

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GABRIELLA C. SCOTT	:	CIVIL ACTION
vs.	:	
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; THOMAS CURRAN BROWNING; NEW JERSEY TRANSIT; and ANTHONY BUNCH	:	NO. 97-6529

**MEMORANDUM AND ORDER**

**AND NOW**, to wit, this 3<sup>rd</sup> day of February, 1998, upon consideration of the Motion of Defendants New Jersey Transit and Anthony Bunch, for Dismissal for Lack of Subject Matter Jurisdiction Pursuant to Rule 12(b)(1), (Document No. 6, filed December 26, 1997) and Plaintiff's response ("Plaintiff Gabriella C. Scott has Subject Matter Jurisdiction over Defendant New Jersey Transit"), (Document No. 7, filed January 23, 1998), **IT IS ORDERED** that defendants' Motion is **GRANTED** and defendants New Jersey Transit and Anthony Bunch are **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

The decision of the Court is based on the following.

**Facts:** Plaintiff alleges that he was injured, on December 4, 1996, in a collision in Philadelphia between two vehicles – a bus operated by defendant New Jersey Transit and another vehicle operated by defendant Environmental Protection Agency ("EPA"). At the time of the accident, plaintiff states that he was a passenger on the New Jersey Transit bus which was being driven by defendant Anthony Bunch who was acting within the scope of his employment. The accident, according to plaintiff, was the result of defendants' negligence. The basis asserted by plaintiff for the exercise of this Court's jurisdiction is that, because the United States is a party, there is a federal question. See 28 U.S.C. § 1331.<sup>1</sup>

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<sup>1</sup> Plaintiff nowhere cites the legal basis for any of his claims. As against the federal government, the basis is presumably the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et.

**Standard:** Defendants challenge this Court’s subject matter jurisdiction on the basis that defendants are an arm of the State of New Jersey and that New Jersey has not waived its Eleventh Amendment sovereign immunity in this case. Questions of sovereign immunity go to a court’s subject matter jurisdiction, see, e.g., Dawson v. United States, 894 F.2d 70, 71 (3d Cir. 1990), and defendants’ Motion was therefore properly brought pursuant to Rule 12(b)(1). In a Rule 12(b)(1) motion, the court’s power to hear a claim is at issue. As a result, “the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.” Mortensen v. First Federal Savings and Loan Assn. 549 F.2d 884, 891 (3d Cir. 1977). Moreover, the party asserting jurisdiction, the plaintiff in this case, bears the burden of persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991). In this case, however, there is no factual dispute as to the jurisdictional facts and, in deciding the Motion, the Court has assumed all allegations in the Complaint to be true.

**Discussion:** The question posed by defendants’ Motion is whether New Jersey Transit is an “alter ego” of the State of New Jersey for purposes of Eleventh Amendment sovereign immunity. The answer is clearly yes. After engaging in a lengthy, eight factor analysis of the relation of New Jersey Transit to the State of New Jersey in Smith v. New Jersey Transit Corp., 691 F.Supp. 888 (E.D. Pa. 1988), Judge Broderick concluded that the real party in interest in the suit was the state. The Court agrees with this analysis.<sup>2</sup>

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seq. (If this is the basis of plaintiff’s claim, then jurisdiction over the United States as defendant should properly have been invoked pursuant to 28 U.S.C. § 1346.) The Court must also assume that plaintiff is asserting state law negligence claims against defendants New Jersey State Transit and Anthony Bunch. The Court’s subject matter jurisdiction over the claims brought against those defendants should properly have been invoked, therefore, pursuant to 28 U.S.C. § 1367 (supplemental jurisdiction).

<sup>2</sup> The factors employed in Smith were derived from Urbano v. Board of Managers of New Jersey State Prison, 415 F.2d 247, 250-51 (3d Cir. 1969), cert. denied, 397 U.S. 948. The Third Circuit has since simplified “alter ego” analysis by adopting a three factor test. See Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d 655, 659 (3d Cir. 1989) (clarifying test as 1) whether money that would pay any judgment would come from state treasury, 2) status of agency under state law, and 3) degree of agency’s autonomy). The essential elements remain the same and because there is no evidence that the way in which New Jersey Transit operates has been materially altered since Smith was decided – indeed the language of the enabling statute making it an “instrumentality of the State”,

Although Eleventh Amendment immunity is technically a question of subject matter jurisdiction, Dawson, 894 F.2d at 71, unlike all other questions of subject matter jurisdiction, a state may waive its immunity under the Eleventh Amendment and consent to be sued in federal court. The Court concludes, however, that with respect to this case, New Jersey has not waived its immunity. Although New Jersey has provided in the New Jersey Tort Claims Act, N.J.S.A. §§ 59:1-1, et. seq., for a limited right to sue “public entities” in New Jersey state courts, nothing in the text of that Act states, or even suggests, that New Jersey has consented to be sued in federal court. See, Smith, 691 F.Supp at 892. The Court must, therefore, conclude that New Jersey Transit is immune from suit in federal court under the Eleventh Amendment, see Bryant v. New Jersey Transit, Civ. A. No. 93-6298, 1994 WL 326856, \*1 (E.D. Pa. July 6, 1994); Smith, 691 F.Supp at 893; Cianfrani v. New Jersey Transit Bus Operations, Inc., Civ. A. No. 87-3707, 1987 WL 15624, \*1 (E.D. Pa. Aug. 10, 1987); Walker v. Transport of New Jersey, 534 F.Supp. 719, 720 (E.D. Pa. 1982), and that this Court lacks subject matter jurisdiction over New Jersey Transit.

The only question which remains is whether Anthony Bunch, the driver of the bus involved in the accident and employee of New Jersey Transit, is also immune from suit in federal court. State officials are immune from suit in federal court under the Eleventh Amendment when the real party in interest is the state. See, e.g., Regents of the University of California v. Doe, --- U.S. ---, ---, 117 S.Ct. 900, 903-04 (1997); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100 (1984); Smith, 691 F.Supp. at 893. In his Complaint, plaintiff alleges that “Defendant Anthony Bunch was an employee for New Jersey Transit and in the scope of his employment at the time of this cause of action.” Complaint, ¶ 5 (emphasis added). From the face of the Complaint it is apparent that defendant Bunch was acting in his official capacity. New Jersey is,

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N.J.S.A. § 27:25-4(a), has not changed – the conclusion must be the same: New Jersey Transit is an “alter ego” of the state of New Jersey for purposes of the Eleventh Amendment.

therefore, the real party in interest. As such, Mr. Bunch, like his employer, is immune from suit in federal court and the Court has therefore granted, without prejudice, defendants' Motion to dismiss.

**BY THE COURT:**

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**JAN E. DUBOIS**