

<b>Miello v City of New York</b>
2021 NY Slip Op 33013(U)
November 23, 2021
Supreme Court, Richmond County
Docket Number: Index No. 151068/2021
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

-----X  
JOMARIE R. MIELLO,  
Plaintiff,

Part C-2  
Present:  
Hon. Thomas P. Aliotta

-against-

THE CITY OF NEW YORK, MTA NEW YORK  
CITY TRANSIT AUTHORITY, ACCESS-A-RIDE  
MV PUBLIC, MV PUBLIC TRANSPORTATION, INC.,  
And "JOHN DOE", name of driver being unknown,  
Defendants.

DECISION AND ORDER

Index No: 151068/2021  
Motion No. 001

-----X  
Recitation of the following papers numbered "1" through "4" as required by CPLR 2219(a) were marked fully submitted on September 15, 2021:

	<b>Papers Numbered</b>
Defendants' Notice of Motion and Affirmation for Summary with Exhibits and Supporting Papers.....	1, 2
Plaintiff's Affirmation in Partial Opposition with Exhibits and Supporting Papers .....	3
Defendants' Reply with Exhibit.....	4

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Upon the foregoing, defendants' motion for an Order, *inter alia*, pursuant to CPLR 3211 and 3212 is granted as to defendants, CITY OF NEW YORK, ACCESS-A-RIDE, NEW YORK CITY TRANSIT AUTHORITY S/H/A MTA NEW YORK CITY TRANSIT AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY S/H/A ACCESS-A-RIDE, and denied as to defendants, MV PUBLIC, MV PUBLIC TRANSPORTATION, INC., as follows:

Defendants' The City of New York, New York City Transit Authority s/h/a MTA New York City Transit Authority, New York City Transit Authority s/h/a Access-A-Ride, MV Public

Transportation, Inc. s/h/a MV Public and MV Public Transportation, Inc., move for an Order pursuant to CPLR 3211 and 3212 to dismiss the plaintiff's complaint on the grounds that plaintiff cannot make out a prima facie case. Alternatively, defendants The City of New York and Access-A-Ride as well as NYCTA s/h/a Access-A-Ride, move to dismiss the complaint against them as they are improper parties to this action. Finally, defendants move to have their answer deemed timely served should this Court deny that branch of the motion seeking an order of dismissal.

This matter arises from an accident that occurred on September 30, 2020, at approximately 1:00 P.M. while plaintiff was a passenger on an Access-A-Ride vehicle that was travelling on Victory Boulevard in Staten Island, New York. It is alleged that during the ride, her unsecured wheelchair flipped over, causing plaintiff to strike her head on the floor of the vehicle.

In support of their motion, defendants' attach, inter alia, the transcript from the statutory hearing conducted pursuant to Public Authorities Law. They argue that the testimony contained in the transcript bears no resemblance to the allegations in the Notice of Claim. In comparison, the Notice of Claim states that the motor vehicle owned and operated by the defendants caused plaintiff's unsecured wheelchair to flip over, which caused her to be injured. The Summons and Complaint alleges the same. However, plaintiff testified at the statutory hearing that she did not recall the date of the accident, that she was not in a wheelchair but had a walker, that Maria her aide was not with her on that day and that she hit her head on the sidewalk outside of the Access-A-Ride van, not in the van itself.

In opposition, plaintiff attaches the affidavit of Maria Duenas, a home health aide, who was assigned to the plaintiff on the day of the accident. In her sworn affidavit Maria states that

on September 30, 2020, she was accompanying the plaintiff to a medical appointment in an Access-A-Ride vehicle. She further states that when the Access-A-Ride vehicle arrived, the plaintiff was placed on a lift, while in her wheelchair, and placed into the vehicle. Duenas was also in the van, sitting to the right of the plaintiff. At approximately 1:00 P.M. while climbing a hill on Victory Boulevard, Duenas observed the plaintiff's wheelchair tilt and fall backwards, causing the plaintiff to strike the back of her head, losing consciousness, on the floor of the Access-A-Ride vehicle. Duenas further stated that she observed that plaintiff's wheelchair was not locked and strapped into the vehicle. Ms. Duenas called 911. An ambulance arrived and plaintiff was taken to Staten Island University Hospital where she was admitted for several days. Prior to plaintiff being removed from the scene, a representative from Access-A-Ride came to the site and spoke with the driver of the vehicle, but did not speak to Ms. Duenas or the plaintiff.

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 eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted] ). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, 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" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324, [1986] [citations omitted]).

**I) Defendants' motion pursuant to CPLR § 3211 and § 3212. Plaintiff cannot establish a prima facie case on liability based upon the statutory hearing testimony.**

In the instant case, defendants' have demonstrated that the statutory hearing transcript does not corroborate the allegations in the notice of claim and summons and complaint.

However, under the facts presented, summary judgment is not warranted since plaintiff has personally verified the notice of claim and complaint, both of which contained the same factual allegations. In essence, these are prior sworn statements. Therefore, any conflict between the plaintiff's statutory hearing testimony and the other sworn evidence presented by defendants is a question of credibility for the jury (*Brown v. Kass*, 91 AD3d 894, 895 [2d Dept. 2012]), irrespective of whether the inconsistency is with plaintiff's testimony or that of another witness (*see Rodriguez v. New York City Housing Authority*, 194 AD2d 460, 462 [2d Dept. 1993]).

It is noted that defendants' assertions that plaintiff had 60 days to execute the transcript is without merit because "[T]he provisions of the Civil Practice Law & Rules...are not applicable to a pre-action [statutory] hearing" (*Colon v. Martin*, 2016 WL 11681304, p.2 [Sup. Ct., Aliotta, J.]), *affirmed* 170 AD3d 1109, 1112 [2d Dept. 2019], *order affirmed by* 35 NY3d 75 [2020]). Further, the affidavit of plaintiff's aide, Ms. Duenas, who was allegedly with the plaintiff on the day of the accident, raises issues of fact as to how the accident happened. Accordingly, defendant failed to establish its *prima facie* entitlement to summary judgment and this branch of defendants' motion is denied.

**II) Defendants' motion pursuant to CPLR § 3211 and § 3212. The City of New York and New York City Transit Authority s/h/a Access-A-Ride are improper parties.**

Defendants also move to dismiss the causes of action against the City of New York and Access-A-Ride as improper parties, which is unopposed by plaintiff. In support of their motion, defendants, City of New York and Access-A-Ride attach the affidavit of Robin R. Cooper, the Assistant Director of Risks and Insurance Management Department for the MTA. In the sworn, notarized affidavit, Ms. Cooper states in relevant part that Access-A-Ride is merely the name of the Paratransit Program and not a legal entity. Further she states, that the City of New York is a

separate municipal corporation and with no connection to the Paratransit Program. In addition, the City of New York and Access-A-Ride do not own, lease or service the vehicle involved in the accident, nor do they hire, train, supervise, oversee or employ any of the Paratransit drivers. Plaintiff has not opposed this portion of the motion. Therefore, summary judgment is granted to the City of New York and Access-A-Ride.

**III) Defendants' motion pursuant to CPLR § 3211 and § 3212. MTA New York City Transit Authority is an improper party pursuant to 49 USC § 30106 ("Graves Amendment").**

Defendant, NEW YORK CITY TRANSIT AUTHORITY s/h/a MTA NEW YORK CITY TRANSIT AUTHORITY ("NYCTA"), also moves to dismiss the action against it under 49 USC § 30106 ("Graves Amendment"). "Under the Graves Amendment, the owner of a leased vehicle will not be held vicariously liable for the negligent operation of that vehicle where the owner proves that it is engaged in the business of renting or leasing motor vehicles and it was not otherwise negligent" (*Casine v Wesner*, 165 AD3d 749, 749 [2d Dept 2018]; see 49 USC § 30106; *Graham v Dunkley*, 50 AD3d 55, 58 [2d Dept 2008]).

In support of this branch of their motion, defendant once again relies on the affidavit of Robin R. Cooper as well as a Lease between the NYCTA and MV Public Transportation which remained in effect through the date of the accident on September 30, 2020. The lease was authenticated by Ms. Cooper's affidavit, which states that the NYCTA leases vehicles to the participating vendors of the Paratransit Program. The affidavit further states that the NYCTA did not hire, train, supervise, or employ the Paratransit drivers, nor have a say in how the vehicles are maintained or driven.

Here, defendants have made the requisite showing of entitlement to summary judgment pursuant to the statute. The affidavit of Robin R. Cooper establishes that NYCTA is the title

owner of the vehicle which was leased to defendant MV Public Transportation. By lease agreement, MV Public Transportation was required to maintain and repair the vehicle. There are no allegations that New York City Transit Authority was negligent with respect to the mechanical operation of the vehicle at issue. Therefore, this branch of the motion is also granted.

The court has considered the remaining arguments and finds them to be unavailing.

Accordingly, it is hereby

ORDERED that defendants' motion for partial summary judgment on the issue of liability is denied without prejudice to renew upon further discovery, and it is further

ORDERED that defendants' motion for summary judgment dismissing the complaint against defendants, THE CITY OF NEW YORK AND ACCESS-A-RIDE, is granted without opposition and the complaint is dismissed in its entirety against defendants, THE CITY OF NEW YORK AND ACCESS-A-RIDE, and it is further

ORDERED that the defendants' motion for summary judgment dismissing the complaint as against defendant, MTA NEW YORK CITY TRANSIT AUTHORITY, is granted; the complaint is dismissed in its entirety as against defendant, MTA NEW YORK CITY TRANSIT AUTHORITY; and it is further

ORDERED, that the remaining parties shall appear virtually for a compliance conference on December 2, 2021; and it is further

ORDERED, that the Clerk shall transfer this action to Transit Part 2; and it is further

ORDERED, that the caption of this action shall be amended to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

-----X  
JOMARIE R. MIELLO,

Plaintiff,

Index No: 151068/2021

-against-

MV PUBLIC, MV PUBLIC TRANSPORTATION,  
INC., and "JOHN DOE", name of driver being unknown,

Defendants.

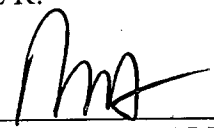
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and it is further

ORDERED, that defendants shall serve a copy of this Order with Notice of Entry through  
NYSCEF; and it is further

ORDERED, that the Clerk shall enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

ENTER:



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HON. THOMAS P. ALIOTTA, J.S.C.

11/23/21