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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11

Justice

Index Number : 115159/2010
RANDELL, RONNIE
VS.
LONG ISLAND RAILROAD
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

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 decided in accordance with the annexed Memorandum Decision + Order.

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

Dated: March 12, 2014

_____, **J.S.C.**

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: PART 11

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RONNIE RANDELL,

Plaintiff,

-against-

THE LONG ISLAND RAILROAD COMPANY AND THE METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants,

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Index No: 115159/10

Joan A. Madden, J.

In this personal injury action, defendants The Long Island Railroad Company ("LIRR") and Metropolitan Transportation Authority ("MTA") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them. Plaintiff Ronnie Randell ("Randell") opposes the motion. For the reasons set forth below, the motion is denied.

Background

Randell alleges that she was injured on December 2, 2009, between 11:30 a.m. and 11:45 a.m., when she fell on a raised portion of yellow tactile metal strip after exiting the LIRR train. According to plaintiff's testimony, she boarded a westbound LIRR train at the Massapequa train station. Upon arriving at Penn Station, the train pulled into track 19. Randell testified that when the train doors opened, she was the first one to exit the train. She stated that she was using a cane, and pulling luggage on wheels. According to Randell she stepped over the gap between the train and the platform, and proceeded to take another step with her left foot and the next thing she knew she was lying on the platform. Randell testified that she fell as a result of "metal plates on the lip of the track that are after the gap, where they meet, that are suppose to be flat, they buckled" and that before she fell she felt her left toe make contact with the metal plate (Randell's EBT, at 24).

Randell testified that following the incident, the MTA Police Department responded to the scene. She testified that the police officer told her "'not to be embarrassed as people fall here all the time" Id, at 38. The MTA police officers who responded to the incident, Eric Moore ("Moore") and Greg Beuller ("Beuller"), have been deposed. Moore testified that inspecting the platform areas was not part of his duties, and that during his 14 years working at Penn Station he never observed someone from MTA inspecting the platform to ensure the areas were level. The record contains an MTA Incident Report, which identifies Moore as the reporting officer, and indicates that the platform where Randell fell was raised "an approximate one to one and a half inches." According to Moore, he prepared the incident report in the ordinary course of business on the date of the accident pursuant to the MTA's Police Department's general accident investigation procedures. He also stated that although he had no specific recollection of the incident, that he would generally observe a condition before making an approximation like the one in the report that the platform was raised one to one and a half inches. Moore testified that in his position as an MTA officer, he would consider a platform raised one to one and a half inches to be a hazardous condition.

Beuller took the photographs for the accident report but testified he did not have any recollection of the incident beyond what is contained in the report. He also testified that it was not his job to inspect the platform but that if he observed a hazardous condition he would report it to his supervisor. He testified that he observed contractors for Amtrak, which owns the building, doing maintenance and repair work on the platforms. However, he testified that before December 9, 2009, he had never observed anyone inspecting the platform areas.

Bart Thumser ("Thumser"), an LIRR conductor and an eyewitness to the incident, was also deposed. Thumser alleged that Randell had her back towards the platform and was

"yanking" her suitcase which was caught on the pole inside the train when she fell backwards on to the platform. Thumser also testified that he did not see "any raising or peeling back or...lifting up of the safety tread on the platform" (Thumser EBT, at 43).

Defendants move for summary judgment dismissing the complaint against them on the grounds that Randell did not establish that defendant had either created the alleged condition, or had actual or constructive notice of it. Defendants contend that Randell did not establish any evidence of actual notice or constructive notice since Randell provided no information or evidence as to how long the purported condition is alleged to have existed. Additionally, defendants assert that Randell's own testimony indicates that the defect was neither apparent nor visible since she stated that she did not observe the purported defect before she fell.

Defendants also assert that inspections of the platform were made twice a month by Amtrak, as the owner of the property pursuant to an agreement between Amtrak and LIRR, and in support of this assertion, submit the affidavit of David Cooper ("Cooper"), who is employed by Amtrak as an assistant supervisor of structures at Penn Station, together with a copy of inspection reports. According to Cooper, in 2009, it was the business practice of Amtrak to ensure that the inspections of the Penn Station tracks utilized by LIRR, including track 19, occurred "approximately once or twice per month" (Cooper Aff., ¶ 3). Cooper's states that visual inspections were conducted to make sure that strips were secure, and that any unsecured or damaged strips were repaired at the time of the inspection. Cooper also notes that following each inspection, inspection reports were prepared. The inspection reports attached to Cooper's affidavit are dated January 9, 2009, February 13, 2009, February 27, 2009, March 27, 2009, April 9, 2009, May 1, 2009, June 12, 2009, July 27, 2009, and August. According to Cooper, the inspection reports included information such as the completion date and the repairs

that were required. The reports show that tactile strips on track 19 were repaired seven times in a five month period. Cooper states that "based upon having reviewed the inspection report completed on August 9, 2009, I can testified that at the time of the inspection, there were no safety or tripping hazards observed on track 19" (Id, ¶ 7).

Randell opposes the motion, asserting that defendants failed to offer evidence demonstrating that the raised tactile strip existed for an insufficient amount of time to be discovered and remedied. Randell also argues that the court should disregard Cooper's affidavit as he was not disclosed by defendants as a witness and she has not had an opportunity to take his deposition. Likewise, the tactile inspection reports attached to Cooper's affidavit were not produced in discovery. Randell also argues that these reports and Cooper's affidavit reveal that there were numerous repairs and instances of tactile strip regularly loosening, defendants allowed track 19 to remain uninspected for four (4) months prior to plaintiff's accident, which went against defendants' self-imposed procedures requiring the track to be inspected once or twice a month. Thus, Randell argues that, at the very least, whether defendants had constructive notice of the dangerous condition raises an issue of fact for trial.

In reply, defendants assert that Randell has not provided any evidence of actual notice since the repairs that Randellrefers to are unrelated to the subject location. Defendant claims that LIRR diligently inspects track 19 which is hundreds of feet long, and that the inspection reports do not establish the existence of a recurring dangerous condition at the subject location. Defendants also argue that Randell failed to show constructive notice since there is no evidence or testimony about an ongoing dangerous or a hazardous condition at the specific location in question. Instead, defendant claims that Randell only refers to inspection reports that show repairs for the entire platform of track 19.

Further, defendants contend that it took all reasonable steps to ensure that there were no dangerous condition since Moore's and Beuller's testimony establish that repairs would be made for any safety hazards that they observed. According to the defendant, the constant patrol by MTA Officers such as Moore and Beuller disproves plaintiff's claim that defendants allowed the tactile strip of track 19 to remain uninspected for four (4) months prior to the incident in question. In response to plaintiff's argument that the existence of a dangerous condition is an issue of fact, defendant argues that the condition was not visible and apparent for a sufficient period of time, despite the diligent inspection by LIRR, MTA, and Amtrak employees.

As for Randell's assertion that Cooper was never deposed, defendants argue that as Cooper is employed by Amtrak, who is not a party to the case, and that they produced Thumser for deposition as he witnessed the accident. Defendants also assert that they responded to all of plaintiff's discovery demands, and that they provided Randell with Cooper's inspection reports by attaching it to their summary judgment motion.

After the motion was fully submitted, and without the permission of the court, defendants submitted an affidavit from Tim Nordt ("Nordt"), the Assistant Manager of Facilities Maintenance for the LIRR and LIRR records for track 19. Nordt states that "as part of an ongoing search for LIRR records pertaining to inspections of ...track 19, on October 23, 2013, I located records stemming from inspections at Penn station platform track 19 in 2009" (Nordt Aff., ¶ 4). He further states that "in 2009, Amtrak employees performed a visual inspection of the platforms and tactile strips. The inspections were performed to determine their overall physical condition and their safety for the use by the public and the passengers of the LIRR trains" (id, ¶ 7). According to Nordt, the reports, which are dated September 1,

September 15, October 5, October 20, November 5, November 19 and December 2, 2009, show that "no repairs were required for the tactile strips located at Penn Station platform track 19" (id, ¶ 11).

Randell argues that the court should not consider the belated submission and that it has not have an opportunity to depose Nordt and did not receive his records in discovery, and that defendants should be precluded from introducing the evidence at trial. To the extent the court considers either Nordt's affidavit and the annexed reports and/or Cooper's affidavit and the annexed reports, Randell argues that she should be given an opportunity to depose Nordt and Cooper.

Discussion

To succeed on a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case...." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

"A common carrier owes a duty to its passengers to stop at a place where they may safely disembark and leave the area ." Malawer v. New York City Tr. Auth., 18 AD3d 293, 295 (1st Dept 2005), affirmed, 6 NY3d 800 (2006). Whether a common carrier has breached its duty is generally a question of fact to be determined at trial. Id. At the same time, however, "a common carrier, like any other defendant, is not an insurer of the safety of its equipment"

and thus, to be held liable, the carrier must have actual or constructive notice of the defect. Boyd v. Manhattan & Bronx Surface Transit Operating Authority, 9 NY3d 89, 92 (2007).

To constitute constructive notice, a defect must be visible, apparent, and exist for a sufficient length of time prior to an accident to permit the owner or its agents to discover and remedy it. Gordon v. American Museum of Natural History, 67 NY2d 836 (1986). Additionally, "[a] defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition." Osorio v. Wendell Terrace Owners Corp., 276 AD2d 540, 540 (2nd Dept 2000); Freund v. Ross-Rodney Hous. Corp., 292 AD2d 341, 342 (2nd Dept 2002).

An owner may demonstrate prima facie entitlement to summary judgment dismissing a personal injury claim against it by providing evidence that the area where the injury occurred was routinely maintained and inspected. Mauge v. Barrow Street Ale House, 70 AD3d 1016 (2nd Dep't 2010). However, a plaintiff may defeat summary judgment by providing evidence that raising factual questions as to whether the maintenance and inspection efforts were adequate to address the remedy the recurrent condition. See Gautier v. 941 Intervale Realty LLC, 108 AD3d 481 (1st Dept 2013); Irizarry v. 15 Mosholu Four, LLC, 24 AD3d 373 (1st Dept 2005).

As a preliminary matter, the belatedly submitted affidavit from Nordt and the inspection reports attached to it, will not be considered by this court. It is well established that in the absence of "good cause" papers submitted after the return date for the motion will not be considered. Traders Co. v. AST Sportswear, Inc., 31 AD3d 276 (1st Dept 2006), citing CPLR 2214(c). Here, defendants do not offer a sufficient explanation as to why the records, which were in existence since 2009, were suddenly found in LIRR's files. Significantly, defendants

failed to identify Nordt as a witness during discovery even though he states in his affidavit that he had knowledge as to inspections of track 19; that it was his responsibility to ensure that such inspections were performed by Amtrak; and that LIRR was given notice of the inspection following its completion. This failure prejudiced Randell who should have been permitted to examine Nordt as to the statements made in his affidavit which are central to defendants' potential liability.[1]

Here, the inspection reports submitted in support of the summary judgment motion, the last of which is dated July 31, 2009 for inspection occurring on July 24, 2009, reveal that the tactile strip on track 19 regularly loosened and thus constituted a recurring dangerous condition for which defendants can be charged with constructive notice of each recurrence. Freund v. Ross-Rodney Hous. Corp., 292 AD2d at 342. Furthermore, while the MTA officers were not specifically charged with inspecting the platforms, their testimony that they regularly patrolling of the area of the platform and were required to report any dangerous conditions raises an issue of fact as to whether they knew or should have known the condition which caused Randell to fall.

Moreover, even assuming *arguendo* that defendants made a prima facie showing that the area where the injury occurred was routinely maintained and inspected, triable issues of fact exist as to whether the recurring condition on which plaintiff fell was adequately addressed by the inspections and repairs performed by Amtrak. See Hurley v. Related Management Co., 74 AD3d 648 (1st Dept 2010)(finding triable issue of fact as to whether defendant Con Edison's inspection of sidewalk grate two months prior to accident satisfied its

[1]Although plaintiff produced Thumser, the LIRR conductor who witnessed the accident, as a witness, Thumser had no knowledge as to the issue of notice.

duty of care to maintain and repair sidewalk vaults) . In this connection, defendants' reliance on Di Sanza v. City of New York, 47 AD3d 535 (1st Dept 2008) is misplaced. In Di Sanza, plaintiff allegedly tripped over a metal grated owned by defendant Con Edison. Although summary judgment was granted dismissing the complaint based on evidence that Con Edison had inspected the grate five months before the accident, Di Sanza did not involve a recurring condition like the one at issue here, which defendants acknowledge required inspections as often as twice monthly.

Next, under the circumstances here, where the record contains evidence that defendants were aware of the recurring condition of the kind which allegedly caused the plaintiff to fall, it cannot be said as a matter of law that the defect was insufficiently visible or apparent to give rise to liability. Accordingly, summary judgment must be denied.

Finally, as to Randell's request to preclude Nordt's testimony at trial based on defendants' failure to identify him as a witness during discovery, the court grants such request only to the extent of permitting Randell to depose Nordt conditioned on her noticing his deposition within 30 days of the date of this decision and order. Randell may also issue a subpoena for Cooper's testimony within 60 days of this decision and order. The court is permitting Randell to seek this discovery despite the filing of the note of issue so that she will not be prejudiced at trial by defendants' failure to identify these witnesses during discovery. Any further evidence obtained as a result of these depositions shall not be considered by the court, in any motion by defendants to renew or reargue their summary judgment motion.

Conclusion

In view of the above, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that Randell's request to preclude Nordt's testimony at trial is granted to the extent of permitting Randell to depose Nordt conditioned on her noticing his deposition within 30 days of the date of this decision and order; and it is further

ORDERED that Randell may also issue a subpoena for Cooper's testimony within 60 days of this decision and order; and it is further

ORDERED that following the depositions of Nordt and Cooper or after the expiration of the period for seeking such depositions, the parties shall proceed to mediation.

DATED: March 12, 2014

J.S.C.