

Alvarez v Metropolitan Transportation

2013 NY Slip Op 32317(U)

June 12, 2013

Sup Ct, Bronx County

Docket Number: 300298/2010

Judge: Betty Owen Stinson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA8

-----X
LAURIE ALVAREZ,

Index No. 300298/2010

DECISION AND ORDER

Plaintiff(s),

Present:
HON. BETTY OWEN STINSON

-against-

METROPOLITAN TRANSPORTATION a/k/a
MTA BUS COMPANY, at times also known as
LIBERTY LINES TRANSIT, INC., DAVID
GIBBS, COUNTY OF WESTCHESTER, and
WESTCHESTER COUNTY DEPARTMENT
OF TRANSPORTATION

Defendant(s)
-----X

STINSON, J.:

This is an action involving an automobile accident that occurred April 2, 2009 at the intersection of Broadway and West 240th Street, Bronx County, New York. An earlier motion was made by the defendant, Liberty Lines Transit, Inc., County of Westchester and Westchester County Department of Transportation to change the venue of this action from Bronx County to Westchester County. The motion was denied by this court for the reason that the Metropolitan Transportation Company deemed by law a resident of the County within the City of New York in which the accident occurred was also a party thus creating a conflict in which public entity was entitled to the conflicting provisions of the CPLR, namely, CPLR §504(1) and CPLR §505(a).

The court then exercised its discretion in favor of the placement in Bronx County because of the presence of the Metropolitan Transportation Authority as a party to the lawsuit. The venue decision was upheld by the Appellate Division, First Department on November 17, 2011 indicating that where there were conflicting claims of venue between governmental entities, the court was left with the discretion to determine which was appropriate and found that the court did not abuse its discretion when it left venue in Bronx County where the accident occurred and where the defendant bus driver resides. However, the court also noted that should it develop that the Metropolitan Transportation Company was improperly named as a defendant, the remaining defendants may still move under CPLR §504(1) for a change of venue.

Before that issue is addressed the court must first address the defendant MTA Bus Company's motion to dismiss plaintiff's action against it on the grounds that it neither owned or operated the bus involved in the accident nor did it employ defendant David Gibbs, the alleged operator of the bus. In support of its claim the movant (hereinafter MTA) offers the affidavit of Marlo A. Polese, Esq., an associate counsel for the defendant MTA Bus Company who claims to have personal knowledge and access to all records regarding the ownership and operation of the buses and bus routes maintained by the MTA Bus Company, employee records and other personal knowledge of the MTA by virtue of her employment.

First, and this is undisputed at this point, Ms. Polese states that the MTA Bus Company is a subsidiary of the Metropolitan Transportation Authority, a public authority and is a separate legal entity from the Metropolitan Transportation Authority. She further avers that defendant MTA Bus Company did not own, maintain, operate or control the bus bearing New York State license plate number L84992 on April 2, 2009. Moreover, she avers that MTA did not employ

defendant David Gibbs nor was he an agent for MTA. Lastly, she states there is no contract or agreement in effect between MTA and any of the remaining defendants. No proof has been offered in opposition to these statement. In fact, the defendants, County of Westchester, Westchester Department of Transportation, David Gibbs and Liberty Lines Transit, Inc. have admitted or acknowledged that the bus in question was owned by the County of Westchester and was being operated as part of the Bee-Line Bus program. Plaintiff has offered no evidence to the contrary except to say that in the answer of the County of Westchester ownership of the subject bus was denied. Unfortunately, there was no allegation in the complaint that the County of Westchester owned the bus therefore there is no denial and presently with the affidavit of Richard L. Stiller, the Director of Surface Transportation for Westchester County Department of Transportation, there is a direct admission that the County of Westchester owned the bus.

The issue of ownership of the bus was not particularly noted in the Westchester defendants' original motion for change of venue. Additionally, there apparently was some reference made to a contractual relationship between the Metropolitan Transportation Authority and Westchester County in the provision of transportation services. That notion seems to have been put to rest by the affidavit of Ms. Polese who states that there was no contract or agreement in effect between the MTA Bus Company and any of the defendants Liberty Lines Transit, Inc., David Gibbs, The County of Westchester and Westchester County Department of Transportation on the date of the accident. Again, plaintiff has not presented any evidence to the contrary to create an issue of material fact involving MTA Bus Company's involvement directly or indirectly in the subject accident. Accordingly, the defendant MTA Bus Company's motion for summary judgment dismissing the complaint and all cross-claims against it is granted.

Turning now to the cross-motion to change venue brought by the remaining defendants. Plaintiff objects to the court's consideration of this motion on the grounds that it is not one for renewal nor are there any new facts not offered on the prior motion that would change the prior determination. Rather, plaintiff argues that the Appellate Division's statement made in the last sentence in the decision, as follows "We note that should the record develop sufficiently to establish that the Metropolitan Transportation Company was improperly named as a defendant, the remaining defendants may still move under CPLR §504(1) for a change of venue." The court reads that to say that should it develop that the MTA Bus Company was an improper defendant from the beginning then the Westchester defendants may properly move for a change of venue. That seems to be what the remaining defendants have done in the form of a cross-motion. The cross-motion is based upon a presumption that if the MTA Bus Company is dismissed from this action then they would be permitted to move for a change of venue. Needless to say, the co-defendants did support the motion for summary judgment dismissing the complaint against MTA Bus Company. But that is not of any significance to this court. What this court must look at now is whether the dismissal of MTA Bus Company triggers a review of the venue of this case.

Since both sides of the issue have given their argument in the cross-motion, opposition and reply papers, the subject is sufficiently briefed for this court to reconsider venue and will do so in an effort to save time, expense and judicial economy.

This court in its original venue decision indicated that even if the MTA was dismissed from the suit after discovery, venue would still be proper in Bronx County because of the residence of the bus driver, David Gibbs, who will be an important witness as to the happening of the accident. Of course, that statement was not a finding by this court but was *dicta* as was the

statement by the Appellate Division that a change of venue motion may be made upon changed circumstances.

At the time of this accident, both the plaintiff, Laurie Alvarez and the defendant driver David Gibbs were residents of Bronx County, New York. At the time this action was commenced on or after January 12, 2010, the plaintiff had moved to Yonkers in Westchester County, New York. Therefore, at the time of the commencement of this action, the only connection to Bronx County other than the place of the accident was the residence of the defendant Gibbs and the alleged ownership and operation of the bus by MTA Bus Company. Had MTA not been named as a party defendant, venue of this action was required by law to be in Westchester County despite the residence of the defendant Gibbs. The question that obviously arises is whether or not the naming of MTA was done, in part, for the purpose of placing venue in Bronx County. On this subject, the court will not speculate. However, I do find it interesting that a bus designated as being part of the Bee-Line with all sorts of signs indicating that it has a connection to Westchester County and Liberty Lines could be thought to be part of the Metropolitan Transportation Company unless an investigation into who the proper parties were to sue was done. There is no evidence that the true ownership of the subjected bus was investigated by plaintiff. Records certainly are available to the public as to who the owner of a vehicle bearing a New York license plate may be. The accident report indicates that the owner of the vehicle was Liberty Lines Transit, 475 Saw Mill River Road, Yonkers, New York 10703. The accident report further indicates that the state of registration was "W.C." presumably representing Westchester County. Additionally, upon a copy of the Summons and Complaint, the MTA Bus Company through its associate council Marlo A. Polese, Esq. sent a letter to plaintiff's attorney on February 1, 2010

advising plaintiff's counsel that MTA Bus Company was not a proper party to the action and sent a Department of Motor Vehicle's print out indicating that Westchester County Department of Transportation was a registered owner of the vehicle and requested a discontinuance of the action against MTA Bus Company. As indicated by defendants' counsel, he received no response from plaintiff's counsel to the letter and the request for a discontinuance. Therefore, plaintiff's counsel knew within thirty (30) days of the service of the Summons and Complaint that MTA Bus Company was denying its ownership of the bus, which was supported by the public record proof that the owner was not MTA Bus Company. Now, some two years have passed in getting a determination as to whether MTA Bus Company was a proper party for this action or not. After this decision, there is clearly no longer an issue.

In light of the history and what plaintiff's lawyer knew and when he knew it, and his failure to respond to a request to dismiss an improper party from the lawsuit lends credence to the suggestion that by continuing to maintain MTA Bus Company as a party to this lawsuit and resisting a change of venue to Westchester County where the plaintiff and all but one defendant lives or has a place of business was improper.

Pursuant to CPLR §504(1), the place of trial of all actions against counties, cities, towns, villages, school districts and district corporations or any of their officers, board or departments shall be, for a county, in such county. The statute is mandatory and, in light of the fact that the only non-resident witness is Mr. Gibbs, venue must be placed in Westchester County.

Accordingly, the defendant MTA Bus Company's motion to dismiss the plaintiff's and all cross-claims against it is granted and the Clerk shall enter judgment dismissing same. The remaining case shall be transferred by the Clerk of Bronx County to the Clerk of the Court of

Westchester County forthwith. As the cross-motion is made on behalf of governmental entities of Westchester County and Westchester County Department of Transportation, all fees for the transfer shall be waived.

This constitutes the decision and Order of the court.

June 12, 2012
Bronx, New York



BETTY OWEN STINSON, J.S.C.