

Han v New York City Tr. Auth.
2020 NY Slip Op 34351(U)
December 28, 2020
Supreme Court, New York County
Docket Number: 152872/2013
Judge: Suzanne J. Adams
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SUZANNE J. ADAMS PART IAS MOTION 21

Justice

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INDEX NO. 152872/2013

ASHLEY HAN, ESTATE OF KI SUCK HAN, SE RIM HAN,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 011

- v -

NEW YORK CITY TRANSIT AUTHORITY,

**DECISION + ORDER ON
MOTION AND CROSS-MOTION**

Defendant.

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NEW YORK CITY TRANSIT AUTHORITY

Third-Party
Index No. 595681/2016

Plaintiff,

-against-

NAEEM DAVIS

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 011) 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353

were read on this motion to/for DISMISS.

This wrongful death matter arises out of the December 3, 2012, incident in which plaintiff's decedent was pushed by third-party defendant Naeem Davis ("Davis") during an altercation on the platform of the southbound Q train at the 49th Street station in Manhattan, resulting in the decedent's falling onto the subway tracks and being killed by an oncoming train. Davis was arrested and charged in the decedent's death, remained incarcerated until his trial, and ultimately was acquitted of all charges and released from jail on July 17, 2017. Plaintiff commenced this action against defendant New York City Transit Authority

(“NYCTA”) in March 2013, issue was joined, and NYCTA commenced the third-party action against Davis in September 2016. Davis did not answer or appear in the third-party action, resulting in NYCTA’s obtaining a default judgment against Davis by order of this court dated April 12, 2018. The parties herein were recently before this court when Davis moved to vacate the default judgment and NYCTA cross-moved to vacate the note of issue, compel discovery and enlarge its time to move for summary judgment of any counterclaims, or alternatively to stay trial pending completion of discovery and any motion practice. By decision and order of this court dated August 5, 2020, the default judgment against Davis was vacated and NYCTA’s cross-motion was granted to the extent that there was to be expedited discovery in the third-party action and an extension of time for NYCTA to move to dismiss counterclaims, if any.

In the motions now before the court, Davis moves pursuant to CPLR 3211(a)(7) and 3211(c) to dismiss the Third-Party Complaint. NYCTA cross-moves pursuant to CPLR 3107 and § 3215 for an order compelling Davis’ deposition pursuant to notice, granting default judgment to NYCTA against Davis for his failure to appear and answer the Third-Party complaint, and for inquest against Davis. For the reasons set forth below, the motion and cross-motion are both denied, and the parties are ordered to comply with the directives of the August 5, 2020, decision which ordered expedited discovery in the third-party action and an extension of time for NYCTA to move to dismiss counterclaims, if any.

Motion to Dismiss

Initially, the court notes that the instant motion to dismiss is timely. The August 5, 2020, order’s directive that Davis serve an answer within 30 days of entry of said order did not preclude him from moving to correct the pleadings pursuant to CPLR 3024(b), and the court granted Davis’ request to extend the time to so move to September 1, 2020. Thereafter, NYCTA

agreed to withdraw the paragraph of the Third-Party Complaint that was the subject of Davis' motion, and Davis formally withdrew his motion by letter to the court dated September 22, 2020. This court then issued a short form order dated September 24, 2020, and uploaded to NYSCEF on September 29, 2020, which formally closed out the motion. Pursuant to CPLR 3024(c), Davis had ten days from the disposition of his motion to serve a responsive pleading (or otherwise move pursuant to CPLR 3211). Thus, whether the 10-day period began to run on September 22, 24 or 29, the instant motion – filed and served on October 2, 2020 – is timely.

With respect to the substance of the dismissal motion, it is well established that “[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law [cite omitted].” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The Third-Party Complaint alleges in sum that Davis “intentionally, knowingly, and recklessly battered and assaulted and pushed the decedent,” thereby causing his death, and that plaintiff’s damages were proximately caused by Davis’ “intentional, knowing and/or reckless act of pushing the decedent . . .” (Affirmation in Opposition to Third-Party Defendant’s Motion to Dismiss and in Support of the Instant Cross-Motion, Exhibit B, ¶¶ 6, 7) NYCTA has asserted causes of action against Davis sounding in the classic third-party claims of indemnification and contribution, *i.e.*, that if plaintiff was injured, these injuries were the result, in whole or in part, by the acts of Davis and not NYCTA. According NYCTA the benefit of a favorable inference, it has alleged sufficient facts to state such claims. It is undisputed that Davis pushed the decedent, causing him to fall

onto the subway tracks. Whether Davis' acts can be considered to relieve NYCTA of whole or partial liability for the decedent's death is a question for the trier of fact, and indeed is only one of several questions of fact in this case surrounding each party, as well as the decedent.

Davis' acquittal of criminal charges in causing the decedent's death is not dispositive of any proceedings against him in this civil action. As Davis himself acknowledges, the standard of proof in a civil action is lower than the "proof beyond a reasonable doubt" standard in a criminal proceeding. *Reed v. State of New York*, 78 N.Y.2d 1, 8 (1991). The Court of Appeals in *People v. Boutin*, 75 N.Y.2d 692, 695-96 (1990), stated that "the carelessness required for criminal negligence is appreciably more serious than that for ordinary civil negligence," and reversed a conviction of criminally negligent homicide, holding that "[i]n the present case, there is no question that defendant's failure to see the vehicle stopped in the lane ahead of him resulted in the fatal accident. That failure may well constitute civil negligence. But the proof does not establish *criminal* negligence." *Boutin*, 75 N.Y.2d at 697 (emphasis in original). Accordingly, Davis' motion to dismiss the Third-Party Complaint is denied.

Cross-Motion to Compel and for a Default

As discussed above, Davis has not defaulted in answering or otherwise responding to the Third-Party Complaint, and thus a default judgment is not warranted. With respect to the outstanding discovery in the third-party action, the parties are again directed to proceed with discovery in the third-party action on an expedited basis. It should go without saying that the parties are to abide by the scope and methods of disclosure as set forth in CPLR Article 31. Discovery shall conclude on or before March 31, 2021, and NYCTA shall have 45 days from the completion of discovery to file a motion for summary judgment with respect to any

counterclaims asserted by Davis. Pursuant to CPLR § 3126(2), Davis' failure to appear for a deposition shall result in his being precluded from offering his own testimony at the time of trial.

Accordingly, it is hereby

ORDERED that Davis' motion pursuant to CPLR 3211(a)(7) and 3211(c) to dismiss the Third-Party Complaint is denied; and it is further

ORDERED that pursuant to CPLR 3211(f) Davis shall serve an answer to the Third-Party Complaint upon all parties within 10 days of entry of the instant order; and it is further

ORDERED that NYCTA's cross-motion pursuant to CPLR 3107 and § 3215 to compel and for a default is denied; and it is further

ORDERED that all discovery in the third-party action shall be completed on or before March 31, 2021, and NYCTA shall have 45 days from the completion of said discovery to move for summary judgment with respect to any counterclaims asserted in the third-party action; and it is further

ORDERED that pursuant to CPLR § 3126(2), Davis' failure to appear for a deposition shall result in his being precluded from offering his own testimony at the time of trial.

This constitutes the decision and order of the court.

12/28/2020
DATE

SUZANNE J. ADAMS, J.S.C.

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