Harris v Metro North Commuter R.R.
2013 NY Slip Op 31211(U)
May 29, 2013
Sup Ct, New York County
Docket Number: 115890/2009
Judge: Eileen A. Rakower
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SCANNED ON 6/10/2013

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

PRESENT: Hon. EILEEN A. RAKOWER PART 15

Justice

ERICA LANICE HARRIS, as Administratrix of the Estate of SEDRICK M. HARRIS, Deceased,

Plaintiff,

- v -

METRO NORTH COMMUTER RAILROAD,

Defendant.

INDEX NO. 115890/2009

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

FILED

JUN 10 2013

NEW YORK COUNTY CLERK'S OFFICE

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answer — Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: Yes X No

Erica Lanice Harris ("Plaintiff"), as the Administratrix of the Estate of Sedrick Harris, brings this Federal Employees Liability Act ("FELA") action to recover compensatory damages for the alleged wrongful death of plaintiff's decedent Sedrick M. Harris ("Sedrick Harris"). Defendant Metro North Commuter Railroad ("Metro North") brings this motion for summary judgment pursuant to CPLR §3212.

Plaintiff alleges that on November 10, 2006, around 8 p.m. while Sedrick Harris was working as an employee of Metro North at Grand Central Terminal, he was injured when he fell from the top of a pile of timbers which were located on a flatcar. The complaint alleges that he was injured "because of the negligence, carelessness and recklessness of the defendant, its agents, servants and/or employees."

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On November 23, 2007, Sedrick Harris died. The complaint asserts that his death was a result of the injuries sustained on November 10, 2006. Plaintiff claims that Metro North was negligent in failing to provide Mr. Harris with a reasonably safe place to work as required by FELA and failing to provide safety equipment as required by the Federal Safety Appliance Act (49 USC §203301 et seq) and the Locomotive Inspection Act, f/k/a Boiler Inspection Act (49 USC §20701 et seq).

In support of its motion, Metro North provides: the pleadings; the verified bill of particulars; the affidavit of Bob O'Connell, a supervising assistant for Metro-North; the incident report written by Bob O'Connell; the deposition of Frank Hogan, a crane operator for Metro-North; the deposition of James Holley, a foreman for Metro-North; the deposition of John Williams, a senior engineer for Metro-North; the deposition of Patrick Gleason, an assistant supervisor for Metro-North; a copy of the "Little Giant Crane Maintenance and Part-Instructions"; and Plaintiff's expert disclosure of Anthony Storace.

In opposition, Plaintiff attaches: the expert affidavit of Anthony Storace; the deposition of Bob O'Connell; a diagram of the incident dated November 14, 2006; photographs of the location where the incident allegedly occurred; the deposition of James Holley; the deposition of Patrick Gleason; the deposition of John Williams; and the incident report.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

The Federal Employers' Liability Act ([FELA] 45 USC §51 et seq) upon which Plaintiff has based her action, generally provides that every railroad "shall

be liable in damages to any person suffering injury while he is employed by such carrier in such commerce... for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (45 USC §51).

The test as to whether a case under FELA is to be submitted to a jury is whether the proof submitted justifies the conclusion that the employer's negligence played any part, even the slightest, in producing the death or injury for which damages are sought: "It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." (*Pidgeon v. Metro North Commuter RR*, 248 AD2d 318 [1st Dept 1998]). A case is deemed unworthy of submission to a jury only if evidence of negligence is so thin that on a judicial appraisal, the only conclusion that could be drawn is that negligence by the employer could have played no part in an employee's injury. (*Id.*) The Defendant must have had notice, either actual or constructive, of the alleged condition that caused the plaintiff's injures. (*Id.*)

Mr. O'Connell was the supervisor in charge on the night of Mr. Harris' accident. He states that Mr. Harris' work consisted of replacing timbers (e.g. railroad ties) on tracts north of Grand Central Terminal between 102nd and 110th Streets. Twenty-five timbers, measuring 21' long, 7" wide and 9" deep were preloaded on a flat car prior to the start of the shift. The flat car was located on Track 60, considered a storage track for equipment and track material. The flat car was attached to a self-propelled crane, which would transport the flatcar of timbers to the job location. He states that Mr. Harris' duties were to load and unload material from the flatbed in conjunction with the crane operator.

The incident report filed by Mr. O'Connell reveals:

> Employee [Harris] got up on north end of flatcar 1011 to take rail tongs off boom. Ten feet of north end was clear of any material.

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> Employee heard banging and thought someone was at emergency exit at 48th St by Tower C. He proceeded to walk south on flat traversing timbers, 21' and 22', 15 total, that were on flat and using left hand to run along boom for support. The banging was not steady and at one point when the banging started up again employee shouted hold on at the same time he gestured with both hands in continued stride [and] slipped off flatcar.

Mr. Holley, a Metro-North forman in charge of supervising workers, testified that he spoke to Mr. Harris about his accident soon after it occurred. He says that Mr. Harris described his accident as follows:

> He said he heard someone banging on the door like they was trying to get in — there's an entrance on 48th Street that would bring you directly down to Track 60. He said someone was banging on the door loudly and he thought it was a worker that didn't have a key. He turned to get off the flatcar and that is when he fell.

Mr. Williams, a Metro-North senior engineer of track, inspected the flatcar train with the timbers the morning after the accident. He states that although the timbers could have been laid more neatly, there was no requirement that they are stacked flat, and the placement was not contrary to Metro-North guidelines, procedure or safety concerns.

Additionally, Metro-North alleges that there is no evidence provided that that it created a hazardous condition which caused the incident. They point to evidence that Mr. Harris told his co-workers that he did not know what caused him to fall.

In response, Plaintiff submits evidence that defendant did in fact create a dangerous condition. Plaintiff alleges that Metro had notice that the timbers were coated with Creosote (also known as Creosol), and the Creosote created a slippery condition. Plaintiff points to Mr. Holly's testimony which states:

> Q. Did Mr. Harris at any time specifically say what, if anything, regarding the timbers or the car caused him to slip?
> Mr. Keaveney: Objection. You can answer.

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A. Yes, the Creosol on the cars was– Creasol is like a waterproofing for the timbers.
Q. It's a chemical of some sort?
A. Yes.
Q. What did he say about that?
A. It makes the timbers slippery...
Q. Did he say something about the Creosol itself?
A. He just said he slipped off the timbers.
Q. Did he say that there was Creosol on the timbers?
A. It's on there. He didn't have to say anything. It's on there.
Q. Is that something you know from your job?
A. Yes.

Plaintiff's expert, Dr. Anthony Storace, a professional engineer who has worked in the engineering and biomechanics field for over forty years, states in his affidavit that Creosote is a petroleum derived oil used as a wood preservative, which creates a "low friction" standing/walking surface.

When asked whether there was anything provided to prevent the timbers from being slippery, Mr. Holley responded "no". Dr. Storace states in his affidavit "[h]ad Mr. Harris been wearing proper and adequate slip-resistant footwear, and/or using other means of improving foot traction, and had Metro-North provided a slip resistant walking surface, this accident likely would not have occurred."

Furthermore, Mr. Holley testified that he was aware that others of Defendant's workers slipped on Creosol coated timbers. When asked "approximately how many different people [he knew of] that slipped on timbers" he responded, "[n]umerous people".

Here, there are triable issues of fact as to whether Metro North was negligent in causing and creating a slippery surface on its railroad car, whether it provided proper footwear or railings, and whether Metro North had actual or constructive notice of a dangerous condition. "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." (*Pidgeon v. Metro North Commuter RR*, 248 AD2d 318 [1st Dept 1998]). Accordingly, Metro North's

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motion for summary judgment on the negligence claim is denied.

Metro North also asserts that the Federal Safety Appliance Act (SAA) and the Boiler Inspection Act (now Locomotive Inspection Act) (LIA), should be dismissed as inapplicable. They assert that "liability under the [LIA and SAA] only exists if the locomotive was 'in use' at the time of the accident." (See, Crockett v LIRR, 65 F3d 274 [2nd Cir 1995]). Both claims are deemed abandoned as Plaintiffs have failed to rebut Metro North's position or address their claims in the opposition papers. (see, *Genovese v. Gambino*, 309 AD2d 832 [2d Dept 2003]).

Wherefore, it is hereby,

ORDERED that Defendant Metro North Railroad's motion for summary judgment is granted only to the extent that causes of action based upon the Federal Safety Appliance Act (SAA) and the Boiler Inspection Act (f/k/a LIA) are dismissed; and it is further,

ORDERED that all other causes of action remain.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: **May 29, 2013**

HON. EILEEN A. RAKOWER

Check one: **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

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