Carela v New York City Tr. Auth.
2018 NY Slip Op 31090(U)
May 18, 2018
Supreme Court, New York County
Docket Number: 152588/2015
Judge: Lisa A. Sokoloff

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 21

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DEIVYS CARELA and JESSICA CARELA,

Plaintiffs,

DECISION AND ORDER

Index No: 152588/2015

Mot. Seq. 4

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYCEF #
Defendant's Motion / Affirmation for Protective Order	1	56-67
Plaintiff's Opposition/ Affirmation	2	69-84
Defendant's Reply / Affirmation (3)	3	86

LISA A. SOKOLOFF, J.

In this personal injury action by Plaintiffs Deivys and his wife, Jessica Carela, arising out of a slip and fall on a subway station stairway, Defendant New York City Transit Authority (Transit) moves for summary judgment, pursuant to CPLR § 3212, dismissing Plaintiff's complaint, as a matter of law.

On September 26, 2014, at approximately 8:40 pm, Plaintiff Deivys Carela alleges that he slipped on a MetroCard on a stairway at the 145th street "D" subway station and fell down several stairs. Defendants contend they had neither actual nor constructive notice of the alleged unsafe condition, while Plaintiffs argue that strewn MetroCards at rush hour are a recurring dangerous condition, and therefore, Defendant should be charged with constructive notice of each specific recurrence.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [NY 1985]). Once this showing has been made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). In deciding a summary judgment motion, a court must view the evidence in the light most favorable to the non-moving party, here Plaintiff, affording it the benefit of every favorable inference which can be drawn from the evidence (*Hasley v Abels*, 84 AD3d 480 (1st Dept 2011]).

To establish a *prima facie* case of negligence, a plaintiff must demonstrate that the defendant owed him a duty of reasonable care, breached that duty, and a resulting injury was proximately caused by the breach (*Boltax v Joy Day Camp*, 67 NY2d 617 [1986]; *Kenney v City of New York*, 30 AD3d 261 [1st Dept 2006]). A property owner owes a duty to maintain the property in a reasonably safe condition (*Basso v Miller*, 40 NY2d 233 [1976]) and one who has fallen as a result of a defective or dangerous condition must prove that the property owner created or had either actual or constructive notice of the condition in order to recover (*Ceron v Yeshiva University*, 126 AD3d 630 [1st Dept 2015]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit a defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

Jason Hamilton, the porter/cleaner responsible for cleaning the subway station on the date of the accident during the 3pm-11pm shift, had worked at this station for about

three years. Transit provided Hamilton with a written cleaning schedule that listed his job duties, the times required to perform them, and noted that it was "Subject to change and/or chance," which permitted it to be altered to address conditions as they arose. Although Mr. Hamilton did not have an independent recollection of what the cleaning schedule was on the date of the accident, he testified on the assumption that he performed his normal routine, including prepping the station by looking for glaring problems like broken glass, emptying the garbage cans, and scrapping (cleaning) the station. Mr. Hamilton testified that he empties the garbage cans three times during his shift (once more than required by the written schedule) and scraps constantly, including removing MetroCards from the subway platforms and stairs.

Although a recurring condition in the area of an accident may give rise to the inference of constructive notice that the condition existed at the time of the accident (*Lance v Den-Lyn Realty Corp.*, 84 AD3d 470 [1st Dept 2011]), and strewn MetroCards may constitute a recurrent condition, Defendant has demonstrated that it has a rational means of dealing with the problem by virtue of its written janitorial schedule as enhanced by its staff. Where "a reasonable cleaning routine was established and followed, liability cannot be imposed" and the "court cannot impose a duty upon a municipal authority to alter its cleaning schedule or hire additional cleaners without a showing that the established scheduled is manifestly unreasonable" (*Harrison v New York City Transit Authority*, 94 AD3d 512 [1st Dept 2012]).

Relying on *Williams v New York City Housing Authority*, 99 AD3d 613 (1st Dept 2012), Plaintiffs argue that the Transit cleaner failed to adhere to the written cleaning schedule by emptying the garbage an extra time, and as a result, the removal of litter on the subway stairs was delayed. In *Williams*, the defendant failed to present competent

evidence that the janitorial schedule was followed on the day of the accident and could not show that it lacked constructive notice of the complained of condition. Similarly, in *Molina v New York City Transit Authority*, 115 AD3d 416 (1st Dept 2014]), the defendant did not demonstrate that a reasonable cleaning schedule was established and followed prior to the plaintiff's accident, and the defendant was aware that debris on the stairs was not addressed.

Transit's cleaner in the instant action, Mr. Hamilton, testified that he performed his usual routine, which included an additional garbage removal beyond the two times prescribed by the written schedule as well as scrapping the station. Plaintiffs have failed to provide any evidence that Transit had notice of the MetroCard on the stairway or failed to adhere to its enhanced janitorial schedule (*Love v New York City Housing Authority*, 82 AD3d 588 [1st Dept 2011]; *cf. Rich v Twin Parks Northeast Associates, LP*, 117 AD3d 482 [1st Dept 2014]). Moreover, speculation as to when the stairway may have last been swept is insufficient to defeat Defendant's motion (*Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986]).

During the three years that Mr. Hamilton was employed cleaning this subway station, he recognized the need for an additional round of garbage removal and instituted and maintained this enhanced cleaning routine. Where an employee goes above and beyond what is required to insure a better result, liability may not be imposed without a showing that the enhancement was manifestly unreasonable which Plaintiffs have not done.

Accordingly, it is ordered that Defendants' motion for summary judgment is granted and Plaintiff's complaint is dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: May 18, 2018
New York, New York

ENTER:

Lisa A. Sokoloff, J.C.C.