SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

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EDNA ASTUTO,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY AND JOHN DOE,

Defendant.

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DECISION AND ORDER

Index No. 154861/2016

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Order to Show Cause/Notice of Motion and Affidavits/Affirmations/ Memo of Law annexed	1
Answering Affidavits/Affirmations/ Memo of Law	2
Notice of Cross-Motion and Affidavits/ Affirmations annexed	3
Answering Affidavits/Affirmations to Cross Motion	4
Reply Affidavits/Affirmations	5

LISA A. SOKOLOFF, J.

Plaintiff Edna Astuto commenced this action against Defendants for her personal injury on the theory that Defendant John Doe, an unknown bus driver, negligently closed the door on her raincoat when she was alighting the bus, which was owned by Defendant New York City Transit Authority, and caused her injury. Defendants move for summary judgement pursuant to CPLR § 3212 to dismiss the claim. Plaintiff opposes and cross-moves for leave to serve an amended Notice of Claim upon New York City Transit Authority.

According to Plaintiff Astuto's affidavit, on May 21, 2015, at approximately 7:30 am, when she was exiting the bus near 200 Vesey Street in New York county, the bus door closed on her raincoat and caused her to fall and sustain a dislocated and fractured right elbow and a rotator cuff tear in her right shoulder. The New York City Transit Authority provides video captured by a camera on the bus showing that the door never moved when Plaintiff exited the bus. In fact, it appears Plaintiff fell because her raincoat got caught on a hinge in the opened stationary door of the bus.

Defendants move for summary judgement for dismissal on the grounds that Defendants neither breached the duty of care owed Plaintiff, nor caused the injury.

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a *prima facie* showing of entitlement to a judgment as a matter of law (*Alvarez v Prospect Hospital.*, 68 NY2d 320, 324 [1986]; *Taveras v 1149 Webster Realty Corp.*, 134 AD3d 495 [1st Dept 2015]). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient (*Zuckerman v City of New York*, 49 NY2d 557, 562 ([1980]).

It is well-settled that to establish a *prima facie* case of negligence, Plaintiff must show that defendant owed a duty of care to plaintiff, breached the duty, and that the breach was a substantial cause of the events that produced the injury (*Derdiarian v Felix Contr. Co.*, 51 NY2d 308, 315 [1980]; *Maniscalco v. New York City Transit Authority*, 95 A.D.3d 510 [1st Dept 2012]).

Here, the video clearly shows that Plaintiff did not fall because of the operation of the bus door. Defendants have met their initial burden of establishing entitlement to judgment on the issue of negligence. The burden of proof then shifts to Plaintiff to prove there is a material issue of fact requiring a trial.

Plaintiff opposes the motion by arguing that the original notice of claim is broad enough to cover the current theory of liability, therefore there is a triable issue on whether Defendant failed to provide a safe egress. To establish a triable issue of material fact, Plaintiff must do more than merely allege failure to provide safe egress. She must identify the defects or conditions which caused the accident and articulate Defendant's negligence in causing or permitting those conditions to exist. By failing to specify how the egress provided was unsafe and was caused by Defendants, Plaintiff has failed to raise a question of fact necessary to defeat Defendant's motion.

Even if Plaintiff had established a triable issue, her action should nonetheless be dismissed because it did not articulate its basis for liability in the Notice of Claim. A plaintiff may not add a new theory of liability which was not included in the notice of claim (*Monmasterio v New York City House. Auth.*, 39AD3d 354, 355 [1st Dept 2007]). General Municipal Law §50-e [6] authorizes only good-faith, non-prejudicial technical changes, but not substantive changes in the theory of liability (*Mahase v Manhattan & Bronx Surface Tr. Operating Auth.*, 3AD3d 410, 411 [1st Dept 2004]; *Semprini v Village of Southampton*, 48 AD3d 543, 545 [2d Dept 2008]).

Here, Plaintiff is seeking to add a new theory of liability, a substantive change in the theory of liability. It is a new, distinct theory because the original one is the bus driver

operated the bus negligently, while the new one is New York City Transit Authority negligently failed to maintain the hinge in the bus's door in good condition.

Furthermore, Plaintiff never sought leave to serve a late notice of claim containing her new theory pursuant to General Municipal Law §50-e[5], and it was not asserted until after the one-year-and-90-day statute limitations period for a late notice expired (Ahnor v. City of New York, 101 AD3d 581 [1st Dept 2012]). Therefore, cross motion for leave to amend the Notice of Claim is denied.

Accordingly, this Court finds that the Defendants' motion for summary judgment to dismiss the complaint is granted, and Plaintiff's cross motion for leave to amend the Notice of Claim is denied. A copy of the decision will be e-filed.

Dated: December 18, 2017
New York, New York

ENTER:

Lisa A. Sokoloff, J.C.C.