

**Terranova v New York-MTA-Metro. Suburban Bus
Auth. (MSBA)**

2012 NY Slip Op 31523(U)

April 27, 2012

Supreme Court, Nassau County

Docket Number: 4824/08

Judge: F. Dana Winslow

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SWAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**IGNAZIO TERRANOVA as Administrator of the
ESTATE OF ADRIANO TERRANOVA, deceased,**

**TRIAL/IAS, PART 3
NASSAU COUNTY**

Plaintiffs,

-against-

**MOTION SEQ. NO.: 002, 003
MOTION DATE: 2/14/12**

**New York-MTA-METROPOLITAN SUBURBAN
BUS AUTHORITY (MSBA), COUNTY OF NASSAU
and JOHN DOE Bus Driver,**

INDEX NO.: 4824/08

Defendants.

The following papers having been read on the motion (numbered 1-6):

Notice of Motion Seq. No. 002.....1
Notice of Motion Seq. No. 003.....2
Affidavit in Opposition.....3
Affirmation in Opposition.....4
Affirmation in Opposition.....5
Reply Affirmation.....6

This motion by the defendant County of Nassau for an order pursuant to CPLR 3211(a)(7), 3212 granting it judgment dismissing the complaint against it is determined as provided herein.

This motion by the plaintiff Ignazio Terranova, as Administrator of the Estate of Adriano Terranova, for an order pursuant to CPLR 3212 granting it summary judgment against the defendant MTA-Long Island Bus s/h/a New York-MTA-Metropolitan Suburban Bus Authority ("MSBA") and dismissing the third, fourth, fifth, sixth, eighth and tenth affirmative defenses of the County is determined as provided herein.

As Administrator of the Estate of Adriano Terranova, the plaintiff in this action seeks to recover for, inter alia, the wrongful death of Adriano Terranova. Adriano Terranova was killed on October 12, 2007 at approximately 4:00 PM at the intersection of Newbridge Road and Old Country Road when, while riding his bicycle, he collided with a bus owned by the MSBA. At the time of the collision, Adriano Terranova was riding

southbound on Newbridge Road and the bus was negotiating a right turn from a dedicated right hand turn lane on southbound Newbridge Road onto westbound Old Country Road. The plaintiff filed a Notice of Claim on January 15, 2008, in which he represented that the nature of the claim was to recover for personal injuries, conscious pain and suffering and wrongful death as the result of a motor vehicle accident caused by the “negligence, recklessness, gross negligence, vicarious liability and other culpable conduct of the [defendants] in the operation, maintenance and control of their . . . bus . . . in causing a collision between the bus with the bicycle and the body of [Adriano Terranova], in running [him] over and causing his consequent death at the scene of the occurrence. . . .” Allegations that the County is at fault for negligently intrusting the bus to the driver and negligent hiring and supervision were not advanced in the Notice of Claim or the complaint. Those allegations were first made by the plaintiff in his Verified Bill of Particulars and Supplemental Bill of Particulars.

The plaintiff’s claims for negligent entrustment, hiring and supervision fail on account of the plaintiff’s failure to advance that claim in his Notice of Claim. Demorcey v City of New York, 137 AD2d 650 (1st Dept 1988); see also, Semprini v Village of Southampton, 48 AD3d 543 (2nd Dept 2008). In any event, the Lease and Operating Agreement between the County and the MSBA afforded the MSBA the “unqualified right” to “hire and appoint such officers and employees as it may require for the performance of its duties; to fix and determine their qualifications, duties and compensation; . . . [to] otherwise establish and from time to time alter their conditions of employment” and to “do all other things it may deem necessary, convenient or desirable in the conduct” of its business. MSBA is given full and exclusive control over its business and financial affairs and is solely responsible for the maintenance and repair of leased buses. Therefore, the County could not have hired or supervised the bus driver or entrusted the bus to him. Maintenance of the bus however would present an issue of fact at this juncture had it been properly advanced.

Vehicle and Traffic Law § 388 renders owners of vehicles used or operated in this state liable for the death of or injuries to persons or property resulting from the negligent use or operation of their vehicles in the business of such owner or otherwise by any person using or operating the vehicle with their express or implied permission. Nevertheless, the Graves Amendment (49 USC § 30106) provides:

“An owner of a motor vehicle that rents or leases the vehicle to a

person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if -

(1) the owner (or affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and,

(2) there is no negligence or criminal wrongdoing on the part of the owner (or the affiliate of the owner).

If applicable, this federal statute preempts the vicarious liability imposed by Vehicle and Traffic Law § 388. Graham v Duffy, 50 AD3d 55, 58 (2nd Dept 2008), app dism, 10 NY3d 385 (2008); citing Hernandez v Sanchez, 40 AD3d 446, 447 (1st Dept 2007); Kuryla v Halabi, 39 AD3d 485 (2nd Dept 2005); Murphy v Pontillo, 12 Misc 3d 1146 (Supreme Court Nassau County 2006). The County's leasing of the bus involved in the accident to the MSBA would preclude the imposition of liability pursuant to the Graves Amendment.

However, the County has not established that the bus involved fell within the parameters of its lease with the MSBA. The County has only established that it entered into a Lease and Operating Agreement in 1973 with the MSBA which certainly encompassed motor vehicles. That Lease and Operating Agreement also contemplated the County's leasing and assigning of "rolling stock" to the MSBA with the approval of the MSBA and in the manner therein provided. That Agreement provides: "the lease and assignment of the leased assets shall be effected without further act by the annexation to this Agreement, with the written approval of the County and the Authority endorsed thereon in each instance, of an exhibit identifying the particular leased assets then being subjected to the terms and conditions of this Agreement. . . ." It also provides: "if the County shall determine from time to time to acquire . . . capital assets, including omnibus rolling stock, with the intention of including the same in the coverage of this Agreement, the County shall in each instance submit the proposed contract or purchase order, together

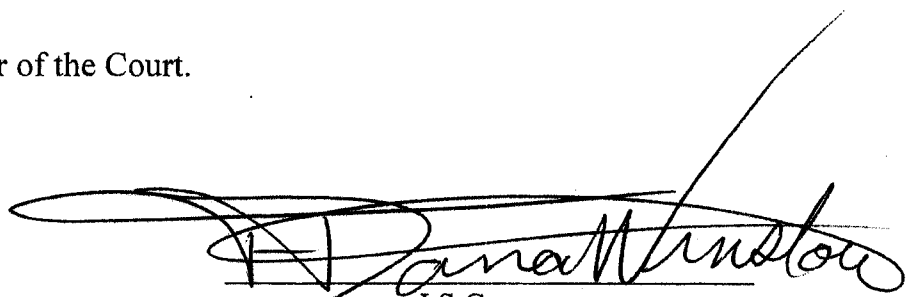
with the plans and specifications, to the Authority for its prior written approval and shall permit the Authority, at its option, to take part in the supervision of the performance of the work.” The bus involved in the accident in question has not been shown to be within those parameters of the Lease.

Turning to the plaintiff’s motion, the Preliminary Conference Order required all summary judgment motions to be made within 30 days of the filing of the Note of Issue. The Note of Issue was filed on April 5, 2011. The plaintiff’s motion which was made on August 3, 2011 is untimely. Deberry-Hall v County of Nassau, 88 AD3d 634, 635 (2nd Dept 2011), citing Miceli v State Farm Mut. Auto Ins. Co., 3 NY3d 725, 727 (2004); Brill v City of New York, 2 NY3d 648, 652 (2004); Castro v New York City Health & Hosps. Corp., 74 AD3d 1005, 1006 (2nd Dept 2010); see also, Van Dyke v Skanska USA Civ. Northeast, Inc., 83 AD3d 1049 (2nd Dept 2011). The motion is not “nearly identical” to the County’s motion and cannot be saved on that ground. Compare, Ianello v O’Connor, 58 AD3d 684 (2nd Dept 2009). Therefore, the plaintiff must demonstrate good cause for his failure to timely file his motion. Deberry-Hall v County of Nassau, *supra*, at p. 635 (citations omitted). Since the plaintiff has failed to do so, this motion is **denied**. Miceli v State Farm Mut. Auto Ins. Co., *supra*; Deberry-Hall v County of Nassau, *supra*. The court notes that the motion would be denied had it been timely as issues of fact abound.

In conclusion, the plaintiff’s motion is **denied** as untimely. The County has established its entitlement to summary judgment dismissing the claim for negligent entrustment, hiring and supervision and those claims are **dismissed**. The County has not established its entitlement to summary judgment dismissing the complaint against it pursuant to the Graves Amendment. That portion of the motion is **denied**, without prejudice.

This constitutes the Order of the Court.

Dated: April 27, 2012


J.S.C.

ENTERED
JUN 04 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE