

**Franklin v New York City Transit Auth.**

2012 NY Slip Op 32842(U)

November 20, 2012

Sup Ct, New York County

Docket Number: 109763/11

Judge: Michael D. Stallman

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice*

PART 21

Index Number : 109763/2011  
FRANKLIN, MAE  
vs.  
NEW YORK CITY TRANSIT  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. 109763/11  
MOTION DATE 10/25/12  
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3 were read on this motion to dismiss

Notice of Motion; Affirmation — Exhibits A-F | No(s). 1; 2  
Answering Affirmation — Exhibit A | No(s). 3  
Replying Affirmation — Exhibits | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order.

## FILED

NOV 26 2012

NEW YORK  
COUNTY CLERK'S OFFICE

FOR MICHAEL D. STALLMAN

Dated: 11/20/12  
New York, New York

 \_\_\_\_\_, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 1. Check one: .....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED  NON-FINAL DISPOSITION
- GRANTED  DENIED  GRANTED IN PART  OTHER
- SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 21

-----X  
MAE FRANKLIN,

Plaintiff,

Index No. 109763/11

-v-

Decision and Order

NEW YORK CITY TRANSIT AUTHORITY, CITY OF  
NEW YORK, ABNER PROPERTIES COMPANY,  
METROPOLITAN TRANSIT AUTHORITY,  
MANHATTAN & BRONX SURFACE TRANSIT  
OPERATING AUTHORITY, and NEW YORK CITY  
DEPARTMENT OF TRANSPORTATION,

Defendants.

-----X

**FILED**

NOV 26 2012

NEW YORK  
COUNTY CLERK'S OFFICE

**HON. MICHAEL D. STALLMAN, J.:**

In this personal injury action arising out of a slip and fall accident near a bus stop and bus shelter, defendants New York City Transit Authority (NYCTA), Metropolitan Transportation Authority s/h/a Metropolitan Transit Authority (MTA), and Manhattan and Bronx Surface Transit Operating Authority (MABSTOA) (collectively the Authorities) move to dismiss the complaint and all cross claims as against them (motion sequence 001). Co-defendant Abner Properties Company (Abner) moves for summary judgment dismissing the complaint and all cross claims as against it (motion sequence 002). Plaintiff opposes both motions.

## BACKGROUND

On January 22, 2011, plaintiff alleges that she slipped and fell at a bus stop on West 14<sup>th</sup> Street near 7<sup>th</sup> Avenue. Plaintiff alleges that she was walking toward the bus stop when she slipped on snow and ice, sustaining injuries. Thereafter, plaintiff commenced this action against the New York City Transit Authority, the City of New York, Abner Properties Company, Metropolitan Transportation Authority s/h/a Metropolitan Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, and the New York City Department of Transportation. The NYCTA, MTA, MABSTOA and Abner now move for summary judgment.

## DISCUSSION

### Motion Sequence 001

The NYCTA and MABSTOA have not met their prima facie burden for judgment as a matter of law. Although the NYCTA and MABSTOA are not legally responsible for maintenance or repair of, or snow or ice removal from, public streets and sidewalks including traffic islands, these defendants have not demonstrated that they did not undertake to perform snow removal here. There is no affidavit of someone with knowledge and no records search has been performed. Pursuant to CPLR 3212 (f), the motion may be denied if facts essential

to justify opposition might exist but cannot be stated at this time. In this case, the NYCTA and MABSTOA are the only entities that would have information pertaining to whether either authority performed snow removal in the area.

The MTA has met its prima facie burden for judgment as a matter of law. “It is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility.” (*Cusick v Lutheran Med. Ctr.*, 105 AD2d 681, 681 [2<sup>nd</sup> Dept 1984].) The MTA’s motion is not premature, as it is a matter of law that it is not responsible for maintenance and repair of the public streets and sidewalks and does not perform the snow removal at issue here.

#### Motion Sequence 002

Defendant Abner has not met its prima facie burden for entitlement to judgment as a matter of law. It has not shown that it had no duty to maintain the sidewalk where plaintiff fell. There is an issue of fact as to where the plaintiff fell. She testified at her statutory hearing that she was walking toward the bus stop in the middle of the sidewalk and that when she fell she landed with her head near the bus shelter. (South Affirmation, Ex. C at 9.) It is unknown how far away she was from the bus shelter when she slipped as there are no measurements included in the motion or opposition papers. Plaintiff’s counsel surmises that plaintiff was

five feet away from the shelter when she slipped because she is five feet, four inches tall and she landed with her head near the bus shelter. However, this is not an exact measurement. However, there is some confusion as to whether plaintiff fell in the area between the bus stop and the curb or on the sidewalk near the shelter. Plaintiff's statutory hearing testimony is unclear as to where she fell. She describes landing with her head near the bench of the bus shelter and also in the area in between the bus shelter and the curb. (*Id.* at 10, 11.) She also testified that her foot was about a foot and a half away from the curb when she slipped. (*Id.* at 12.) Thus, it is unclear from plaintiff's statutory hearing testimony where she fell. New York City Administrative Code §7-210 (a) imposes a duty to maintain a sidewalk in a reasonably safe condition on the abutting property owner. Administrative Code § 7-210 (b) states that "the owner of real property abutting any sidewalk...shall be liable for any injury to property or personal injury...proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition." In this case, defendant Abner argues that it is not responsible for the maintenance of the area where plaintiff fell because she allegedly fell at a bus stop. However, it is unclear at this time where plaintiff actually fell. Therefore, there is an issue of fact as to what entity was responsible for maintenance of the subject area.

**CONCLUSION**

Accordingly, it is hereby

ORDERED that the motion to dismiss by the New York City Transit Authority, the Metropolitan Transportation Authority and the Manhattan and Bronx Surface Transit Operating Authority is granted to the extent that the complaint and any and all cross claims are dismissed in their entirety as against defendant Metropolitan Transportation Authority, with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the motion to dismiss is denied as to the New York City Transit Authority and the Manhattan and Bronx Surface Transit Operating Authority, without prejudice, in light of the need to undertake disclosure from the New York City Transit Authority and the Manhattan and Bronx Surface Transit Operating Authority; and it is further

ORDERED that the motion for summary judgment by Abner Properties Company is denied.

Dated: November 20, 2012  
New York, NY

ENTER:

  
\_\_\_\_\_  
J.S.C.

MICHAEL D. STALLMAN  
J.S.C.

**FILED**  
NOV 26 2012  
NEW YORK  
COUNTY CLERK'S OFFICE