

Simmons v New York City Transit Authority
2006 NY Slip Op 30388(U)
May 30, 2006
Supreme Court, New York County
Docket Number: 0103349/2001
Judge: Robert D. Lippmann
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Robert D. Lippmann
HON. ROBERT D. LIPPMANN Justice
J.S.C.

PART 21

100y Summers

INDEX NO. 102517/01

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. 101

- v -

New York City Transit Authority et al

The following papers, numbered 1 to 13 were read on this motion to/for Dismiss

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits -- Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The motion and cross-motions are decided in accordance with the accompanying memorandum decision.

FILED
MAY 29 2006
CLERK'S OFFICE

Dated: May 30 2006

[Signature]
HON. ROBERT D. LIPPMANN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MAY 30 2006

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X
TROY SIMMONS,

Plaintiff,

Index No.: 103549/01
DECISION/ORDER

-against-

NEW YORK CITY TRANSIT AUTHORITY,
RAILROADS/RAIL WORKS a/k/a IMPULSE
ENTERPRISE/F&V MECHANICAL JV, JOHN P.
PICONE and FLORENCE 16TH CENTURY MARBLE,
INC.,

Defendants.

-----X

HON. ROBERT D. LIPPMANN, J.S.C.:

In this personal injury/negligence action, each of the defendants moves separately for summary judgment to dismiss the plaintiff's complaint and the other defendants' cross claims (collectively, motion sequence number 002). For the following reasons, all of these motions are granted.

BACKGROUND

The Parties

On November 29, 1999, plaintiff Troy Simmons (Simmons) slipped and fell while walking down a flight of stairs to enter the New York City subway, and suffered injuries to his right foot and ankle as a result. See Notice of Motion, Exhibit A (complaint), ¶ 26. The steps in question were on the second of two flights of one of the stairways that leads down from street level into the Canal Street Station, which is located at the intersection of Broadway and Canal Streets in the State, City and County of New York. See Notice of Motion, Zegarelli Affirmation, ¶ 11. More specifically, the subject flight of stairs is known as the "M3B stairway." Id.

FILED
JUN 09 2006
COUNTY CLERK'S OFFICE
NEW YORK

The defendant New York City Transit Authority (NYCTA) owns and operates the New York City subway. On January 7, 1994, NYCTA retained defendant Impulse Enterprise/F&V Mechanical, a Joint Venture (Impulse),¹ to serve as the general contractor for certain renovation work at the Canal Street Station known as “the Canal Street Complex Rehabilitation Project” (the Project). *Id.*, ¶ 13. Impulse thereafter subcontracted with defendant John P. Picone (Picone) to perform structural steel and concrete block work on the Project. *Id.*, ¶ 14. Defendant Florence 16th Century Marble, Inc. (Florence) also entered into separate subcontracts with both Impulse and Picone to perform tile installation work on the Project. *Id.*

The work of the Project was divided into four phases that bore the respective designations “Broadway Line, Lower Level,” “Broadway Line, Upper Level,” “Nassau Loop” and “Lexington Avenue Line.” *Id.*, ¶ 13. Repairs to the M3B stairway were performed during the “Broadway Line, Upper Level” phase. *Id.*, ¶ 24. Impulse asserts that that phase was completed on June 30, 1997, and presents a copy of the “Beneficial Use Certification,” signed by officers of NYCTA, that states that the work comprising the “Broadway Line, Upper Level” phase had been inspected and was found to be satisfactory so that the public could again use the portions of the Canal Street Station that had been affected by that work. *Id.*; Exhibit S. Picone states that NYCTA issued the Beneficial Use Certification before Impulse had engaged Picone as a subcontractor, and that Picone did not do any work on the M3B stairway. *See* Notice of Cross Motion (Picone), Boule Affirmation, ¶ 24. Florence also states that it had completed its tile work on the M3B stairway before NYCHA signed off on the Beneficial Use Certification. *See* Notice of Cross

¹ Impulse notes that it is sued here incorrectly as “Railroads a/k/a Impulse Enterprise/F&V Mechanical JV.”

[* 4]

Motion (Florence), Arankli Affirmation, ¶ 22. NYCTA, however, claims that there is an issue of fact as to whether Impulse and Piconc were still performing work on the Project at the time Simmons was injured. See Notice of Cross Motion (NYCTA), Siegel Affirmation, ¶ 34.

Simmons appeared for a General Municipal Law 50-h hearing on April 4, 2000, and was later deposed on February 6, 2002, and again on October 22, 2003. See Notice of Motion, Exhibits L, M, N. On each of those occasions, he was asked what had caused him to trip and fall. At his 50-h hearing, Simmons stated as follows:

A. I think it was the steps, the back addition of the steps. I know there was a construction site in the area and stuff like that, and the darkness. When I was there I couldn't see very well. I think that's basically what made me fall because I could see very well. I have very good vision. ...

Q. When I asked you before what caused you to fall you said three things, it might have been a bad condition, that it was dim and that there was a construction area. Which is it?

Q. (Plaintiff's counsel) Maybe it's all three.

A. I think it was because when I fell I heard a lot of construction, a lot of noise in the area and I'm not sure, you know, about was it either/or.

Q. (Plaintiff's counsel) He wants to know was there anything on the steps?

A. It seemed like the steps were real slippery and was real griddy [sic - gritty?]. I might have slipped on something that was there on the step. I'm not sure. I know it wasn't just me.

Q. Do you know if there was debris that caused you to fall? ...

A. Yes, I could say there was something on the steps, yes.

Q. Do you know what type of garbage was on the steps?

A. It seemed like it was just like ...

Q. (Plaintiff's counsel) If you don't know, if you're not sure

A. I'm not really quite sure exactly what I slipped on, but I know a lot of steps were pretty bad and that's what made me fall. ...

Q. Was there construction going on the staircase itself?

A. I'm not sure, I'm not sure.

Id., Exhibit L, at 18-20. At his first deposition, Simmons stated as follows:

Q. As you were walking down the stairs, what happened when you got to about the tenth step?

A. It seem like I slipped on something. I must have slipped on something. It happened so fast and then my ankle was turned all the way around completely to the other side. I was really scared because I never seen my foot facing in that direction.

Q. Do you know what you stepped on?

A. It - I think it was something from the construction like something orange - when I was on the ground, I seen a lot of the orange thing on the steps on the ground and the wood. ...

Q. Before you slipped, did you see anything on the step that you slipped on any particular item?

A. I seen like the yellow - some orange type of thing.

Q. (Plaintiff's counsel) Where was that, was that on the stairs or above the ground?

A. It seems like it was on the stairs.

Q. (Plaintiff's counsel) She is asking you before you fell.

A. (Continuing) Yeah.

Q. Did you see this orange stuff on the step before you slipped?

A. No, I didn't see it before I slipped because I think if I would have seen it, I would have walked around it.

Q. Can you tell me how much orange stuff was there?

A. When I was on the ground, I seen a lot of orange stuff because of the construction. I don't know. It could have been from anywhere.

Q. Were there any people working in the vicinity?

A. Yes. ...

Q. (Continuing) When you were walking down the stairs, was there anything else that you saw before you fell that may have caused you to slip?

A. Yeah. I seen like a lot of gook and stuff.

Q. (Plaintiff's counsel) Debris?

A. Like debris.

Q. Papers?

A. It seemed really messy at the time. ...

Q. Was there anything on the step that caused you to slip?

A. It seem like there was stuff on the step.

Q. That would be the bottom step near the pole?

A. No.

Q. What step?

A. Maybe like from the bottom, maybe like six step from the bottom.

Q. What was on that step that caused you to fall?

- A. I think it was something from the construction like a nail or something. It could have been anything.
- Q. Other than trash and debris, was there anything else wrong with the step?
- A. It seem like the maintenance, didn't really have good maintenance.
- Q. Talking about cleaning?
- A. Yes.
- Q. Did you see any cracks or -
- A. I see cracks.
- Q. - on the step that you fell on?
- A. The one that I slipped on, not specifically. It seem like I slipped on a bad step. It could have been a crack.
- Q. But you are not sure?
- A. I am not sure if I slipped on the crack stepped [sic]. It seem to have a lot of cracks around the steps.
- Q. (Plaintiff's counsel) She is asking you specifically about the step. If you remember, do you remember if it was like the other steps you are describing or was it a perfectly clean step?
- A. (Continuing) It had a lot of stuff on it like garbage, maybe not a lot of garbage, but it had stuff on it. I don't recall. I slipped on something. I'm not sure.

Id., Exhibit M, at 19-21, 40-43. At his second deposition, Simmons stated as follows:

- Q. Did you see anything on the steps that you were walking onto?
- A. It was like a little bit of stuff here and there on the steps.
- Q. What kind of little bit of stuff are you talking about?
- A. Like wood and stuff like that, you know.
- Q. Can you describe the wood that you saw?
- A. It was like a lot of sawdust and wood and stuff. It was little stuff everywhere, little yellow stuff, orange tape and stuff like that. I seen a little bit of that everywhere, so I didn't know exactly. ...
- Q. This wood that you saw, what type of wood was that?
- A. Like sawdust wood. Just regular wood.
- Q. Other than sawdust, did you see any picces of wood?
- A. Like little picces of wood.
- Q. How big were these picces?
- A. About two to three inches.
- Q. Is that two to three inches long?
- A. Uh-huh.
- Q. What shape were they?
- A. Like chipped-off wood and stuff.
- Q. The yellow stuff you stated you saw, what was that made out of?

- A. Like plastic.
- Q. Could you tell me where it came from?
- A. I'm not sure. Maybe it's like from the work site. I'm not sure. It was like little orange stuff like on the bottom.
- Q. The orange stuff that you are saying -
- Q. (Plaintiff's counsel) She's asking about before you fell. Right?
- Q. That's right. This is before you fell, you said you saw yellow stuff. What type of yellow stuff?
- Q. (Plaintiff's counsel) He said plastic.
- Q. You are saying it was plastic?
- A. Uh-huh.
- Q. Did it have any writing on it?
- A. No, just yellow.
- Q. Thin plastic?
- A. Like thin-ish, yeah, thin plastic.
- Q. The orange stuff that you were describing before, describe to me what it is?
- A. It's like the orange stuff from like the construction. When they have people blocking and stuff like that, they put the orange screen or plastic over. I think that's what it was.
- Q. The orange stuff that you saw, how big were those pieces that you saw?
- A. Not big. Maybe four or five inches wide. ...
- Q. What caused you to fall?
- A. What caused me to fall?
- Q. What caused you to fall?
- A. Actually, I'm not sure what caused me to fall, but I think it was something that was on the stairs or whatever that I slipped on.
- Q. Did you see what you slipped on?
- A. Not exactly.
- Q. (Plaintiff's counsel) At the time he stepped on it?
- Q. Right. At the time that you took the step right before your fall, did you see yourself step on anything?
- A. I didn't see exactly what I slipped on.
- Q. After you fell, did you see anything that you might have stepped on or did you see what you stepped on after you fell?
- A. Like I said, I seen like a lot of wood and stuff and yellow stuff.
- Q. I know you said you saw the wood and yellow stuff in the area of the stairwell. Did you actually see what you stepped on when you fell?
- A. I think that's what it was that I stepped on. ...
- Q. I'm going to quickly go back to the actual time of the accident. Do you recall seeing any construction signs in place on the stair section that you fell on?

- A. No, I don't recall seeing any construction signs or nothing.
- Q. Do you recall seeing any construction personnel?
- A. No.
- Q. You had mentioned some orange-ish material that was in the area; do you recall seeing any labels or words printed on this construction material?
- A. No.
- Q. You described something also as being yellow in that area.
- A. Like wood.
- Q. The wood itself was yellowish-brown?
- A. Yeah.
- Q. Can you describe the size of the wood picccs that were on the steps?
- A. Well, it was like a lot of little small woods and little sawdust and stuff like that around there, and maybe about two inches, three inches long.
- Q. Werc the stairs wet at the time of the accident'?
- A. Not that I could remember.

Id., Exhibit N, at 41-44, 53-54, 57-58. In his bill of particulars to NYCTA, Simmons stated:

6. ... Plaintiff claims that the stairs were caused, created and maintained in a dangerous and hazardous, broken, dilapidated, chipped and slippery condition. This is information in the control of defendants.
7. Plaintiff alleges that the stairs were defective due to defendants causing, creating and maintaining broken, dilapidated, worn, chipped and slippery condition.

Id., Exhibit J, ¶¶ 6, 7. In his bill of particulars to Florence, Simmons claimed:

3. That the defendant, [Florence], ... [was] negligent ...in failing to adequately and properly clean, repair, inspect, construct, maintain the ... public stairway, in causing and creating a dangerous and hazardous condition ... in failing to make use of proper and adequate cleaning, construction, maintenance, inspection and repair procedures; in failing to make use of proper and adequate supplies, materials, tools and/or instrumentalities ... in failing to warn ... in failing to remove and eliminate construction debris and garbage from the public sidewalk
... .

Id., Exhibit K, ¶ 3. The parties have not presented copies of Simmons' other bills of particulars.

Prior Proceedings

Simmons initially commenced an action solely against NYCTA on February 13, 2001, to

which NYCTA served an answer. Id., Exhibits C, D. Simmons then commenced a second action against Impulse, Picone and Florence on June 3, 2002, to which all defendants served answers. Id., Exhibits A, B. NYCTA thereafter commenced a third-party action against Impulse, Picone and Florence on September 9, 2002, to which all defendants served answers. Id., Exhibits E, F. On April 23, 2003, this court issued an order that consolidated all of the foregoing actions, and converted all of the respective counterclaims into cross claims. Id., Exhibit G. Simmons asserts one cause of action for negligence, while each of the defendants asserts cross claims against the others for contractual and/or common-law indemnity. Defendants now each move separately for summary judgment to dismiss the complaint and to dismiss the other defendants' cross claims.

DISCUSSION

Impulse's Motion

The first branch of Impulse's motion seeks summary judgment dismissing Simmons' cause of action for negligence. Pursuant to New York law, "the traditional common-law elements of negligence" are: "duty, breach, damages, causation and foreseeability." Hyatt v Metro-North Commuter R.R., 16 AD3d 218, 218 (1st Dept 2005). Impulse argues that Simmons has failed to establish the element of causation. See Notice of Motion, Zegarelli Affirmation, ¶¶ 15-20.

In its recent decision in Mazurck v Metropolitan Museum of Art (27 AD3d 227 [2006]), the Appellate Division, First Department, recounted that:

The proponent of a motion for summary judgment must establish that there are no material issues of fact in dispute and that it is entitled to summary judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853

[1985]). ... The burden then shift[s] to plaintiff to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). In this regard, plaintiff must show the existence of “facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred” (Schneider v Kings Highway Hosp. Ctr., 67 NY2d 743, 744 [1986]). “The proof, however, must be sufficient to permit a finding of proximate cause ‘based not upon speculation, but upon the logical inference to be drawn from the evidence’ ” (Robinson v City of New York, 18 AD3d 255, 256 [2005], quoting Schneider v Kings Highway Hosp. Ctr., *supra* at 744).

Id. at 228. In its earlier decision in Kane v Estia Greek Rest. (4 AD3d 189 [1st Dept 2004]), the Appellate Division, First Department, had noted that:

As we have repeatedly stated, “[r]ank speculation is no substitute for evidentiary proof in admissible form that is required to establish the existence of a material issue of fact and, thus, defeat a motion for summary judgment” (Sawh v Schoen, 215 AD2d 291, 293 [1995], quoting Tungsupong v Bronx-Lebanon Hosp. Ctr., 213 AD2d 236, 238 [1995]). Even if the plaintiff suffers memory loss as a consequence of the slip and fall, he still must present a theory of liability and facts in support thereof on which the jury can base a verdict. Absent an explication of facts explaining the accident, the verdict would rest on only speculation and guessing, warranting summary judgment (Lynn v Lynn, 216 AD2d 194 [1995]).

Id. at 190. In both of those cases, the Appellate Division, First Department, reversed the trial courts’ initial denials of summary judgment because it found that the plaintiffs had not presented sufficient evidence of causation for a jury to make a determination that was based on more than mere speculation.²

² In Mazurek v Metropolitan Museum of Art, the Appellate Division found that “[a]lthough plaintiff argued that the backing [up] of the tractor frightened her and caused her to fall, there is no evidence to support these conclusions. Plaintiff repeatedly testified that she did not know why she fell and she never testified that she was frightened or that the tractor made contact with her body. Plaintiff therefore failed to set forth a prima facie case of negligence against any defendant.” 27 AD3d at 228-229.

In Kane v Estia Greek Restaurant, Inc., which involved a 72 year-old man who died after falling down a flight of stairs, the Appellate Division found that “[t]he present case rests on pure surmise regarding the cause of decedent’s fall and the connection of the staircase, if any, with the resulting injuries. Accordingly, we must dismiss.” 4 AD3d at 191.

Impulse argues that the same situation obtains here. Impulse specifically contends that Simmons “has failed to identify the specific defect allegedly responsible for his injury producing fall,” but instead “offers several possible causes for his accident,” including “‘dim’ lighting ... sawdust ... orange mesh ... even a cracked step.” See Notice of Motion, Zegarelli Affirmation, ¶¶ 18, 19. Impulse concludes that “any finding of proximate cause in this action would be predicated on nothing more than rank speculation.” Id., ¶ 20. The court agrees.

As set forth at length earlier in this decision, Simmons did indeed advance four distinct theories of causation in his various depositions and bills of particulars. His responses to the question of what caused him to fall varied from stated adherence to one of those theories to admissions that “I don’t know.” In his opposition papers, Simmons contends that Impulse’s and the other defendants’ causation arguments are based on selective quotations from his deposition testimony. See Gross Affirmation in Opposition, at 10. This is not so. After having reviewed the entirety of Simmons’ deposition testimony and his bills of particulars, and having accorded Simmons the benefit of the most favorable possible reading of both, the court concludes that Simmons himself was merely speculating as to the cause of his fall on every occasion on which he was asked about it. It would be unreasonable to assume that a jury presented with such “evidence” would do any differently. Simmons also argues that “there can be several proximate causes or contributing causes to an accident,” although he cites no case law to support this proposition. Id. Be that as it may, however, this argument is unavailing because Simmons’ testimony simply did not advance compounded theories of causation. Rather, it is clear that - even when read in the most favorable light - Simmons was merely opining that he might have slipped on one or another type of construction debris, or on a cracked step, or because of poor

lighting. That defendants have admitted to using orange construction netting and plywood during their work on the Project (and that scraps of those items may therefore have been in the vicinity of the M3B stairwell) does not avail Simmons because, although it might support one of his posited theories of causation, it does not excuse his repeated speculation about the others. Therefore, the court finds that Simmons has failed to raise a triable issue as to the causation element of his negligence claim. Accordingly, the court grants the portion of Impulse's motion that seeks summary judgment dismissing the complaint against it.

The balance of Impulse's motion seeks summary judgment dismissing the counterclaims and cross claims for contractual and common-law indemnity that the other defendants' have asserted against it. These claims are all now moot because the court has dismissed the underlying complaint. Accordingly, the court grants Impulse's application to dismiss all of the counterclaims and cross claims asserted against it herein on that ground.

Picone's Cross Motion

The first portion of Picone's cross motion seeks summary judgment dismissing the complaint for the same reasons as Impulse advanced in its motion. The court grants this relief for the same reasons as were discussed above.

The second portion of Picone's cross motion seeks summary judgment dismissing the other defendants' counterclaims and cross claims against it for contractual and common-law indemnity. The court grants this relief for the same reasons as were discussed above.

Florence's Cross Motion

The first portion of Florence's cross motion seeks summary judgment dismissing the complaint for the same reasons as Impulse advanced in its motion. The court grants this relief

for the same reasons as were discussed above.

The second portion of Florence's cross motion seeks summary judgment dismissing the other defendants' counterclaims and cross claims against it for contractual and common-law indemnity. The court grants this relief for the same reasons as were discussed above.

NYCTA's Cross Motion

The first portion of NYCTA's cross motion seeks summary judgment dismissing the complaint for the same reasons as Impulse advanced in its motion. The court grants this relief for the same reasons as were discussed above.

The second portion of NYCTA's cross motion seeks summary judgment dismissing the other defendants' counterclaims and cross claims against it for contractual and common-law indemnity.³ The court grants this relief for the same reasons as were discussed above.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendant Impulse Enterprise/F&V Mechanical, a Joint Venture (incorrectly sued herein as "Railroads and/or Rail Works") is granted and the complaint, as well as counterclaims and cross claims asserted herein against said defendant, are dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; ; and it is further

³ In particular, NYCTA opposed Impulse's, Picone's and Florence's motions on the ground that there was an issue of fact as to whether those entities were still performing work on the project at the time Simmons was injured. Those defendants responded with arguments based on the availability - or lack thereof - of contractually required insurance to indemnify against any possible claims resulting from their performance of such work. However, the court need not address any of these arguments because it has dismissed the underlying complaint.

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendant John P. Picone is granted and the complaint, as well as counterclaims and cross claims asserted herein against said defendant, are dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of cost; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendant Florence 16th Century Marble, Inc. is granted and the complaint, as well as counterclaims and cross claims asserted herein against said defendant, are dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of the defendant New York City Transit Authority is granted and the complaint, as well as counterclaims and cross claims asserted herein against said defendant, are dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

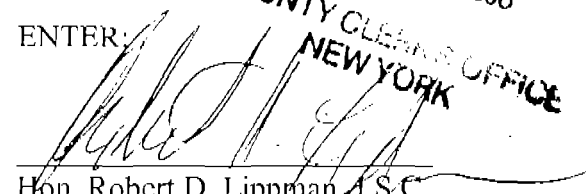
ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
May 30, 2006

MAY 30 2006

FILED
JUN 09 2006

COUNTY CLERK'S OFFICE
NEW YORK

ENTER: 

Hon. Robert D. Lippman, J.S.C.

HON. ROBERT D. LIPPMANN
J.S.C.