

Rijper v City of New York
2013 NY Slip Op 30672(U)
March 29, 2013
Supreme Court, New York County
Docket Number: 113389/09
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number : 113389/2009
RIJPER, CORNELIA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 113389/09
MOTION DATE 12/20/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 4 were read on this motion for summary judgment

Notice of Motion— Affirmation — Exhibits A-G	_____	No(s). <u>1; 2</u>
Answering Affirmation — Exhibits A-P	_____	No(s). <u>3</u>
Replying Affirmation — Exhibits	_____	No(s). <u>4</u>

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the annexed memorandum decision and order.

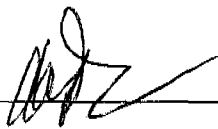
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED HON. MICHAEL D. STALLMAN

APR 05 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/29/13
New York, New York

 _____, J.S.C.

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
CORNELIA RIJPER,

Plaintiff,

Index No. 113389/09

-v-

Decision and Order

THE CITY OF NEW YORK, THE NEW YORK CITY
TRANSIT AUTHORITY d/b/a MTA NYCTA and
METROPOLITAN TRANSPORTATION
AUTHORITY.

FILED

Defendants.

APR 05 2013

-----X
HON. MICHAEL D. STALLMAN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this personal injury action, arising out of a slip and fall on subway stairs, defendants City of New York, New York City Transit Authority and Metropolitan Transportation Authority (the Authorities) move to dismiss the complaint as against them.

BACKGROUND

Plaintiff alleges that on January 7, 2009 at approximately 8:10p.m., she slipped and fell as she was stepping down from the P-6 staircase to the station floor just before the turnstiles at the Broadway and Prince Street subway station. She alleges that she had her right foot on the station floor, and as she lifted her left foot off the step her right foot slipped out from the underneath her. (Coffey

Affirmation, Ex. F at 19, 22.) She alleges that she slipped due to a slippery and wet condition on the stairs. It is undisputed that the stairway connects to the street and therefore is open to the elements. Plaintiff commenced this action against the Authorities. The Authorities now move for summary judgment.

DISCUSSION

The Authorities have established their prima facie entitlement to judgment as a matter of law. They have shown that there was a storm in progress at the time of plaintiff's alleged accident. "A defendant cannot be held liable for an injury caused by a storm which was in progress at the time of the injury." (*Taylor v New York City Tr. Auth.*, 266 AD2d 384, 384 [2nd Dept 1999].) Moreover,

"[j]ust as landowners have no duty to clear outdoor public spaces while precipitation is still falling, they are not required to provide a constant, ongoing remedy when an alleged slippery condition is said to be caused by moisture tracked indoors during a storm. And, just as it is unreasonable to require the Transit Authority to keep the floors of subway cars clean and dry during ongoing storms, when the subway cars are continuously filled with wet commuters, similarly, a station floor cannot be effectively kept dry in such circumstances." (*Hussein v New York City Tr. Auth.*, 266 AD2d 146, 146-147 [1st Dept 1999].)

In this case, climatological records from the National Climatic Data Center of NOAA, show that it was raining at the time of plaintiff's alleged accident, and that it had been raining all day, except for a brief interruption from 4p.m. to approximately 5p.m. (Coffey Affirmation, Ex. G.) The records show that the rain had started the night before and lasted all day on January 7, 2009 until approximately 11p.m. (*Id.*) The NOAA records indicate that a total rainfall of 1.19 inches on that date. (*Id.*) Plaintiff testified at her deposition that it was not raining at the time of her alleged accident. (*Id.*, Ex. F at 13.)

The cleaning records from the date of the alleged accident show that it was raining on that day, and New York City Transit Authority (NYCTA) witnesses testified, based on records produced, at depositions that it had been raining all day. (Coffey Affirmation, Ex. H, Ex. K at 36, Ex. I at 28.) Defendants have submitted cleaning records that show that the area where plaintiff allegedly slipped was cleaned approximately a half hour before the alleged accident and the area was left "clean and well lit." (*Id.*, Ex. H.) The accident report states that the area was clean and had no defects. (*Id.*) Moreover, plaintiff testified at deposition that she did not notice any water on the steps or on the station floor. (*Id.*, Ex. F at 21, 23.) She alleges that the floor was wet and that she landed in a puddle of dirty water; however, she does not know how long the water was present in the area. (*Id.* at

23.) Plaintiff did not testify or present any evidence of how deep the puddle was, although she did testify that there was water all over the floor. (*Id.*)

Plaintiff has not been able to show that there is an issue of fact for a jury to determine. Plaintiff argues, without evidentiary support, that it was not raining at the time of her alleged accident. She testified that it had stopped drizzling about an hour before the alleged accident. (Coffey Affirmation, Ex. F at 13.) Arguendo, there is no evidence that defendants had enough time from when plaintiff said the rain stopped to discover and remedy the wet condition. (*see Rosario v New York City Tr. Auth.*, 215 AD2d 364 [2nd Dept 1995].) Furthermore, the rain had not stopped completely, as the records show that it rained all day until approximately 11 p.m. on January 7, 2009. Therefore, the storm was still in progress at the time of plaintiff's alleged accident, irrespective of whether precipitation was actually perceived as falling at the exact moment she slipped. Plaintiff further argues that the water had been there for a long enough time for defendants to notice it because the water was "dirty." (Coffey Affirmation, Ex. F at 22.) However, climatological records show that a storm was still in progress at the time of plaintiff's alleged accident. The water could have become dirty simply from people walking through it. "The law does not require defendant New York City Transit Authority (NYCTA) to constantly maintain dry station floors during a storm." (*Solazzo v*

New York City Tr. Auth., 21 AD3d 735, 736 [1st Dept 2005] *affd* 6 NY3d 734.)

Plaintiff further argues that the station cleaner could not have left the steps and station floor “clean and well lit” at 7:35p.m. because he could not have been cleaning the area of the alleged accident at that time. (Coffey Affirmation, Ex. H.) Plaintiff bases her argument on the fact that, according to the station time control log, the cleaner arrived back at the Prince Street station at 7:35p.m. and, therefore, could not have cleaned the area at that time. (*Id.*, Ex. J.) However, this argument is speculative as plaintiff offers no proof that the cleaner did not clean the area at the time he stated on the accident report. Moreover, the cleaner’s schedule shows that the first task a cleaner attends to when arriving at the Prince Street station is to clean the stairways and station floor. (*Id.*) Therefore, he could have left the area clean at approximately 7:35p.m. Moreover, the station cleaner, Jerry Lawson, testified at deposition that he has to follow a cleaning schedule, and that he follows the instructions on the schedule. (*Id.*, Ex. I at 19-20, 23, 31.) A NYCTA witness, station supervisor Mary Gomes, testified that if there was inclement weather the station floor would be mopped if there was excessive water. (*Id.*, Ex. K at 13.) However, defendants have shown that the area was cleaned approximately a half hour before plaintiff’s alleged accident. The puddle plaintiff allegedly slipped in could have formed after the cleaner had already cleaned the

area.

In her opposition papers, plaintiff's counsel speculates about defective or clogged drains in the floor near where she allegedly slipped. It is unclear whether plaintiff is arguing that clogged drains caused the puddle she allegedly slipped in. Plaintiff's counsel relies on testimony by the NYCTA witnesses, Jerry Lawson and Mary Gomes, that if or when drains get clogged a request would be made for cleaning, and plumbers would go to the station to clean or snake the drains. (Coffey Affirmation, Ex. I at 18, Ex. K at 34-35.) However, the testimony deals with a hypothetical situation without any proof that the drains at issue were clogged or defective. Furthermore, this argument is of no moment because there is no mention of defective or clogged drains in the notice of claim, the complaint or the bill of particulars, and no evidence of any clogged or defective drains.

As to the Metropolitan Transportation Authority (MTA), "[i]t is well settled, as a matter of law, that the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the operation, maintenance, and control of any facility." (*Cusick v Lutheran Med. Ctr.*, 105 AD2d 681, 681 [2nd Dept 1984].)

Moreover, there is no evidence whatsoever to indicate any liability on behalf of the City of New York, which is effectively an out of possession owner

that does not maintain or control the subway system.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendants City of New York, New York City Transit Authority d/b/a MTA NYCTA and Metropolitan Transportation Authority for summary judgment is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

FILED

APR 05 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 29, 2013
New York, NY

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN