

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHARLES J. MARKEY IA Part 32
Justice

MURAD MAYAYEV, <p style="text-align: center;">-against-</p> METROPOLITAN TRANSPORTATION AUTHORITY BUS, et al.	X Index : Number 29965/2007 : : Motion date: : October 16, 2008 : : Motion : Cal. Number 20 : : Motion Seq. No. 2 X
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The following papers numbered 1 to 10 read on this motion by defendant MTA Bus Company (MTABC), sued hereunder as Metropolitan Transportation Authority Bus, to dismiss the complaint pursuant to CPLR 3211 (a) (5) and on this cross motion by plaintiff to strike MTABC's affirmative defense asserting the statute of limitations.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 4
Notice of Cross Motion - Affidavits - Exhibits	5 - 8
Reply	9 - 10

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff allegedly was injured on May 23, 2006 when the driver of the Q38 bus in which he was a passenger made a sudden and violent maneuver, causing him to fall. Plaintiff commenced this action by filing a summons and complaint on December 5, 2007.

MTABC alleges that the complaint must be dismissed because the action was not commenced within a year and 30 days of plaintiff's accident, the applicable statute of limitations for an action brought against a public authority (see, Public Authorities Law §1276 [2]; CPLR 204 [a]; *Burgess v Long Is. R.R. Auth.*, 79 NY2d 777 (1991); *Rose v Metro North Commuter R.R.*, 143 AD2d 993 (1988)).

Plaintiff acknowledges that this action is untimely, but argues, in his cross motion, that defendant should be equitably estopped from asserting such defense because he was misled in an earlier timely action brought against incorrect defendants, the Metropolitan Transportation Authority and the New York City Transit Authority.

More important, the affirmation of Timothy L. Bompert, Esq., provides other reasons for the conclusion by this Court that the defendant MTABC unfairly led plaintiff to believe that he had sued the correct entity. Specifically, the letter by MTABC attorney Marlo A. Polese, Esq., dated September 29, 2006, annexed as Exhibit E to Mr. Bompert's affirmation, is most damning of the defendant's misconduct. It amply reveals that an attorney representing the defendant advised counsel that a hearing date would be provided and urged counsel to provide records in order to get a "prompt disposition" of the claim. Under these circumstances, for the defendant to move to dismiss, after it lulled plaintiff to believe that the claim would be processed in the ordinary course of business and then to pull a surprise of a dismissal after the expiration of the Statute of Limitations should offend the basic sensibilities of any fair-minded person. For a governmental agency to behave in such a duplicitous manner, premised on the writing of one of its attorneys, makes the misconduct all the more unfathomable and reprehensible. *See, e.g., Bender v. New York City Health and Hospitals Corp.*, 38 NY2d 662 (1976); *Candelario v. MTA Bus Co.*, 2008 WL 5330524, 2008 NY Slip Op 52544[U] (Sup Ct Bronx County 2008).

Accordingly, defendant's motion to dismiss the complaint is denied in all respects. Plaintiff's cross motion to strike the defendant's limitations defense is granted.

The foregoing shall constitute the decision and order of the Court.

Dated: June 8, 2009

Honorable Charles J. Markey
J.S.C.