

82 A.D.3d 1165
Supreme Court, Appellate Division,
Second Department, New York.

Leslie Karen LARIVIERE, appellant-respondent,
v.
NEW YORK CITY TRANSIT AUTHORITY,
respondent-appellant, et al., defendants.

March 29, 2011.

Synopsis

Background: Pedestrian struck by a bus operated by a city transit authority sued the authority to recover damages for personal injuries. The Supreme Court, Kings County, Sherman, J., denied pedestrian's motion for leave to amend her notice of claim and complaint, but granted summary judgment against the authority on the issue of liability. The parties cross-appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] evidence established authority's liability, but

[2] pedestrian should have been granted leave to amend her notice of claim and complaint.

Ordered accordingly.

Attorneys and Law Firms

****232** Ronemus & Vilemsky, New York, N.Y. (Michael B. Ronemus and Susan J. Kerker of counsel), for appellant-respondent.

Wallace D. Gossett, Brooklyn, N.Y. (Lawrence Heisler of counsel), for respondent-appellant.

DANIEL D. ANGIOLILLO, J.P., ANITA R. FLORIO,
JOHN M. LEVENTHAL, and ROBERT J. MILLER, JJ.

Opinion

***1165** In an action to recover damages for personal injuries, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Kings County (Sherman, J.), dated ***1166** March 10, 2010, as denied those branches of

her motion which were pursuant to General Municipal Law § 50-e(6) and CPLR 3025(b) for leave to amend her notice of claim and complaint, respectively, to assert a derivative cause of action to recover for loss of services on behalf of her husband, nonparty John David Lariviere, and the defendant New York City Transit Authority cross-appeals, as limited by its brief, from so much of the same order as granted that branch of the plaintiff's motion which was for summary judgment against it on the issue of liability.

ORDERED that the order is reversed insofar as appealed from, on the facts and as a matter of discretion, and those branches of the plaintiff's motion which were pursuant to General Municipal Law § 50-e(6) and CPLR 3025(b) for leave to amend her notice of claim and complaint, respectively, are granted; and it is further,

ORDERED that the order is affirmed insofar as cross-appealed from by the defendant New York City Transit Authority; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

[1] The plaintiff pedestrian was crossing the street within a crosswalk with the traffic light and pedestrian crossing signal in her favor when she was struck by a bus operated by the defendant New York City Transit Authority (hereinafter the NYCTA), as it was making a left turn. The NYCTA did not deny that the plaintiff was within the crosswalk and had the traffic and pedestrian signals in her favor at the time of the accident. The evidence submitted by the plaintiff established that, as a matter of law, the defendant driver violated the Traffic Rules and Regulations of the City of New York (34 RCNY) § 4-03(a)(1)(i) and that the plaintiff was free from comparative fault (*see Klee v. Americas Best Bottling Co., Inc.*, 60 A.D.3d 911, 875 N.Y.S.2d 270; *Voskin v. Lemel*, 52 A.D.3d 503, 859 N.Y.S.2d 489; *Hoey v. City of New York*, 28 A.D.3d 717, 813 N.Y.S.2d 533; *cf. Cator v. Filipe*, 47 A.D.3d 664, 850 N.Y.S.2d 510). In opposition, the NYCTA failed to raise a triable issue of fact. Accordingly, that branch of the plaintiff's motion which was for summary judgment on the issue of liability was properly granted.

****233** [2] The Supreme Court should have granted those branches of the plaintiff's motion which were for leave to amend her notice of claim and complaint, respectively, to assert a derivative cause of action to recover for loss of services on behalf of her husband, nonparty John David Lariviere. The plaintiff sought leave to amend her notice of

claim in order to supply an omission (*see* General Municipal Law § 50-e[6]). The proposed amendment sought to add a derivative claim predicated upon the same facts which had already been included in the plaintiff's notice of *1167 claim and her testimony at the General Municipal Law § 50-h hearing, which was held about seven weeks after the accident. Therefore, the NYCTA had been duly and timely notified (*see Burgarella v. City of New York*, 265 A.D.2d 361, 697 N.Y.S.2d 68). Under the circumstances of this case, since there can be no possible prejudice to the NYCTA, that branch of the motion which was for leave to amend the notice of claim should have been granted.

Further, that branch of the plaintiff's motion which was for leave to amend the complaint pursuant to CPLR 3025(b) should have also been granted. "Leave to amend should be

freely given absent prejudice or surprise" (*Rosicki, Rosicki & Assoc., P.C. v. Cochems*, 59 A.D.3d 512, 514, 873 N.Y.S.2d 184). The proposed amendment, which relates to the derivative claim, was neither palpably insufficient nor patently devoid of merit, and there was no evidence that the amendment would prejudice or surprise the NYCTA (*see Sanatass v. Town of N. Hempstead*, 64 A.D.3d 695, 881 N.Y.S.2d 901; *Zorn v. Gilbert*, 60 A.D.3d 850, 875 N.Y.S.2d 245).

The NYCTA's remaining contention is without merit.

All Citations

82 A.D.3d 1165, 920 N.Y.S.2d 231, 2011 N.Y. Slip Op. 02631