

**McPherson v New York City Tr. Auth.**

2025 NY Slip Op 34337(U)

November 6, 2025

Supreme Court, New York County

Docket Number: Index No. 151405/2021

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. 151405/2021**

MARIAELENA MCPHERSON and KATINA PEARCE,

**MOTION DATE 06/23/2025**

Plaintiffs,

**MOTION SEQ. NO. 003**

- v -

NEW YORK CITY TRANSIT AUTHORITY and WESLEY  
MCCANT,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 1, 31-32, 51 - 59  
were read on this motion to/for JUDGMENT – SUMMARY.

In this action, plaintiffs Mariela McPherson and Katina Pearce allege that on December 26, 2019, a bus, owned by the New York City Transit Authority (NYCTA), and operated by defendant Wesley McCant, struck a metal barrier, and pushed the barrier into a crowd of pedestrians, causing plaintiffs’ injuries.

Plaintiffs now move for summary judgement in their favor as to the issue of liability and, furthermore, seek to dismiss Defendants’ affirmative defenses of culpable conduct and the emergency doctrine.

**BACKGROUND**

Preliminarily, the court notes that plaintiffs previously filed a motion for summary judgment (Seq. No. 002) in this action, which was “denied without prejudice and with leave to refile upon completion of discovery” by another judge who was then presiding over this part (Seq. No. 002 Decision and Order [NYSCEF Doc. No. 42] at 1). Although plaintiff has submitted three additional exhibits on this motion, the parties also refer exhibits that were previously e-filed as part of the prior motion for summary judgment (Seq. No. 002), as they are permitted to do.

*Affidavit of Non-Party Stephanie Ramos*

Ramos, who is not a party to this action, provided an affidavit describing what she observed at the time of the incident. Ramos averred that, on December 26, 2019, she was “employed by TKTS and on duty at the TKTS location in Times Square, at the southwest corner of the intersection of 7<sup>th</sup> Avenue and West 47<sup>th</sup> Street in Manhattan, New York” (Exhibit E in support of motion [NYSCEF Doc. No. 32], Ramos affidavit ¶ 1). According to Ramos, during this time “[t]o accommodate pedestrian foot traffic along the

west side of 7<sup>th</sup> Avenue between West 47<sup>th</sup> Street and West 46<sup>th</sup> Street, the city used interlinking metal barricades to cordon off 7<sup>th</sup> Avenue's western lane of vehicle travel" (*id.* ¶ 5). Ramos further stated, "the metal barricades ran the full length of the block, were movable and were not affixed to the ground" (*id.*).

Additionally, Ramos stated that, "[o]ver the course of the day, the heavy pedestrian traffic caused different sections of the metal barricades separating the pedestrians and vehicles on the west side of 7th Avenue to encroach into an active lane of vehicle travel on 7th Avenue" (*id.* ¶ 7). On multiple occasions, she observed "NYC police reposition encroaching sections of the metal barricades out of 7th Avenue's active lane of vehicle travel" (*id.* ¶ 8).

Ramos described the incident as follows:

"I observed the NYC bus approach the area where the subject metal barrier was encroaching two (2) feet into the roadway approximately halfway between West 47<sup>th</sup> Street and West 46<sup>th</sup> Street. The section of the encroaching metal barricades had not been moved and remained where it had been for at least the previous 30 minutes.

No one pushed the gates further into the roadway or towards the NYC bus as the NYC bus was approaching the metal barricades involved in the accident, or as any part of the NYC bus was passing by the metal barricades involved in the accident.

As it attempted to pass by the subject encroaching metal barriers, the NYC bus did not sufficiently maneuver around them. Instead, the NYC bus's rear passenger side struck the metal barriers and began to drag them" (*id.* ¶¶ 14-16).

#### *Testimony of Plaintiff Mariela McPherson*

At her deposition, McPherson testified to "crossing the street" with her friends and that the sidewalk was closed for pedestrians such that it looked "like they used a transit lane, they made it into a pedestrian area where they had these steel barriers blocking that traffic lane for pedestrians only, so as we crossed the street we were forced to go into that lane" (Exhibit A in support of motion [NYSCEF Doc. No. 54], McPherson's EBT at 37, line 22 through 38, line 6). Similarly, at McPherson's statutory hearing, she stated, "the area for people to walk was closed or they had it blocked and there was an open [] lane for pedestrians that was – they opened on the – they took a traffic lane and made it into a pedestrian lane" (Exhibit B in support of motion [NYSCEF Doc. No. 29], McPherson Statutory Transcripts at 36, lines 16 – 20). While walking in this designated area, McPherson stated that she "kept looking down, making sure [she] wouldn't trip [on the barrier]" (McPherson EBT at 38, lines 20-22).

McPhearson further testified, “I don’t know how far we walked in that pedestrian area I felt an impact on my back, on my left side” *id.* at 38, lines 22-25). McPherson stated that the impact “sort of threw me forward, and as I went forward, my left leg extended back and got tangled on the metal barrier, but then as I went – as I fell to the ground, I hit the ground” (*id.* at 39, lines 3-7). She further stated that “[t]he barrier kept pushing me and dragging me, so I mean, at the moment, I was confused, didn’t know what was happening and I sort of turned my head a little bit, and in the corner of my eye, I saw the big bus” (*id.* lines 7-15).

At her statutory hearing McPherson stated that she:

“felt the impact of my body sort of extended from the top part forward, me leg, left leg, extended back and some reason got tangled up with the guardrail in between the pipes and fell to the ground. First my knees to the ground first and [], then the rest of my body. And then after I was on the ground with my leg cut up on the guardrail, I was still being dragged by the [b]us” (McPherson Statutory Transcripts at 41, line 19 through 42, line 1).

#### *Testimony of Katina Pearce*

At her deposition, Pearce testified that she and her boyfriend were walking southbound along 7<sup>th</sup> Avenue, on the right-hand side (Exhibit B in support of motion [NYSCEF Doc. No. 55], Pearce EBT at 20, lines 5-9). More specifically, Pearce stated, “I am walking on the right-hand side, my boyfriend is on my left-hand side and the barricade is on his left side” (*id.* at 22, lines 22-24). After passing the intersection at 47<sup>th</sup> Street, Pearce testified that she was within a designated pedestrian area on a rightmost portion of 7<sup>th</sup> Avenue, which typically operates as the right traffic lane for passing vehicles (*id.* at 23, lines 5-21). Pearce stated that this designated pedestrian area was marked by rectangular metal barricades that separated the pedestrian walkway from moving traffic (*id.* at 34, line 23 through 24, line 21). Similarly, at her statutory hearing, Pearce stated, “there was no sidewalk to walk on, we were walking in the pathway that was created, or allowed for pedestrians to walk” (Exhibit C in support of motion [NYSCEF Doc. No. 30], Pearce Statutory Hearing at 35, lines 15-17).

Pearce testified that the accident occurred “[a]fter I was hit from behind. And thrust forward I turned around to see why – what hit me, and I saw my boyfriend on the floor, on the ground” (*id.* at 27, lines 18-21). Pearce testified that “the first time I saw the bus” was when she “turned around back in front of me” (*id.* at 27, lines 22-24). Pearce later clarified that the bus struck a barricade, which in turn, struck her in the back and resulted in her injuries (*id.* at 29, line 9 through 30, line 3). At her statutory hearing, Pearce stated, “[s]o, I’m walking and [], I feel a big bang against my back. I’m thrust forward. I didn’t know what was happening, it all happened so fast” (Pearce Statutory Hearing at 38, lines 4-6).

### *Deposition of Wesley McCant*

At defendant McCant's deposition, he stated that he was operating the bus along 7<sup>th</sup> Avenue, with no objects obstructing his route, and that he did not become aware that an accident occurred until he heard "screams" (McCant EBT [NYSCEF Doc. No. 56] at 31, line 24 through 32, line 7, at 33, lines 1-19, at 35, lines 5-9). McCant stated that after he heard screams, alerting him to something happening, he stopped the bus and "[c]alled console" (*id.* at 34, lines 9-12). McCant stated that he learned that the right side of his bus came in contact with a metal barrier by overhearing a conversation between his supervisor and "the officers" (*id.* at 43, line 15 through 45, line 3).

After the incident, McCant submitted a report of the collision. On both pages of the report, McCant indicates he was traveling down 7<sup>th</sup> Avenue "clear of obstructions" immediately prior to the incident occurring (Exhibit F in support of motion [NYSCEF Doc. No. 33], McCant's signed statements).

Lastly, plaintiffs submitted a police report in support of the motion. According to the police report:

"[the] driver states he was traveling S/S on 7<sup>th</sup> Ave Crossing 47 Street, there were metal barriers to his right blocking off the right lane of traffic for a pedestrian walkway. Unknowingly he states he struck one of the barriers causing it to travel into the crowd of pedestrians. Driver of the bus immediately pulled over to the side when safe. A witness on scene stated she observed the barriers being pushed by uninvolved passing pedestrians causing it to become wider out of the lane, possibly causing the bus to collide with them. Upon collision, the barrier traveled into the crowd and struck three pedestrians causing injury to each" (Exhibit D in support of motion [NYSCEF Doc. No. 31], certified police report at 1-2).

### **DISCUSSION**

"To prevail on a motion for summary judgment, the movant must make a prima facie showing by submitting evidence that demonstrates the absence of any material issues of fact. Once that initial showing has been made, the burden shifts to the opposing party to show there are disputed facts requiring a trial. All facts are viewed in the light most favorable to the non-moving party" (*Nellenback v Madison County*, — NY3d —, 2025 NY Slip Op 02263 [2025] [internal citations omitted]).

In this case, plaintiffs' theory of liability rests on the idea that the bus operator should have seen the supposedly hazardous condition and, thus, avoided a collision with the barricade (plaintiffs' counsels' affirmation ¶¶ 24-35). As both plaintiffs were struck from behind, plaintiffs' counsel relies on the affidavit provided by Stephanie Ramos.

In this instance, plaintiffs have failed to meet their prima facie burden demonstrating an absence of any material issues of fact regarding the issue of liability. In support of the motion, plaintiffs submit their own deposition testimonies, the deposition transcript of McCant, and an affidavit from an eyewitness. In this situation, previous courts have “correctly held that plaintiff[s]’ proof on the motion, consisting mainly of the deposition transcripts of [themselves] and defendant driver, does not show, prima facie, that the driver’s actions ... were negligent” (*Binetti v Infante*, 38 AD3d 210 [1st Dept 2007]).

Assuming such deposition testimonies were probative on the issue of liability, the conflicting testimonies demonstrate a triable issue of material fact as to whether McCant negligently operated the bus. During McCant’s deposition, he stated several times that there were no obstacles blocking his lane of travel (McCant EBT at 31, line 24 through 32, line 7; 35, lines 5-9). Immediately after the accident, McCant stated to the police, and the responding MTA supervisor, that there were no obstacles blocking his lane of travel (McCant EBT at 47, line 17 through 48 line7). McPherson even confirms this in her own deposition. She testified that she did not notice anything in the road that was obstructing vehicle traffic; however, she noticed “that traffic was so close to the lane” (McPherson EBT at 43, lines 5-12).

In contrast, Ramos states in her affidavit that the metal barriers were in fact encroaching into the roadway (Ramos affidavit ¶ 9). Furthermore, she states that the barriers were encroaching into the roadway for at least 30 minutes before the incident (*id.* ¶ 11). Lastly, she stated that McCant failed to properly maneuver his vehicle around the obstacle, thus resulting in the collision (*id.* ¶ 16).

Based on testimonies from the parties, and the affidavit from Ramos, there are conflicting accounts to McCant’s operation of the bus. As such, there is well settled case law that states that such “conflicting accounts raise triable issues of fact as to whether ... defendant driver failed to exercise due care to avoid the accident or was negligent in any manner” (*Wein v Robinson*, 92 AD3d 578, 578 [1st Dept 2012] [denying plaintiff’s motion for summary judgment on liability as it is unclear if the defendant driver was negligent or if the plaintiff pedestrian was negligent]; *Carswell v Banda*, 88 AD3d 604, 605 [1st Dept 2011] [reversed a lower court’s granting of plaintiff’s motion for partial summary judgment on liability as it was unclear if defendant driver exercised due care when operating the vehicle]; *Villaverde v Santiago-Aponte*, 84 AD3d 506 [1st Dept 2011] [plaintiff’s motion for partial summary judgment was denied as defendant driver’s testimony that he did not see any pedestrians, or object, in the lane of travel created a triable issue of fact]).

As such, plaintiffs’ motion for summary judgment as to liability is denied.

The branch of plaintiffs’ motion for summary judgment dismissing the affirmative defense of culpable conduct is granted. In this instance, plaintiffs have met their prima facie burden showing their conduct was not a substantial factor in causing the incident, as a matter of law. As show in the deposition testimonies by plaintiffs, they were

walking along a pedestrian walkway when they were struck from behind (McPherson EBT, Pearce EBT). McPherson specifically testified to watching the barriers to avoid “tripping” which establishes that she had not made contact with the barrier so as to have pushed it into the bus (McPherson EBT at 38, lines 20-22). Additionally, Pearce testified that she was not near the barrier before the incident; her boyfriend stood in between her and the barrier (Pearce EBT at 22, lines 22-24). Under these circumstances, this affirmative defense is dismissed “[b]ecause the record does not contain any evidence of culpable conduct by plaintiff[s]” (*Gamble v MTA Bus Co.*, 2025 NY Slip Op 05767 [1st Dept, Oct. 21, 2025]; see also *Stephenson v New York City Tr. Auth.*, 226 AD3d 546 [1st Dept 2024]).

The branch of plaintiffs’ summary judgment motion seeking dismissal of the affirmative defense of the emergency doctrine is also granted.

The emergency doctrine:

“recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context, provided the actor has not created the emergency” (*Caristo v Sanzone*, 96 NY2d 172, 174 [2001] [internal citations and quotation marks omitted]).

Where the emergency doctrine is invoked, “[t]he existence of an emergency and the reasonableness of a driver’s response thereto generally constitute issues of fact” that are left to the determination of the factfinder (*Dalton v Lucas*, 96 AD3d 1648, 1649 [4th Dept 2012]). In this instance, however, as a matter of law, defendants cannot properly invoke the emergency doctrine as there does not appear to be any emergency.

According to McCant’s deposition testimony, he was traveling along 7<sup>th</sup> Avenue when he was alerted to a sudden commotion (McCant EBT at 33, lines 10-24). During the deposition, McCant testified about statements he made after the incident. He testified to hearing screaming, which prompted him to check his rear-view mirror where he saw the metal barricade being dragged along by the back of the bus (*id.* 57, lines 9-23). Once he became aware of the situation, he brought his vehicle to a stop (*id.* 34, lines 9-12). Thus, McCant only became aware of the incident after the collision happened.

“Without having perceived or reacted to any emergency, the defendant may not rely on the emergency doctrine to excuse [his] conduct” (*De Diaz v Klausner*, 198 AD3d 475, 476 [1st Dept 2021]; see also *Jablonski v. Jakaitis*, 85 AD3d 969, 970 [2d Dept. 2011]).

**CONCLUSION**

Upon the foregoing documents it is hereby **ORDERED** that plaintiff's motion for summary judgment (Seq. No. 003) is **GRANTED IN PART TO THE EXTENT THAT** the branches of plaintiffs' motion for summary judgment dismissing the affirmative defenses of culpable conduct and the emergency doctrine are granted, and the first and third affirmative defenses of defendants' answer (NYSCEF Doc. No. 4) are stricken; and it is further

**ORDERED** that the branch of plaintiffs' motion for summary judgment as to liability in plaintiffs' favor against defendants is **DENIED**; and it is further

**ORDERED** that the remainder of the action shall continue.



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11/6/2025

DATE

RICHARD TSAI, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE