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

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STEVEN WALDRON,

Plaintiff,

Index No. 158038/2014

- against -

NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSIT AUTHORITY,

Decision and Order

Defendants.

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HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff, a police officer, alleges that he allegedly tripped and fell on a stopped escalator within a subway station. Plaintiff now moves to compel defendants to comply with discovery. Defendants cross-move to compel plaintiff to comply with discovery. This decision addresses both the motion and cross motion.

BACKGROUND

On January 31, 2014, at approximately 1:20 A.M.,[1] plaintiff, a NYPD police officer, allegedly tripped and fell on an escalator in the subway station

[1] By counsel, plaintiff stated at his deposition that the incident occurred on January 31, 2014 at 1:20 A.M. (Berkson Opp. Affirm., Ex A at 39.)

The Court notes that the notice of claim states the incident occurred at approximately 1:20 *P.M.*, and that the complaint states that the incident occurred on January *14*, 2014 at 1:20 *P.M.* (*Compare* Decolator Affirm., Ex A *with* Decolator Affirm., Ex B [Complaint] ¶ B.)

for the A train at 181st Street and Fort Washington Avenue in Manhattan. According to plaintiff, "I attempted to get on to the escalator to go to the platform. As I stepped on to the escalator due to the fact that the escalator wasn't working I missed the step and twisted my right knee and fell down causing pain to my right knee." (Decolator Affirm., Ex C.)

The complaint asserts a cause of action for negligence and a second cause of action pursuant to General Municipal Law § 205-e, for violations of Transportation Law § 96 and Administrative Code § 28-301.1. The bill of particulars alleges that plaintiff sustained, among other injuries, a torn ACL in his right knee, which required reconstructive surgery; severe and persistent right knee pain; and limp and gait deformity. (Berkson Affirm., Ex C ¶ 10.)

Plaintiff appeared for a deposition on July 9, 2015. It is undisputed that, when plaintiff stepped onto the escalator, the escalator was not moving. Plaintiff testified as follows:

> "Q. Did you put your left foot on the escalator?
> A. Yes.
> Q. Did anything happen?
> A. No, it was normal walking motion.
> Q. Now, then, was your intention to bring your right foot on to the escalator?
> A. Yes.
> Q. And did you?
> A. Yes.
> Q. And then did something happen?

A. Yes.
Q. Then what happened?
A. I took that second step, the right step, and I put my right foot down, my knee buckled.
Q. Which knee was that?
A. My right knee.
Q. To what do you attribute your right knee buckling?
A. I was anticipating a step down on the escalator, but there was no step down because it was never moving."

(Berkson Affirm., Ex D [Plaintiff's EBT], at 71.) According to plaintiff, "When it [his right knee] buckled, I started to go down. I grabbed a handrail and stopped myself from falling further down. On to the knee, and down the escalators." (*Id.* at 73.)

Plaintiff testified that he went to Dr. Mark Grossman for follow-up care. (*Id.* at 92.) Plaintiff also stated that, approximately a year later, in January 2015, he suffered an injury to his right knee, during a foot pursuit of someone observing making graffiti. (*Id.* at 66, 102-103.) Plaintiff stated that he was treated at "St. Luke's Roosevelt, the Uptown one" for this injury. (*Id.* at 103.) According to Dr. Grossman's records from March 9, 2015, plaintiff also slipped on ice while at work and hit his right knee. (Berkson Affirm., Ex E.)

Following plaintiff's deposition, defendants served a demand for authorizations dated July 27, 2015 concerning plaintiff's January 2015 incident/accident. (Berkson Affirm., Ex G). Defendants also served a demand for authorizations dated July 28, 2015 concerning an automobile

incident that purportedly occurred on December 10, 1993 (Berkson Affirm., Ex I), based on an ISO claim search. (*See* Berkson Affirm., Ex F.) Lastly, defendants served a demand for authorizations dated February 26, 2016. (Berkson Affirm., Ex H.)

On April 12, 2016, Delano Gravesande, a maintenance supervisor employed by the New York City Transit Authority, appear for a deposition. Gravesande testified that the escalator at issue, identified as ES 117, had been stopped for cleaning, based on an "outage report." (Decolator Affirm., Ex D [Gravesande EBT], at 31; *see also* Berkson Opp. Affirm., Ex D [outage report].) He stated that the escalator was out of service from 12:58 A.M. until 4:15 A.M, for a total of three hours and 17 minutes. (*Id.* at 32-35.)

Plaintiff now moves to compel defendants to comply with plaintiff's notice for discovery and inspection dated May 2, 2016, which was served after Gravesande's deposition.

Defendants oppose the motion. Defendants objected to all the demands except for item number 4, which sought a copy of the station rules in effect on the date of the accident for taking escalators out of service.

Defendants cross-move to compel plaintiff to respond to their demand for authorizations. Plaintiff apparently did not oppose defendants' cross motion.

DISCUSSION

Plaintiff's Motion to Compel

Plaintiff has not shown that the documents sought in his notice for discovery and inspection dated May 2, 2016 are either relevant, or reasonably calculated to lead to admissible evidence as to the issues of the action.

First, the discovery sought does not bear upon defendants' possible liability under negligence or under General Municipal Law § 205-e. As defendants indicate, the Appellate Division, First Department held that an escalator that is temporarily stopped is not, as a matter of law, a dangerous condition or a reasonably foreseeable hazard. (*Adamo v National R.R. Passenger Corp.*, 71 AD3d 557 [1st Dept 2010].) "The temporarily stationary stairway did not present a reasonably foreseeable hazard, particularly in the absence of any allegation that it was in ill repair . . . or that any of the steps, including the one on which she tripped, was defective or covered with debris." (*Adamo*, 71 AD3d at 558 [internal citation omitted].) Defendants would have "no duty to warn of or otherwise protect plaintiff from a condition that posed no reasonably foreseeable hazard." (*Schurr v Port Auth. of N.Y. & N.Y. & N.J.*, 307 AD2d 837, 838 [1st Dept 2003].)

Thus, all the records sought by plaintiff for a two-year period prior to the date of the accident would have no bearing on defendants' liability under a theory of negligence.

Moreover, the second cause of action under General Municipal Law § 205-e is based on a violation of Administrative Code § 28-301.1, which does not apply to the subway escalator at issue. (*Garcia v New York City Tr. Auth.*, 63 AD3d 1100, 1101 [2d Dept 2009].) Administrative Code § 28-301.1 is enforced by the Commissioner of the Department of Buildings, subject to the provisions of Section 643 of the New York City Charter. (Admin Code § 28-103.1.)

> "Section 643 of the City Charter provides, in relevant part, that the jurisdiction of the New York City Department of Buildings 'shall not extend to ... subways or structures appurtenant thereto" (New York City Charter § 643[7]). Inasmuch as the stairway at issue in this case is a structure wholly contained within a subway station and is inseparable from the function of that station, it is 'appurtenant' to a subway within the meaning of section 643 of the City Charter."

(*Garcia*, 63 AD3d at 1101; *compare with Huerta v New York City Tr. Auth.*, 290 AD2d 33, 41 [1st Dept 2001] [an escalator leading from a subway station is not exempt from the NYC Building Code].)

Thus, all the records sought by plaintiff for a two-year period prior to the date of the accident would have no bearing on defendants' liability under Administrative Code § 28-103.1.

Plaintiff also alleges a violation of Transportation Law § 96, which states, in relevant part: "Every corporation, person or common carrier performing a service designated in the preceding section, shall furnish, with respect thereto, such service and facilities as shall be safe and adequate and in all respects just and reasonable."

Plaintiff does not explain how the records sought for a two-year period prior to the date of the accident might bear on the issue of whether the escalator was "safe and adequate and in all respects just and reasonable" on January 31, 2014. According to Gravesande's testimony and his review of the records, the escalator at issue was taken out of service for cleaning in the middle of the night.

Finally, plaintiff's motion to compel with item number 4 of the demand is denied as academic. Defendants appear to have produced the relevant rules for taking escalators out of service from the Station Environment & Operations Supervisory Policy and Procedures Manual. (Berkson Opp. Affirm., Ex F.) Defendants also apparently produced a copy of the cleaning schedule for Winter 2014, in response to item number 1, which is the only cleaning schedule that is relevant to this incident. (Berkson Opp. Affirm., Ex F.)

Notwithstanding the above, the Court directs defendant New York City Transit Authority to produce a copy of, or make available for inspection and copying, entries from station outage call logbook for the date of the occurrence, i.e., January 31, 2004, within 45 days. At his deposition, Gravesande testified:

> "Q. Would there be any other records that go along with this outage history that would further tell us about what happened on that particular day or this would be it?
> A. We have another outage call logbook.
> Q. What does the logbook tell us?
> A. The same thing you are reading there, the mechanic writes in the logbook of why he was there.
> Q. Where is the logbook maintained?
> A. In the motor room.
> Q. That would be at the station?
> A. Correct."

(Gravesande EBT, at 49-50.) Based on the Gravesande's testimony, the outage call logbook would be relevant or reasonably calculated to lead to admissible evidence about the escalator ES 117 having been taken out of service on January 31, 2014.

The Court also grants plaintiff an additional deposition of defendants. Within 45 days, defendants shall produce for a deposition the person who cleaned escalator ES 117 at the 181st Street subway station for the A train on January 31, 2014, between 12:58 a.m. and 4:15 a.m, if that person is employed by the New York City Transit Authority.

Defendants' Motion to Compel

Defendant's motion to compel is granted without opposition. Pursuant to so-ordered stipulations dated July 30, 2015, November 12, 2015, and March 3, 2016, plaintiff agreed to respond to defendants' demands for authorizations. (Berkson Affirm., Ex K.) The plaintiff's failure to object timely to defendants' demand for authorizations "forecloses inquiry into the propriety of the information sought except with regard to material that is privileged pursuant to CPLR 3101 or requests that are palpably improper." (*During v City of New Rochelle*, 55 AD3d 533, 534 [2d Dept 2008] [citations omitted].)

However, the Court exercises its discretion to deny defendants' cross motion as to their demand for authorizations dated July 28, 2015, concerning a December 10, 1993 automobile incident involving plaintiff. (Berkson Affirm., Ex I.) It is unclear from the ISO claim search record whether plaintiff injured his right knee from that incident, and the incident apparently occurred 21 years prior to the incident at issue. (*See Manley v New York City Hous. Auth.*, 190 AD2d 600 [1st Dept 1993] [defendants not entitled to plaintiff's entire medical records for 15 years preceding accident].) Neither is there

anything in the record to indicate that plaintiff commenced any legal action arising out of the December 10, 1993 incident.

For all other named providers, plaintiff is directed to produce the authorizations demanded. Plaintiff is also directed to provide the authorizations for the release of employment records from the NYPD police surgeon(s) who examined plaintiff for line of duty injuries in January 2015 and March 2015. Plaintiff's deposition testimony and Dr. Grossman's records indicate that plaintiff subsequently injured his right knee again after the alleged incident on January 31, 2014. Plaintiff shall provide these authorizations within 45 days.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion to compel is granted in part as follows: within 45 days, defendants shall

(1) produce a copy of, or make available for discovery and inspection, entries from the outage call logbook for January 31, 2004;

(2) produce the person who cleaned escalator ES 117 at the 181st Street subway station for the A train on January 31, 2014, between 12:58 a.m. and 4:15 a.m, if that person is employed by the New York City Transit Authority,

and plaintiff's motion is otherwise denied; and it is further

ORDERED that defendants' cross motion to compel is granted in part without opposition as follows: within 45 days, plaintiff shall provide HIPAA-compliant authorizations for the release of records, including any X-rays, MRIs or diagnostic films, from

(1)Nassau Sports Care Physical Therapy from January 31, 2014 to the present;

(2) Metropolitan Diagnostic Radiology from March 24, 2014 to the present;

(3) Dr. Mark Geoffrey Grossman from March 24, 2014 to the present;

(4) Mount Sinai St. Luke's Hospital from January 1, 2015 to the present,

(5) the NYPD police surgeon(s) who examined plaintiff for line of duty injuries in January 2015 and March 2015,

and defendants' cross motion is otherwise denied.

Dated: November 9, 2016
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C.