

**Singer v New York City Transit Auth.**

2008 NY Slip Op 33690(U)

December 8, 2008

Supreme Court, New York County

Docket Number: 107499/06

Judge: Joan B. Carey

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: Honorable Joan B. Carey  
Justice

PART 40 D

CELIA SINGER,

Plaintiff,

Index No.: 107499/06

MOTION SEQ. NO. 03

MOTION CAL. NO. \_\_\_\_\_

-v-

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

**FILED**  
DEC 10 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

The following papers, 1 - 8, were read on this motion by plaintiff for an order, pursuant to CPLR § 4404, setting aside the jury's verdict

Notice Of Motion - Affidavit, Exhibits, Memo Of Law  
Answering Affidavit

Papers Numbered  
1-7 \_\_\_\_\_  
8 \_\_\_\_\_

Cross-Motion:  Yes  No

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NYS SUPREME COURT - CIVIL

Plaintiff, Celia Singer, commenced the instant action against defendant, New York City Transit Authority, alleging that she sustained injuries to her wrist as a result of falling from a negligently maintained raised concrete landing platform at the entrance of a subway station located at 168th street and Broadway, in New York City. More specifically, plaintiff alleged that the top edges of the raised concrete landing platform were not painted safety yellow, or adorned with some other marking and/or visual cue, to warn pedestrians of the step down to the sidewalk. This action proceeded to trial on May 29, 2008, and concluded on June 4, 2008, with a jury verdict in favor of plaintiff. The jury awarded plaintiff \$100,000 for past pain, suffering and loss of enjoyment of life. Defendant presently moves for an order, pursuant to CPLR §4404, setting aside the jury's verdict. Defendant argues that the jury's verdict in the instant action should be set aside for the following reasons: (1) the Court erred in admitting photographic evidence of a subway

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platform located at a subway station unrelated to the subject subway station; (2) plaintiff was improperly permitted to read portions from the deposition testimony of a New York City Transit Authority employee; and (3) the Court improperly admitted evidence from the New York City Transit Authority Internal Design Manual. As this Court finds that the jury's verdict was not based on wrongfully admitted evidence, the defendant's motion is denied.

Defendant first argues that the Court erred in admitting photographic evidence of a subway platform located at a subway station unrelated to the subject subway station. The photograph at issue depicted the raised concrete landing platform at the King's Highway station on the F subway line, on which the top edges of such platform were painted safety yellow to warn pedestrians of the step down to the sidewalk. According to defendant, this photograph improperly led the jury to believe that a failure on the part of New York City Transit Authority to paint the platform at the subway station located at 168th street and Broadway in the same manner as the platform depicted in the photograph, was a breach of the duty of care owed to plaintiff, as a pedestrian exiting the subway station. Notwithstanding, the Court finds that this photograph was properly admitted into evidence.

The photograph was admitted into evidence during the direct examination of plaintiff as a means of demonstrating the type of visual markings plaintiff had observed, prior to the subject incident, on a raised concrete landing platform at a subway station she often used. Such evidence was relevant with respect to plaintiff's comparative fault, or lack thereof, in failing to observe the height differential of the platform and the sidewalk at the subway station at issue, at the time of the subject incident. This photograph was also relevant in providing the jury with an example of a marking and/or visual cue that is used to warn a pedestrian of a height differential when stepping down from a raised platform. As testified to by plaintiff's engineering expert, such a marking and/or visual cue is the standard of care in the engineering community. This evidence is admissible proof of a generally accepted practice, custom or usage within the engineering community and is admissible in tending to establish a standard of care, and proof of a departure from this practice, custom or usage may constitute evidence of negligence. *See Cruz v. NYCTA*, 136 AD2d 196 [2d Dept. 1988]; *Fisch*, New York Evidence §203 [2d Edition]. The raised concrete landing platform at the King's Highway station depicted in the photograph was similar to the raised concrete landing platform at the subway station located at 168th street and Broadway, where the subject incident occurred. As a result of the identity of condition that exists between these platforms, evidence relating to the customary practice of placing a marking and/or visual cue, *i.e.*, yellow safety paint, on such platforms to warn pedestrians of a height differential is applicable to the case at hand. *See Cruz v. NYCTA, supra*; *Fisch*, New York Evidence §203 [2d Edition]. Accordingly, the Court finds that this photograph was properly admitted into evidence.

Defendant further argues that plaintiff was improperly permitted to read portions from the deposition testimony of a New York City Transit Authority employee, Vincent Moschello, wherein he testified that he has observed the top of platforms, other than the one at issue herein, painted yellow. According to defendant, Mr. Moschello is a member of New York City Transit Authority's maintenance team who performs masonry work, as opposed to an expert on New York City Transit Authority's painting policy. Therefore, it is argued that, that Mr. Moschello's deposition testimony with respect to the painting of such platforms should not have been permitted. Despite defendant's argument to the contrary, the Court finds that such deposition testimony was properly admitted.

First and foremost, Mr. Moschello was produced by the New York City Transit Authority to testify on behalf of the New York City Transit Authority as a party deponent with knowledge relating to issues relevant to the instant action. Defendant cannot produce such a witness during the course of discovery, and then at the time of trial argue that the witness that they produced does not have the ability to testify as to the issues relevant to the action. Furthermore, contrary to defendant's contention, the portion of Mr. Moschello's deposition testimony at issue does not amount to expert testimony regarding New York City Transit Authority's painting policy. This testimony at issue simply relates to observations made by Mr. Moschello during the course of his employment as a member of New York City Transit Authority's maintenance team. Accordingly, plaintiff was properly permitted to read this portion from Mr. Moschello's deposition testimony.

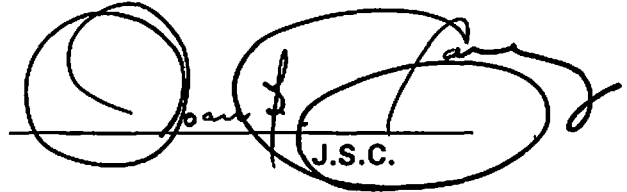
Lastly, defendant contends that the Court improperly admitted evidence from the New York City Transit Authority Internal Design Manual. It is argued that policies set forth in the Design Manual were not admissible because they set forth a standard of care higher than the common law standard of reasonable care. This Court acknowledges that it is well settled that in a negligence action, the internal rules of a defendant are not admissible where such rules set forth a higher standard of care than the common law. *Rivera v. NYCTA*, 77 NY2d 322 [1991], citing *Crosland v. NYCTA*, 68 NY2d 165 [1986]; *Branham v. Loews Orpheum Cinemas, Inc.*, 31 AD3d 319 [1st Dept. 2006]; *Abraham v. Port Authority Of New York and New Jersey* 29 AD3d 345 [1st Dept. 2006]. However, defendant has not demonstrated, either at the time of trial, or in connection with the instant motion, that the portion of the New York City Transit Authority Internal Design Manual at issue sets forth a standard of care higher than the common law standard of reasonable care.

The portion of the Internal Design Manual at issue stated that "the concrete edges" of all raised concrete landing platforms at subway entrances, such as the subject platform herein, "shall be painted safety yellow as a warning of the step from the sidewalk." Plaintiff submitted evidence at trial, through the expert testimony of an engineer, that the standard of care in the engineering community is to provide a marking and/or visual cue on such a raised platform to warn a pedestrian of a height differential when stepping down from the platform. According to the expert, yellow safety paint along the top edges of the platform is an appropriate marking or visual cue. Therefore, it appears that New York City Transit Authority's policy of painting the concrete edges of all raised concrete landing platforms at subway entrances, safety yellow, as a warning of the step from the sidewalk is not an isolated safeguard put in place only by the New York City Transit Authority, and does not set forth a standard of care higher than the common law standard of reasonable care. Such policy seems to be an industry wide practice, and, accordingly, the evidence from the New York City Transit Authority Internal Design Manual was properly admitted. Additionally, the Court finds defendant's argument that this portion of the Design Manual is inapplicable in the present case because the term "concrete edges" only refers to the vertical edge of the platform, and does not relate to the painting of the horizontal edge located on the top portion of the platform, to be without merit.

Based upon the foregoing, it is hereby

ORDERED that defendant's motion is denied.

Dated: 12/8/2008



J.S.C.

Check one:  FINAL DISPOSITION

NON- FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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