Mojica v Metro-North Commuter Railroad Co.
2013 NY Slip Op 32542(U)
October 10, 2013
Sup Ct, New York County
Docket Number: 109805/2011
Judge: Kathryn E. Freed
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This opinion is uncorrected and not selected for official publication.

SCANNED ON 10/21/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT Justice PART 5

FILED
OCT 21 2013
COUNTY CLERK'S OFFICE
NEW YORK

Index Number : 109805/2011
MOJICA, LYDIA
vs.
METRO-NORTH COMMUTER RAILROAD
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

CALENDAR

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

RECEIVED
OCT 18 2013
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10-10-13

OCT 18 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS 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 5

----------X

LYDIA MOJICA,

Plaintiff,

- against-

METRO-NORTH COMMUTER RAILROAD COMPANY, METROPOLITAN TRANSPORTATION AUTHORITY and THE CITY OF NEW YORK,

Defendants.

----------X

DECISION AND ORDER

Index No. 109805/2011
Seq. No. 002 & 003

FILED

OCT 21 2013

COUNTY CLERK'S OFFICE
NEW YORK

KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ATTACHED.....	..1-4....
ORDER TO SHOW CAUSE AND AFFIDAVITS ATTACHED.....	.....
ANSWERING AFFIDAVITS.....	..3-4....
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	.....
OTHER.....	.....

Motion sequence numbers 002 and 003 are consolidated for disposition. Defendant The City of New York (the City) moves in motion sequence no. 002, for an order dismissing the verified complaint, as against it, for failure to state a cause of action pursuant to CPLR §3211 (a) (7), or, in the alternative, for summary judgment, pursuant to CPLR §3212. The City's motion is granted.

In motion sequence no. 003, defendant Metro-North Commuter Railroad Company (Metro North), and defendant Metropolitan Transportation Authority (MTA), move for summary judgment, pursuant to CPLR §3212, dismissing the complaint as against them. The motion is granted to the extent of dismissing the action as against the MTA, and denied with respect to Metro North.

Factual and procedural background:

This is a personal injury action involving an alleged slip and fall on ice in a pedestrian tunnel in a stone railroad bridge that covers East 106th Street at Park Avenue, in Manhattan. The pedestrian walkway, referred to as a "barrel"

(the barrel) is a continuation of a pedestrian crosswalk that connects the respective sidewalks on either side of the northbound and southbound lanes of Park Avenue (*see* Seiden aff., exhs. 11, 12 for photographs of the walkway). The photographs show that the walkway in the barrel is asphalt, and is at the same level as the adjacent roadway.

Plaintiff Sylvia Mojica (Mojica) alleges that, on February 11, 2011 at 5:30 p.m., she was walking across the northbound lane of Park Avenue on the crosswalk and entered the barrel, heading west. She alleges that she slipped and fell on a patch of ice, approximately eight feet into the barrel. She alleges that water dripping from the ceiling had formed a puddle and had frozen. Mojica states that there was some artificial lighting in the barrel, but it was "extremely dark" (Mojica aff, ¶ 2). She also states that she observed icicles on the ceiling over the spot where she fell (*id.*, ¶ 2).

Metro North admits in its answer that it owns, maintains, inspects and repairs the railroad overpass, but denies that it owns maintains, inspects or repairs the walkway and archway (*see* Raye affirmation, ¶ 5).

Conclusions of law:

New York Railroad Law § 93 assigns the respective duties to repair a railroad bridge and its "subway," as pertinent:

> "When a highway passes under a railroad, the bridge and its abutments shall be maintained and kept in repair by the railroad corporation, and the subway and its approaches shall be maintained and kept in repair by the municipality having jurisdiction over and in which the same are situated ... ."

The "subway" referred to in section 93 plainly means the roadway, and the walkway in the barrel underneath the overpass, the maintenance of which, section 93 assigns to the City.

The walkway in the barrel is not a sidewalk as that term is defined in the Administrative Code of the City of New York as:

> "that portion of a street between the curb lines or the lateral lines of a roadway and the adjacent property lines, but not including the curb, intended for the use of pedestrians"

(*id.*, § 19-128.1 [3]).

If the railroad bridge were not there, the walkway in the barrel would constitute a crosswalk, as that term is defined as:

> "that part of a roadway, whether marked or unmarked, which is included within the extension of the sidewalk lines between opposite sides of the roadway at an intersection"

(id., § 19-128.1 [4]).

In order to establish prima facie entitlement to judgment as a matter of law on these summary judgment motions, the City must make "a prima facie showing of entitlement to judgment as a matter of law by demonstrating that it neither created nor had actual or constructive notice of the icy condition alleged to have caused the plaintiff's fall" (*Spinoccia v. Fairfield Bellmore Ave.*,95 A.D.3d 993, 993 [2d Dept.2012]; *Santoliquido v. Roman Catholic Church of the Holy Name of Jesus,* 37 A.D.3d 815, 815 [2d Dept. 2007]).

The City has made its prima facie showing that it did not have sufficient time to discover and correct the alleged icy condition. The City submits evidence that it did not have actual or constructive notice of the alleged icy condition, especially considering that it was not visible and apparent in light of Mojica's testimony that it was dark in the barrel and she did not see the ice patch prior to her fall.

Constructive notice requires that the icy condition be visible and apparent and have existed for a sufficiently lengthy period of time prior to the accident

to permit the defendant's employees, in the exercise of due care, to discover and remedy it (*see Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]).

In support of its motion, the City submits meteorological records of the National Oceanographic and Atmospheric Administration, showing that, on the day of the alleged accident, it rained .11 inches in Manhattan, and the temperature averaged 30 degrees, but was as low as 18. On the day before, it rained .13, with the temperature averaging 41 degrees, with a low of 36 degrees.

The City argues that, in order to hold it liable for an icy condition, a reasonable time must have elapsed for the City to discover and correct the icy condition.

As the Appellate Division, Second Department, has stated:

> "A party in possession or control of real property is afforded a reasonable time after ... temperature fluctuations which created a dangerous condition to exercise due care in order to correct the situation"

(*Porcari v. S.E.M. Mgt. Corp.*, 184 A.D.2d 556, 557 [2d Dept. 1992]).

As the Appellate Division, First Department, stated in *Valentine v. City of New York*, as pertinent:

> "[i]ce is even more difficult to remove than snow. ... [A] municipality need not take any action at all to remove ice caused by a freezing rain but may, instead, await a thaw: This frozen surface it is practically impossible to remove until a thaw comes which remedies the evil. The municipality is not negligent for awaiting that result [citation and internal quotation marks omitted]"

(86 A.D.2d 381, 385-386 [1st Dept.], *affd* 57 N.Y.2d 932 [1982]).

Inasmuch as the meteorological evidence shows that there was only .24 inches of rain in the 24 hours preceding the alleged accident, and no snow, the City has met its burden of demonstrating lack of constructive notice of the alleged icy condition.

Even though Section 93 of the Railroad Law places the duty to maintain the walkway in the barrel on the City, "[t]his obligation to 'maintain' these

sidewalks certainly does not operate so as to preclude from liability one who actively creates or participates in the creation of a dangerous condition" (*Guest v. Consolidated Rail Corp.*, 116 Misc.2d 260, 262 [Sup.Ct, Erie County 1981], *revd on other grounds, Guest v. City of Buffalo*, 109 A.D.2d 1080 [4th Dept. 1985]).

Metro North's bare assertion that it owns only the overpass and not the ceiling and walls of the overpass's supporting stone columns lacks sufficient evidentiary support to be conclusive of its potential liability for causing the alleged icy condition, and is overruled by the requirement of section 93 that Metro North maintain the abutments of the overpass.

Plainly, Metro North is charged with maintaining the entire bridge, including the archways. The definition of the "abutment" of a bridge includes "the support at either extreme end [internal quotation marks and citations omitted]" (*Matter of City of New York v. New York Cent. R. Co.*, 183 Misc. 104, 105-106 [Sup Ct, NY County 1944]).

Metro North has not demonstrated that its alleged failure to repair the railroad bridge did not cause the alleged icy condition on the walkway in the barrel. The annual inspection reports of the overpass, for 2008 through 2011, which are required by law and were prepared by Metro North employees, state that water was leaking in 2011 from cracks in the stone joints in the walls and ceiling of the overpass. This demonstrates conclusively that Metro North had actual notice of water leaking from the walls and ceiling of the overpass. In light of Metro North's actual notice of water leaking over the sidewalk, it has not demonstrated that it did not cause the alleged icy condition, or at least have constructive notice of it. While Metro North disputes the amount of water actually leaking, and whether it reached the sidewalk, this only demonstrates the existence of questions of fact.

The MTA denies that it owns, has inspected, repaired or maintained either the railroad bridge or the walkway in the tunnel, and plaintiff has not submitted any evidence to the contrary. The MTA has demonstrated its entitlement to

judgment as a matter of law by demonstrating that it had no duty to inspect or repair the overpass or the sidewalk. "There is no reasonable basis for finding that there was any negligence on the MTA's part that contributed to plaintiff's injuries" (*Cruz v.Metropolitan Transp. Auth.*, 105 A.D.3d 408, 408 [1st Dept. 2013]).

In accordance with the foregoing,it is hereby

ORDERED that the motion of defendants Metro-North Commuter Railroad and the Metropolitan Transportation Authority (motion sequence no. 002) is granted to the extent of dismissing the action as against defendant the Metropolitan Transportation Authority, and otherwise denied; and it is further

ORDERED that the motion of defendant The City of New York (motion sequence no. 003) for summary judgment dismissing the complaint is granted; and it is and the complaint and any cross claims are hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue and be transferred to the Transit Part as Metro North Commuter Railroad is the remaining party in this action, and it is further

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

ORDERED that this constitutes the decision and order of the Court.

Dated: October 10, 2013

ENTER:

OCT 10 2013

FILED

OCT 21 2013

COUNTY CLERK'S OFFICE
NEW YORK

Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT