

**Ndiaye v Metropolitan Transp. Auth.**

2026 NY Slip Op 31534(U)

April 7, 2026

Supreme Court, Kings County

Docket Number: Index No. 533703/2025

Judge: Inga M. O'Neale

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At City Part 7 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 7<sup>th</sup> day of April, 2026

**Present: HON. INGA M. O'NEALE  
Justice, Supreme Court**

**IBRAHIMA SY NDIAYE,**

**Plaintiff,**

**-against-**

**METROPOLITAN TRANSPORTATION  
AUTHORITY, NEW YORK CITY TRANSIT  
AUTHORITY, MANHATTAN AND BRONX  
SURFACE TRANSIT OPERATING  
AUTHORITY (MABSTOA), MTA BUS  
COMPANY, PAUL A. MILLIGEN, Driver,  
Individually and as an Employee of Metropolitan  
Transportation Authority, NEW YORK STATE  
TRANSIT AUTHORITY, MABSTOA and MTA  
BUS COMPANY, FALLON BERGER and SUSAN  
BERGER,**

**Defendant(s).**

**DECISION & ORDER**

**Index No.: 533703/2025**

**The following papers numbered 1 to \_\_\_\_\_ read on this motion**  
Notice of Motion-Order to Show Cause  
And Affidavits (Affirmations) Annexed \_\_\_\_\_  
Answering Affidavit (Affirmation) \_\_\_\_\_  
Reply Affidavit (Affirmation) \_\_\_\_\_

**NYSCEF Doc. #s:  
Papers Numbered**

\_\_\_\_\_  
2-12  
18-20; 21  
22

Upon the foregoing papers, defendants New York City Transit Authority, Metropolitan Transportation Authority, Manhattan and Bronx Surface Transit Operating Authority, MTA Bus Company and Paul Milligen (collectively, the Transit defendants) move for an order dismissing the complaint and all cross-claims insofar as asserted against them: (1) pursuant to CPLR 3211(a)(1), on the ground that documentary evidence establishes a defense to the asserted claims; and (2) pursuant to CPLR 3211(a)(7), on the ground that plaintiff Ibrahima Sy Ndiaye (plaintiff) failed to state a cause of action.

“A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) on the ground that a defense is founded on documentary evidence may be appropriately granted only where the

documentary evidence utterly refutes . . . plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Bonavita v Gov't Emps. Ins. Co.*, 185 AD3d 892, 893 [2d Dept 2020]). Documentary evidence submitted under a CPLR 3211(a)(1) motion must be "unambiguous, authentic and undeniable" (*see 25-01 Newkirk Ave., LLC v Everest Nat. Ins. Co.*, 127 AD3d 850, 851 [2d Dept 2015], internal quotation marks and citations omitted). "[A]ffidavits and video evidence . . . are not documentary evidence" (*Jesberger v CVS Health Sols., LLC*, 222 AD3d 849 [2d Dept 2023], internal quotation marks and citations omitted).

"On a motion pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action, the court must give the complaint a liberal construction, accept the facts alleged therein as true, provide the plaintiff the benefit of every possible favorable inference, and 'determine only whether the facts as alleged fit within any cognizable legal theory'" (*Pascall v New York City Transit Auth.*, 230 AD3d 1246, 1247 [2d Dept 2024], internal quotation marks and citations omitted). "Where a court considers evidentiary material in determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), but does not convert the motion into one for summary judgment, the criterion becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless the movant shows that a material fact as claimed by the plaintiff is not a fact at all and no significant dispute exists regarding the alleged fact, the complaint shall not be dismissed" (*Damiani v WSNCH North, Inc.*, 244 AD 3d 1059, 1060 [2d Dept 2025], internal quotation marks and citations omitted; *see generally Cali v Maio*, 189 A.D.3d 1337 [2d Dept 2020]). Evidentiary submissions will warrant dismissal only where they establish conclusively that plaintiff has no cause of action (*see Damiani*, 244 AD 3d 1059 at 1061).

After oral argument and upon a review of the parties' papers and the relevant law, the Transit defendants' motion to dismiss is granted to the extent noted herein.

That branch of the Transit defendants' motion seeking dismissal pursuant to CPLR 3211(a)(1), is denied as the Court finds that the evidence submitted by the Transit defendants in support of their motion did not constitute documentary evidence within the meaning of CPLR 3211(a)(1) (*see Jesberger*, 222 AD3d 849 at 851).

That branch of the Transit defendants' motion seeking dismissal pursuant to CPLR 3211(a)(7), is granted as the Court finds that plaintiff does not have a cause of action for common-law negligence as asserted against the Transit defendants. "The elements of a common-law negligence cause of action are a duty owed by the defendant to the plaintiff, a breach of that duty and an injury proximately resulting therefrom" (*Jiminez v Shahid*, 83 AD3d 900 [2d Dept 2011]). "A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle" (*Sroor v Marziano-Fontana*, 229 AD3d 581, 583 [2d Dept 2024]), internal quotation marks and citations omitted). Here based on defendant Paul Milligen's affidavit and the accompanying bus camera video (NYSCEF Doc. #7) Transit defendant demonstrated that their vehicle had been completely stopped when it was struck in the rear, thereby conclusively establishing that they were not at fault in the happening of the accident (*see Sroor*, 229 AD3d 581, 583). Contrary to plaintiff and co-defendants Fallon Berger and Susan Berger's (co-defendants) contention, the Transit defendants' motion to dismiss is not premature. Plaintiff and co-defendants have "failed to demonstrate how discovery may reveal or lead to relevant evidence, or that facts essential to opposing the motion were exclusively within another party's knowledge and control" (*see Sroor*, 229 AD3d 581, 584).

Accordingly, it is hereby

**ORDERED** that the branch of the Transit defendants' motion for an order, pursuant to CPLR 3211(a)(1), dismissing the complaint and all cross-claims insofar as asserted against them is denied; and it is further

**ORDERED** that the branch of the Transit defendants' motion for an order, pursuant to CPLR 3211(a)(7), dismissing the complaint and all cross-claims insofar as asserted against them is granted. The action is hereby severed as against defendants New York City Transit Authority, Metropolitan Transportation Authority, Manhattan and Bronx Surface Transit Operating Authority, MTA Bus Company and Paul Milligen and shall continue as against the remaining defendants, and it is further

**ORDERED** that the caption the caption shall hereinafter read as follows:

\_\_\_\_\_  
**IBRAHIMA SY NDIAYE,**

**Plaintiff,**

**Index No.: 533703/2025**

**-against-**

**FALLON BERGER and SUSAN BERGER,**

**Defendants.**

\_\_\_\_\_  
As the Transit Authority is no longer a party, the instant action is hereby respectfully overridden and transferred to a randomly assigned IAS Part. Any relief requested not specifically addressed herein is denied. The foregoing constitutes the decision and order of this Court.

**For Clerks use only**

**MG** ✓

**MD** \_\_\_\_\_

**Motion Seq.#**

\_\_\_\_\_  
**1**

E N T E R

APR 07 2026

\_\_\_\_\_  
Hon. Inga M. O'Neale  
J.S.C.

**FILED**

APR 13 2026

**KINGS COUNTY CLERK'S OFFICE**