

**Manfredi v Metro N.**

2007 NY Slip Op 34508(U)

December 21, 2007

Supreme Court, Bronx County

Docket Number: 21751/2004

Judge: Edgar G. Walker

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the plaintiff is deceased. *Detres v. New York City Housing Authority*, 271 A.D.2d 309. The MTA police report is sufficient to establish the existence of a triable issue fact as to where the plaintiff entered railroad property.

In addition, RYC argues that they had no responsibility to secure the gate and Metro North argues that they did in fact close the gate and therefore were not negligent. In support of their motion, RYC submitted the deposition testimony and an affidavit from Dante Caputo, the treasurer of RYC. Mr. Caputo alleges that there are three gates at the track overpass. The first gate, where the street and the overpass meet, is broken and is the sole responsibility of Metro North. After passing through the first gate heading towards the tracks there is a gate to the left which accesses the RYC property, there is no access to the tracks from RYC property. There is also allegedly a third gate from which the tracks can be reached. This testimony is consistent with that of Peter Coleman, a Metro North employee which was submitted in support of Metro North's motion. The testimony of Mr. Caputo is sufficient to establish RYC's *prima facie* defense and to shift the burden to the parties opposing the motion to establish the existence of a triable issue of fact. *Alvarez v. Prospect Hospital*, 68 NY2d 320.

In support of its motion and in opposition to RYC's motion, Metro North submitted a lease abstract which allegedly requires RYC to erect a fence from the overpass along the border of its property. However there is no allegation that these lease provisions were not complied with. Mr. Caputo testified that a fence was in fact erected and that some time in 1985 Metro North installed the subject gate in the fence to gain access to the tracks. The affidavit of James Belliveau regarding his observations of the gate more than two years after the accident are of no probative value.

In opposing RYC's motion, plaintiff points to the testimony of Peter Coleman who testified that the gate was secured by a two locks. One of the locks was a "switch lock" commonly used by Metro North and the second lock was a Master key lock. Mr. Coleman testified that he did not know who had keys to the Master lock or why it was there. The ambiguous testimony of Frederick Weaver, a Metro North Deputy Director of Structures, is also insufficient to establish a triable issue of fact. Mr. Weaver testified that he did not know who had keys to the locks, and he did not know if RYC had a key to the lock. Merely referring to the

Master lock as the "Yacht Club's lock" does not make it so. In opposing the motion plaintiff's counsel argues that a jury could conclude that a "sister lock" system was in place and that the gate was left open by a RYC employee. The mere existence of the lock in the absence of any evidence of ownership or control is insufficient to establish an issue of fact as to any negligence on the part of RYC. Based upon the foregoing, RYC's motion for summary judgment is granted in its entirety.

Metro North argues in its motion seeking summary judgment that the testimony of Peter Coleman establishes that the gate was locked. Mr. Coleman testified that it was his responsibility to lock the gate, although occasionally an Ecco employee may have been the one to physically lock the gate in his presence. While Mr. Coleman testified that he was sure that he locked the gate on February 16<sup>th</sup>, he also testified that his recollection is based on "what usually happened" and that he "kind of" checked the lock everyday. This ambiguous testimony, read in a light most favorable to the plaintiff, is insufficient to establish a prima facie entitlement to judgment.

Metro North's additional arguments, that there may be up to 2000 keys to the switch lock, or that Amtrak employees may have opened the lock and that it did not have exclusive possession of the gate are likewise insufficient to meet its burden of the motion. There was no evidence submitted by Metro North from which it may be reasonably inferred that Amtrak employees opened the gate that day. Any such suggestion is purely speculative and certainly insufficient to establish Metro North's defense as a matter of law. The plaintiff is not required to establish exclusive possession as no cause of action is predicated upon *res ipsa loquitur* and Mr. Coleman admits it was his responsibility to lock the gate.

Metro North's arguments concerning plaintiff's own conduct merely raise factual issues concerning contributory negligence and proximate cause which must be resolved at trial. The case of *Derdiarian v. Felix Contracting Corp.*, 51 NY2d 308, involving facts analogous to the case herein, while cited by Metro North, holds that these are questions for the fact finder to resolve. It cannot be said as a matter of law that it was unforeseeable that Metro North's failure to lock the gate could lead to the tragic consequences which occurred in this case. As was stated by the Court of Appeals in *Derdiarian*:

\* 4] Bronx County Clerk  
Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve. 51 NY2d at 315.

While defendant Ecco did not to make a formal motion it urges the court to search the record and dismiss the claims against it. Ecco argues that plaintiff has not shown why it would be liable. In the absence of any motion papers from Ecco establishing that they are not liable, plaintiff has no reason to do so.

To the extent that MTA, MABSTOA and NYCTA have established a prima facie entitlement to judgment as a matter of law and the their application being unopposed, summary judgment is granted to those defendants.

The clerk is directed to enter judgment in accordance herewith.

Dated :

12/21/07



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Hon. Edgar G. Walker, J.S.C.