employee of a subsidiary of the MTA" (*id.*). Unlike *Wolfson*, Public Authorities Law § 1212 (4) does require service of a notice of claim upon a bus operator

employed by MABSTOA who was allegedly negligent in the operation of a vehicle in the scope of their employment.

Even though *Wolson* does not apply, defendants did argue that the complaint should be dismissed as to Jimenez because no notice of claim was served upon MABSTOA. Public Authorities Law §§ 1212 (3) and (4) state, in relevant part:

> "3. The authority shall be liable for, and shall assume the liability to the extent that it shall save harmless any duly appointed officer or employee of the authority for the negligence of such officer or employee, in the operation of a vehicle or other facility of transportation under the jurisdiction and control of the authority, upon the public streets, highways or railroads within the city, in the discharge of a duty imposed upon such officer or employee at the time of the accident, injury or damages complained of, while acting in the performance of his duties and within the scope of his employment.
>
> 4. No action shall be maintained against the authority or against such officer or employee on account of such negligence *unless a notice of claim shall have been made and served on the authority within the time limited and in compliance with all the requirements of section fifty-e of the general municipal law*" (emphasis added).

Public Authorities Law § 1212 also applies to MABSTOA, which is a subsidiary of the NYCTA (*see* Public Authorities Law § 1203-a [6]). Thus, unlike the bus operator in *Wolfson*, a notice of claim must be served as a condition precedent to an action against Jimenez.

Here, defendants did not submit proof that no notice of claim had been served upon MABSTOA. The affidavits submitted with defendants' motion indicated that the records of the NYCTA and MTA were searched for notices of claim served upon the NYCTA and MTA, not upon MABSTOA (*see* Exhibit F in support of motion, Conti aff ¶¶ 1-4; *see* Exhibit G in support of motion, Jacobs aff ¶ 3). Defendants therefore did not meet their prima facie burden for summary judgment and dismissal of the complaint as to defendant Jimenez.

The court need not reach plaintiffs' arguments in opposition.

Thus, the branch of defendants' motion to dismiss and for summary judgment dismissing the complaint as against defendant Jimenez is denied. However, in the exercise of discretion, defendants are granted leave to renew this branch of the motion, no later than 120 days after the filing of the note of issue.

CONCLUSION

Upon the foregoing documents, it is hereby **ORDERED** that the motion by defendants, pursuant to CPLR 3211 and 3212, to dismiss the complaint for failure to timely serve notices of claim, is **GRANTED IN PART TO THE EXTENT THAT** the complaint is severed and dismissed as against defendants New York City Transit Authority and Metropolitan Transportation Authority, with costs and disbursements to these defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment in these defendants' favor accordingly; and it is further

ORDERED that the remainder of the motion is otherwise denied, with leave to renew, no later than 120 days after the filing of the note of issue.

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10/29/2025	
DATE	**RICHARD TSAI, J.S.C.**

CHECK ONE:		**CASE DISPOSED**		X	**NON-FINAL DISPOSITION**		
		GRANTED	**DENIED**	X	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**