

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

-----	Index No. 5950/07
MARCIA PERROTTE,	Motion
Plaintiff,	Date December 18, 2007
-against-	
	Motion
NEW YORK CITY TRANSIT AUTHORITY,	Cal. No. 13
THE METROPOLITAN TRANSIT AUTHORITY	
and "JOHN DOE",	Motion
Defendants.	Sequence No. S001

	<u>PAPERS</u>
	<u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Affirmation in Opposition.....	5-7
Reply Affirmation.....	8-9

Upon the foregoing papers it is ordered that this motion is determined as follows:

Defendants' New York City Transit Authority ("NYCTA") and the Metropolitan Transportation Authority ("MTA" s/h/a Metropolitan Transit Authority) motion for an Order pursuant to CPLR 3211 and 3212 dismissing plaintiff's Complaint against them on the grounds that plaintiff has failed to state a cause of action against the defendants, NYCTA and MTA, and on the grounds that there are no triable issues of fact is granted.

The action is one for personal injuries allegedly sustained by plaintiff, Marcia Perrotte, on April 6, 2006, wherein plaintiff alleges that while a passenger on a Q60 Bus at Queens Boulevard and 34th Street, Long Island City, NY, said bus negligently and abruptly slowed down and stopped, causing plaintiff to be violently propelled and thrown backwards into a pole. Plaintiff alleges that the bus was owned and operated by defendants.

Defendants, NYCTA and the MTA maintain that assuming every allegation purported by the plaintiff is true, the plaintiff's

Complaint must be dismissed because defendants NYCTA and MTA did not own, maintain, manage, operate, or control the Q60 bus line, and therefore, neither defendant owed any duty of care to a person in the position of plaintiff, a passenger on the Q60 Bus. In support of their motion, moving defendants proffer an affidavit of Karl Stricker, General Superintendent, Special Operations at the Manhattan and Bronx Surface Transit Operating Authority, a subsidiary of the NYCTA. Mr. Stricker states in his affidavit that through his position, which he has held since 1999, he has access to files and records relating to bus routes under the jurisdiction of the NYCTA, and he has access to records which identify the different organizations that operate bus routes in New York City and the specific routes that these organizations operate. He states that on the day of the accident, neither defendant NYCTA, nor defendant MTA, operated the Q60 Bus, and on the day of the accident, the Q60 Bus was operated by non-party "MTA Bus Company." Finally, moving defendants cite to case law stating that the MTA is never a proper party to an action involving allegedly negligent conduct in the operations of the transit system.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83 [1994].) In determining whether plaintiff's complaint states a valid cause of action, the court must accept each allegation as true, without expressing any opinion on plaintiff's ultimate ability to establish the truth of these allegations before the trier of fact (*219 Broadway Corp. v. Alexanders, Inc.*, 46 NY2d 506 [1979]; *Tougher Industries, Inc. v. Northern Westchester Joint Water Works*, 304 AD2d 822 [2d Dept 2003]). The court must find plaintiff's complaint to be legally sufficient if it finds that plaintiff is entitled to recovery upon any reasonable view of the stated facts (see, CPLR 3211[a][7]; *Hoag v. Chancellor, Inc.*, 246 AD2d 224 [1st Dept 1998]).

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]).

The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate

as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Defendants, NYCTA and MTA have presented sufficient evidence to establish that as a matter of law there is an absence of a triable issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). This Court finds that the Affidavit of Karl Stricker, included as part of defendants' moving papers is an affidavit from one with personal knowledge of the facts in this matter (see, CPLR 3212[b]), and as such, defendants proffered sufficient proof in evidentiary form to establish the absence of a triable issue of fact.

Plaintiff failed to proffer sufficient proof in evidentiary form to establish a triable issue of fact. In support of its motion, plaintiff merely proffers an attorney's affidavit, which fails to raise any evidentiary proof to rebut defendants' *prima facie* case, as the attorney does not state that he has personal knowledge of the facts in this matter and it is well settled that an affidavit or affirmation from a party's attorney who lacks personal knowledge of the facts, is of no probative value (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Amaze Med. Supply, Inc. v. Allstate Ins. Co.*, 3 Misc 3d 133(A), [App Term, 2d and 11th Jud Dists 2004]; *Wisnieski v. Kraft*, 242 AD2d 290 [2d Dept 1997]; *Lupinsky v. Windham Constr. Corp.*, 293 AD2d 317 [1st Dept 2002]); and plaintiff's own statutory hearing transcript, which raises no triable issues of fact.

Plaintiff argues that moving defendants, should be equitably estopped from denying ownership, operation and control of the bus at issue.

Plaintiff states that the MTA and the NYCTA made initial multiple wrongful and negligent statements that the bus is an "MTA bus" rather than an "MTA Bus Company" bus, which statements should cause them to be equitably estopped from denying ownership, operation, and control of the bus. Plaintiff alleges that on May 24, 2006, she served a notice of claim on the above-captioned defendants; that on April 26, 2006, she filed a No-Fault Application with the MTA Bus Company, and on May 25, 2006, she filed a claim form with the MTA Bus Company. Thereafter, allegedly on June 1, 2006, plaintiff received a letter from the defendant NYCTA stating that the matter involves a claim against "MTA Bus", not "the MTA Bus Company," and requested that the

action be withdrawn against the NYCTA, but not against the Metropolitan Transit Authority. Moreover, plaintiff asserts that on June 20, 2006, plaintiff appeared at a statutory hearing conducted by the NYCTA during which the claims examiner was asked by plaintiff's counsel if he contends that the bus was an MTA Bus, as opposed to a NYCTA bus, to which the claims examiner answered "yes." Plaintiff maintains that based upon the letter dated June 1, 2006 and upon the claims examiner's representation at the statutory hearing, plaintiff filed a lawsuit against NYCTA and MTA only (summons and complaint served on March 14, 2007), rather than against the "MTA Bus Company."

Plaintiff also maintains that on March 30, 2007, moving defendants served their Answer, in which they failed to deny without qualification the ownership of the bus in question, therefore wrongfully failing to alert plaintiff that the Summons and Complaint named the allegedly wrong entities. Plaintiff's Complaint served upon the MTA and the NYCTA alleges that said defendants were the "registered owners of a bus bearing registration number 4265 and New York License Plate #L98319." Plaintiff asserts that rather than denying ownership of the bus in their Answer, moving defendants merely denied the allegation "upon information and belief," which was improper since the ownership of the bus was within the knowledge of the defendants at the time the Answer was prepared. Plaintiff maintains that only at a preliminary conference on September 24, 2007, after the Statute of Limitations to commence a lawsuit against the MTA Bus Company had expired, did the moving defendants unequivocally declare that they did not own the bus in question, and that because the MTA and the NYCTA failed to unequivocally deny ownership of the bus in their Answer, it should be deemed an admission.

In their reply papers, moving defendants NYCTA and MTA assert that the plaintiff's lawsuit should have been brought against the MTA Bus Company, and further state that the MTA and the MTA Bus Company are separate and distinct entities with the defendant MTA's role in public transportation being limited to finance and planning, and the MTA Bus Company being a public benefit corporation that owned and actually operated the Q60 bus line on the day of the plaintiff's accident. The NYCTA and the MTA state that equitable estoppel is only applicable against a governmental subdivision, when it acts wrongfully or negligently, inducing reliance by a party who is entitled to rely and that changes its position to its detriment or prejudice. Defendants maintain that they did not act wrongfully or negligently, or induce plaintiff to believe that the action was brought against the correct defendants. They state that since the beginning of

plaintiff's claim, they have taken affirmative steps to warn plaintiff's attorney that the suit had been brought against the wrong defendants, and alerting them to the fact that the MTA Bus Company was the proper defendant. In support of their position, they reference the letter included in plaintiff's Affirmation in Opposition which letter was sent to the MTA Bus Company and which included a No-Fault application regarding the subject accident, and which included the license plate number of the bus. Defendants maintain that plaintiff could have easily submitted a request to the Department of Motor Vehicles to ascertain the owner of the bus. They also reference the letter sent by plaintiff's counsel to the MTA Bus Company which letter included a personal injury claim form specifically addressed to the "MTA Bus Company."

Moving defendants further assert that plaintiff's attorney had no contact with them prior to serving plaintiff's notices of claim and defendant NYCTA maintains that within 1 week after receiving the plaintiff's notice of claim, it mailed plaintiff's attorneys a letter dated June 1, 2006, informing them that they had mistakenly named NYCTA in the action, stating that "MTA Bus" was the proper party to the action, and further stating that there was no legal relationship between NYCTA and "MTA Bus." Defendants believe a second warning that the plaintiff's claim had been brought against the wrong parties was given when the plaintiff's attorneys produced the plaintiff at a statutory hearing at NYCTA offices on July 20, 2006, and the hearing was ended when plaintiff testified that the bus was a Q60 Bus. Defendants maintain that at the end of the hearing the hearing officer said that the bus involved was an "MTA Bus", whereas the plaintiff believes he said it was an "MTA bus," and so the plaintiff's attorney may have misinterpreted the hearing officer's statement. Defendants assert that it is evident that the plaintiff's attorneys did not rely on the hearing officer's statements because in March of 2007, plaintiff served Complaints upon the MTA and the NYCTA; whereas if the plaintiff had relied upon the statements of the hearing officer, they would not have served the NYCTA. Moreover, defendants contend that on March 30, 2007, they served an Answer denying that the named defendants had any ownership or interest in the Q60 Bus, and state that the statute of limitations period against MTA Bus Company did not expire until July, 2007, so if plaintiff had conducted a basic investigation, it would have discovered the proper defendant was MTA Bus Company.

It is well-established law that the doctrine of equitable estoppel can only be invoked "where a governmental subdivision acts or comports itself wrongfully or negligently, inducing

reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice," and the doctrine "is to be invoked sparingly and only under exceptional circumstances." (*LoCicero v. Metropolitan Transportation Authority*, 288 AD2d 353 [2d Dept 2001][citations omitted]). "Only a showing of fraud, misrepresentation, deception, or similar affirmative misconduct, along with reasonable reliance thereon, will justify the imposition of estoppel." (*Yassin v. Sarabu*, 284 AD2d 531 [2d Dept 2001][citations omitted]).

The Court finds that on March 30, 2007, the moving defendants served an Answer which denied, albeit upon information and belief, ownership and operation of the bus in question. This should have put the plaintiff on notice that the moving defendants may not have been the correct parties to sue (*see, Zaiman v. Metropolitan Transit Authority*, 186 AD2d 555 [2d Dept 1992]). At that time the plaintiff could have made a timely motion for leave to serve a late notice of claim. *Id.* Furthermore, there is no evidence that the NYCTA or the MTA acted wrongfully or negligently, or in any way that could reasonable induce the plaintiff into believing that it had sued the proper party. (*See Id.*) The letter dated June 1, 2006 sent by the NYCTA to plaintiff (and which was admittedly received by plaintiff) states that the correct party to sue would be the "MTA Bus." While the NYCTA could have been more clear by writing that the proper party to sue was the "MTA Bus Company" as opposed to "MTA Bus" the Court does not find that their was any intention on the part of the NYCTA to mislead or deceive plaintiff into believing it had sued the correct party. Furthermore, any statements made by the hearing officer at the statutory hearing do not necessitate the invocation of the equitable estoppel doctrine.

Accordingly, as there are no material issues of fact regarding the ownership and operation of the bus in question and as the conduct of the defendants MTA and NYCTA does not warrant the application of the doctrine of equitable estoppel, defendants' motion is granted (*see, Peele v. Manhattan and Bronx Surface Operating Authority*, 160 AD2d 602 [1st Dept 1990]).

This constitutes the Decision and Order of the Court.

Dated: January 8, 2008

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Howard G. Lane, J.S.C.

