

**Baxter v Metropolitan Transp. Auth.**

2017 NY Slip Op 31891(U)

September 5, 2017

Supreme Court, New York County

Docket Number: 150978/2013

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED  
*Justice*

PART 2

-----X

DAWN BAXTER,  
Plaintiff,

INDEX NO. 150978/2013

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 001

METROPOLITAN TRANSPORTATION AUTHORITY, NEW  
YORK CITY TRANSITY AUTHORITY, KEVIN FONTAINE, MTA  
BUS COMPANY, RHONDA RUSSELL

**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 81, 82, 83

were read on this application to/for Summary Judgment

Upon the foregoing documents, it is

Ordered that the **motion is granted in part and the cross motion is denied.**

In this personal injury action, defendant Kevin Fontaine, sued herein as Kevin Fonta (“Fontaine”), Metropolitan Transportation Authority (“MTA”), MTA Bus Company (“MTA Bus”), and New York City Transit Authority (“NYCTA”) move, and defendant Rhonda Russell (“Russell”) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the Amended Complaint.

**BACKGROUND**

Plaintiff Dawn Baxter commenced this action seeking to recover damages for personal injuries she allegedly sustained on November 9, 2011, when the bus on which she was traveling as a passenger, Express Bus #BM2 bearing New York State registration plate number L94846, collided with another vehicle. Defendants MTA, MTA Bus, and NYCTA allegedly owned and/or maintained the bus, and Fontaine was operating the bus at the time of the accident. Russell was operating the other vehicle, which also had a passenger.

In a related action (*Russell v MTA Bus Co*, Sup Ct, NY County, Bluth, J., Index No. 158685/12), Russell and her passenger sought to recover damages from MTA Bus and Fontaine for personal injuries they allegedly sustained in the accident. By order dated July 22, 2015, this Court (Bluth, J.), directed that the two actions have joint discovery and be tried jointly (Order, Not of Mot, Exh J).

Plaintiff claims to have suffered injury to her right shoulder, lower back, and left knees as a result of the accident. She later went by car to the hospital, where she obtained a CT scan of the cervical spine and was discharged with medication. Thereafter, she received physical therapy, injections for pain management for her lower back, repeated MRIs, and ambulatory arthroscopic surgery for a rotator cuff injury.

The amended Complaint alleges, in essence, that defendants were negligent in the ownership, maintenance and operation of the vehicles. The Bill of Particulars contains similar allegations and outlines the personal injuries allegedly sustained by plaintiff as a result of the accident (Bill of Particulars, Not of Mot, Exh K).

Defendants filed answers, generally denying the allegations in the amended Complaint and asserting various affirmative defenses. The answers of Fontaine and MTA Bus, MTA, and NYCTA, also include cross claims against Russell for contribution or indemnification. Russell cross-claims against co-defendants for contribution and/or indemnification.

Defendants now seek summary judgment dismissing the amended Complaint on various grounds, including that the accident gave rise to an emergency situation absolving Fontaine, MTA, and MTA Bus of any liability.

## DISCUSSION

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York, supra*). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As stated, the amended Complaint alleges a cause of action against defendants sounding in negligence. Negligence is the breach of a duty of care owed by defendant to plaintiff, resulting in injury (*see Pasternack v Laboratory Corp. of America Holdings*, 27 NY3d 817, 825 [2016]). Negligence involves the failure to exercise the degree of care that a reasonably prudent person would exercise in the same situation (*see Bello v Transit Auth. Of NY City*, 12 AD3d 58, 60 [2d Dept 2004]). The amended Complaint alleges, in essence, that defendants were negligent in the ownership, maintenance, and operation of the vehicles that collided, resulting in injury to plaintiff.

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The amended Complaint and cross claims against MTA must be dismissed. MTA is a public benefit corporation created to oversee the mass transportation systems in New York City, as well as commuter transportation and related services within the metropolitan transportation commuter district (*see* MTA Act; Public Authorities Law §§1260 - 1269-b; *see also New York Pub. Interest Research Group Straphangers Campaign, Inc. v Metropolitan Transp. Auth.*, 309 AD2d 127, 134 [1<sup>st</sup> Dept 2003]). The MTA serves as an umbrella organization for eight operating agencies, including MTA Bus and NYCTA (Public Authorities Law §§1261-1279).

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 [2d Dept 1984]). Here, liability is predicated on the negligent ownership, maintenance, and operation a bus driven by an employee of MTA Bus that collided with another vehicle. Although MTA Bus is one of MTA's subsidiary corporations, MTA Bus is a distinct legal entity for purposes of suit. MTA may not be liable for torts committed by a subsidiary arising out of the operations of the subsidiary corporation (*see Noonan v Long Is. R. R.*, 158 AD2d 392, 393 [1<sup>st</sup> Dept 1990]). Thus, in this action alleging negligence in the ownership, maintenance, and control of a bus owned by MTA Bus, MTA is not a proper party, and the Complaint and cross claims against it are dismissed.

Defendants also seek dismissal of the amended Complaint and cross claims against Fontaine based on the emergency doctrine. They argue that Fontaine acted in response to an emergency situation when Russell's vehicle suddenly cut in front of the bus he was operating.

The emergency doctrine holds that those faced with a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for thought, deliberation, or consideration, or causes them to be reasonably so disturbed that they are compelled to make a speedy decision without weighing alternative courses of conduct, they may not be negligent if the

actions taken are reasonably prudent in the emergency context (*see Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]). Although the existence of an emergency and reasonableness of a party's response to it will ordinarily present questions of fact, they may, under appropriate circumstances, be determined as a matter of law (*Bello v Transit Auth. Of N.Y. City*, 12 AD3d 58, 60 [2d Dept 2004]).

To support their position, defendants offer, among other things, transcripts from the examinations before trial ("EBTs") of the parties and the affidavit of another passenger on the bus Fontaine was operating when the accident occurred. At an EBT held on January 15, 2014, Fontaine testified that Russell's vehicle cut off his bus, without any signaling or forewarning, forcing him to press hard on the brake to try to avoid the collision (Fontaine EBT, Not Mot, Exh M, pp. 16-17). Fontaine also testified that, prior to the accident, he had been traveling in the center lane, moving with the flow of traffic (*id.* at 15-16). He also stated that Russell's vehicle had been traveling in the right lane, and yellow taxi had been stalled ahead (*id.* at 20-21). He further stated that Russell's vehicle hesitated and then proceeded into the center lane without signaling (*id.* at 22). He stated that, at the moment of impact, his right foot was on the brake (*id.* at 17). In addition, he stated that as a result of the impact, Russell's car hit the vehicle in front of hers (*id.* at 19).

Plaintiff also testified, at an EBT held on May 5, 2015, that she saw the stalled taxi in the right lane (Baxter EBT, Not of Mot, Exh M, pp. 33-34). However, she also stated that she never saw the red car prior to the accident (*id.*).

In an affidavit, non-party witness Susan Johns, another passenger on the bus, stated that the accident occurred when a small, red car cut off the bus from the right side (Johns Affid, Not of Mot, Exh P). She also stated that, although the bus driver tried to brake after the red car cut off the bus, the bus nevertheless collided with the red car (*id.*).

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In opposition, however, Russell offers a different version of the facts. She relies on the transcript of her EBT in the related action, held on February 1, 2012, during which she testified that she had been traveling north on the FDR Drive at approximately 5 miles per hour prior to the accident; that the traffic had been “getting heavy” at the time of the accident; that she had exited the Brooklyn Bridge and proceeded to the center lane of the three-lane FDR Drive, where she had remained for about two or three minutes before the bus struck the rear of her vehicle (Russell EBT, Not of Mot, Exh L, pp. 16-19). Russell stated that she had not seen the bus before it struck her vehicle; that she had not changed lanes after she exited the Brooklyn Bridge and entered the FDR Drive; that after the collision, her vehicle spun around to face oncoming traffic and went forward into the wall; that she did not know what lane the bus was in prior to the collision; and that the back of the bus had been on her driver’s side door after the collision (*id.* at 21-22).

The parties offer different versions of the events that led up to the subject accident. Thus, it is up to the trier of fact to determine whether Fontaine was confronted with a sudden and unexpected circumstance not of his own making and that, under the circumstances, his actions were reasonable and prudent in the emergency context (*see Odikpo v American Transit, Inc.*, 72 AD3d 568, 569 [1<sup>st</sup> Dept 2010]). Thus, the branch of the motion that seeks summary judgment based on the emergency doctrine must be denied.

Defendants further argue that dismissal of the action is warranted because plaintiff cannot establish that the accident caused the physical injuries alleged in this action. Defendants maintain that the physical injuries alleged by plaintiff resulted from a prior lumbar fusion surgery and other degenerative conditions, and not from the November 9, 2011 accident.

On this point, defendants’ submissions include the report of an independent medical examination of plaintiff, provided by a licensed Orthopedist, who may be called to provide opinion testimony at trial (Expert Exchange, Not of Mot, Exh O). The doctor’s report indicates that

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plaintiff's medical records "indicate a prior injury approximately in 2003 in which she sustained apparently significant injuries to her lower back requiring surgery" (*id.*). The report also notes plaintiff's prior surgeries, including "excision of a soft tissue mass to the anterior aspect of the right shoulder in 2006, bilateral bunionectomy in 2006 and L5-S1 lumbar fusion approximately in 2003 as well as breast reduction in 2011" (*id.*). The report further states:

"The claimant's current subjective findings on sensory testing at least are felt to represent significant modification and exaggeration on the part of the claimant and are unconfirmed by the medical records. In fact some records claim cervical and lower back symptoms radiating to the lower left while others claim symptoms radiating to the right. There are pre-existing degenerative changes present on the MRI and even the emergency room x-ray."

(*id.*). However, the report recommends a neurological independent medical examination, as well as an independent radiological examination of the MRI studies to evaluate, if possible, what pathology predated the accident (*id.*). Thus, defendants' offer of proof does not refute plaintiff's claim, as a matter of law, that the accident caused the physical injuries alleged in this action.

Further, defendants do not meet their initial burden of presenting competent evidence that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law section 5102. (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [1<sup>st</sup> Dept 2011]). The inconclusive report of the independent medical examination performed on plaintiff is insufficient to prove the absence of a "serious injury." Given the foregoing, the branch of the motion that seeks summary judgment based on the failure of causation is also denied. Thus, the motion for summary judgment by Fontaine, MTA, MTA Bus, and NYCTA is granted to the extent of dismissing the claims against the MTA and the motion is otherwise denied.

Turning to Russell's cross motion for summary judgment, a review of the submissions reveals nothing to support the assertion by Russell that the issue of liability has already been



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determined by the Court. Furthermore, Russell fails to demonstrate as a matter of law that the accident was caused by Fontaine's failure to maintain a safe distance from her vehicle. In fact, the Court in the related action concluded that "[t]he jury will hear the evidence, evaluate the witnesses' credibility, decide how the accident happened and which parties, if any, are liable" (*Russel v MTA Bus Co.*, Sup Ct, NY County, dated November 5, 2015, Bluth, J., Index No. 158685/12). Thus, the cross motion for summary judgment dismissing the amended Complaint is also denied.

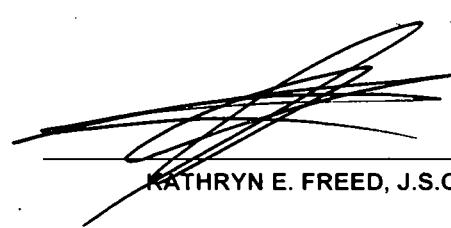
Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by defendants Kevin Fonta, Metropolitan Transportation Authority, MTA Bus Company, and New York City Transit Authority seeking summary judgment dismissing the claims and cross claims against them is granted to the extent that the all claims against Metropolitan Transportation Authority are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the cross motion by defendant Rhonda Russell is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

9/5/2017  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE.
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