Bauman v City of New York
2020 NY Slip Op 32502(U)
May 28, 2020
Supreme Court, New York County
Docket Number: 156924/2015
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19
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ADAM BAUMAN,

Plaintiff,

Index No.: 156924/2015

-against-

Mot. Seq. 2

THE CITY OF NEW YORK, THE NEW YORK CITY TRANSIT AUTHORITY, MABSTOA, METROPOLITAN TRANSIT AUTHORITY, THE MTA BUS COMPANY and "JOHN DOE",

Decision

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

Papers	Numbered	NYCEF #
Defendants' Motion / Affirmation in Support	1	37-56
Plaintiff's Opposition	2	61
Defendants' Reply	3	62

J. Sokoloff:

In this personal injury action, defendants New York City Transit Authority (NYCTA) s/h/a The New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority s/h/a MABSTOA, Metropolitan Transportation Authority (MTA) s/h/a Metropolitan Transit Authority and MTA BUS COMPANY s/h/a The MTA Bus Company (collectively, Authority), move for an order, pursuant to CPLR 3212, granting defendants summary judgment on the ground that plaintiff, Adam Bauman, has failed to state a cause of action against the moving defendants as there are no triable issues of material fact[1] Plaintiff opposes.

For the following reasons, the motion is denied.

[1] By decision and order dated May 10, 2018, the City of New York is no longer a party to this action (motion seq. no. 001).

Background

On February 12, 2015, at 4:39 p.m., plaintiff allegedly slipped and fell when he was boarding an Authority bus on East 79th Street at or near the intersection East End Avenue in Manhattan, New York. Plaintiff sustained a fracture to his right arm as a result of the fall.

Specifically, plaintiff testified at a 50-h hearing, as well as at a deposition, that on the day in question, he waited on East 79th Street, approximately 100 feet east of the intersection at East 79th Street and East End Avenue (5/22/15 hearing tr, defendants exhibit F; 6/6/17 plaintiff dep, defendants exhibit G). He testified that the day and night before the accident, several inches of snow and ice fell, and that there was one or two inches of snow, as well as ice on the ground. While he was walking from his apartment building to the bus stop, there were patches of snow but it was not blanketed, and the sidewalks that plaintiff walked on were not icy at that time.

When the bus pulled up, plaintiff stepped from the sidewalk onto the street and walked to the bus entrance. The bus lowered. Plaintiff stepped from the street with his right foot to the first step of the bus. As he was stepping, he was looking straight ahead, higher up into the bus. He reached with his left hand to grab on to the railing to help pull himself up onto the bottom step of the bus. Plaintiff reached with his right hand to pull himself to the first step while simultaneously stepping on the bottom step with his left foot. While he was pulling himself up, he slipped, dropped onto his knees on the bottom step to the street and fell in a squatting position, striking his right arm on the step.

Plaintiff claims that after he fell, he told the bus driver that he thought he broke his arm and asked the driver to call an ambulance. The driver did not respond but instead looked straight ahead. The bus operator closed the door and pulled away. It was at that point that plaintiff noticed there was ice on the stairs of the bus. Plaintiff did not call the police or an ambulance at

that time, but went to the hospital shortly thereafter, and told the emergency department staff that he was injured when he slipped on ice while boarding a bus.

Samuel DeHoney, employed by the NYCTA as a bus operator for 19 years, testified at a deposition on January 10, 2018 (1/10/18 DeHoney dep, defendants exhibit H). DeHoney did not know if he was working on the date in question. At the deposition, after being shown a daily trip sheet, DeHoney identified it as his own from the date of the accident, which indicated that he was working the M79 bus route on the day of the accident. He testified that during his shift, he followed one route, and that there were a number of drivers that follow the same route and were doing so on the day of the accident. He did not know how many buses would run the M79 route at one time.

DeHoney did not recall any incident that may have occurred during his shift on February 12, 2015, and the trip sheet indicates that there were no incidents of any kind. DeHoney further testified that there would be no way for him to determine if it was his bus at the 79th Street and East End Avenue stop at 4:39 p.m. on that day.

DeHoney testified that generally, if there was snow or ice accumulation from the entrance steps, he would be required to call it in and notify the command center and have the bus taken out of service so the snow and/or ice could be removed (*id.* at 22-23). DeHoney testified that he has never had a situation where there was an accumulation of snow or ice on the bus, and is unaware of any accident or passenger claim of slipping due to an accumulation of snow or ice on the bus steps.

According to the local weather data from the weather station at Central Park for the month of February 2015, the average temperature on that day was 28 degrees Fahrenheit (defendants exhibit J). The high temperature for the day was 40 degrees and the low was 16

degrees (*id.*). The report indicates that there were trace amounts of precipitation on the day of the accident.

Discussion

It is well established that 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 eliminate any material issues of fact'" (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49 [2015], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action" (*Nomura Asset Capital Corp., 26 NY3d at 49; Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the nonmoving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). When there is any doubt as to the existence of triable issues, summary judgment should not be granted (*McCummings v New York City Tr. Auth.*, 81 NY2d 923 [1993]; *Rotuba Extruda v Ceppos*, 46 NY2d 223, 231 [1978]).

"[A] common carrier is subject to the same duty of care as any other potential tortfeasor—reasonable care under all of the circumstances of the particular case" (*Bethel v New York City Tr. Auth.*, 92 NY2d 348, 356 [1998]), and has an obligation to provide its riders with safe ingress (*O'Hara v New York City Tr. Auth.*, 248 AD2d 138 [1st Dept 1998]). As the moving party, a defendant must establish that it neither created a dangerous condition (*Segretti v Shorenstein Co., E.*, 256 AD2d 234, 235 [1st Dept]) nor had actual or constructive knowledge of the condition (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Further, it has been held that "[a] bus operator's duty of care to boarding passengers is to provide

them with a reasonably safe passage onto the bus; the operator should not place the passenger in a position where he or she must follow a dangerous path in order to board the bus" (*Abraham v Port Auth. of N.Y. & N.J.*, 29 AD3d 345, 346-347 [1st Dept 2006]).

Here, defendants argue that this case falls within an exception to the actual/constructive notice rule, known as the storm in progress exception. Specifically, under the storm in progress exception, a defendant is not obligated to provide a constant remedy for the tracking of snow, ice or water during an ongoing storm (*Harbison v New York City Tr. Auth.*, 147 AD3d 693 [1st Dept 2017]; *Byrne v New York City Tr. Auth.*, 78 AD3d 525 [1st Dept 2010]). Rather, the duty to clear away precipitation accumulation does not arise until a reasonable time after a storm has ceased (*Blackwood* v *New York City Tr. Auth.*, 36 AD3d 522 [1st Dept 2007]). Defendants assert that since the floor was wet and/or icy during an ongoing storm, the issue of notice is not implicated, therefore, it has established a prima facie entitlement to summary judgment as a matter of law.

Plaintiff counters, however, that there was no storm in progress on the day in question (*see* defendant exhibit J), but rather, that the storm occurred the day before, and there was "trace" amounts of precipitation on the day of the accident, two times prior to the accident (*id.*). Therefore, plaintiff argues, the storm in progress exception is not applicable. The First Department has held that trace precipitation does not constitute an ongoing storm (*Powell v MLG Hillside Assoc.*, 290 AD2d 345-346 [1st Dept 2002]). Further, "[o]nce there is a period of inactivity after cessation of the storm, it becomes a question of fact as to whether the delay in commencing the cleanup was reasonable" (*id.* at 346).

Given that plaintiff testified that the snow storm occurred the day before, and that only trace amounts of snow occurred on the day of the accident, both of which is supported by the weather report submitted by defendants, the court finds a question of fact remains as to whether

there was, in fact, a storm in progress or if there was a significant lull in the storm (*see Pipero v New York City Tr. Auth.*, 69 AD3d 493, 493 [1st Dept 2010]).

Defendants further argue that even if the court were to find the storm in progress rule is inapplicable, plaintiff may only prevail if it can be shown that defendants either created the condition or had actual or constructive notice of the condition, had enough time to remedy and failed to do so (*Gordon*, 67 NY2d at 837-838). There is no dispute that defendants did not create the condition. The issue is whether defendants had notice of the condition. Defendants assert that plaintiff, himself, testified that when he glanced at the bottom of the step as he was preparing to board, he did not see anything on the step. Therefore, defendants claim that it "strains logic[2]" that the bus operator, who is responsible for operating and not cleaning the bus, would be aware of the condition of the bottom step at all times.

In order "[t]o 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 defendant's employees to discover and remedy it'" (*O'Connor–Miele v Barhite & Holzinger*, 234 AD2d 106, 106 [1st Dept 1996], quoting *Gordon*, 67 NY2d at 837). As the moving party, defendants bear the burden of establishing lack of notice (*Muhammad v New York City Hous. Auth.*, 111 AD3d 513 [1st Dept 2013]). Here, defendants, however, fail to offer a witness with knowledge of the incident. DeHoney, defendants' only witness, testified that he had no recollection of the incident. Further, DeHoney testified that there were a number of busses running the same route on day in question, and he had no knowledge as to whether he was the bus operator driving the bus when plaintiff approached the bus and was injured (*see Simpson v City of New York*, 126 AD3d 640, 640-641

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[2] Any claim that a position based upon testimony strains logic is merely an attack on the credibility of the deponent. Credibility is a question which must be resolved by the trier of fact.

[1st Dept 2015] ["defendants failed to demonstrate that they lacked actual or constructive notice because they failed to proffer an affidavit or testimony based personal knowledge"]). Defendants have not met their burden (*Bailey v New York City Transit Authority*, 182 AD3d 436 [1st Dept 2020] [defendant failed to establish *prima facie* entitlement to judgment as a matter of law by relying exclusively on plaintiff's allegations and deposition testimony]). The court finds a question of fact remains as to whether defendants did have notice of the alleged icy condition on the bottom step of the bus.

Based on the foregoing, the court denies summary judgment.

Conclusion

Accordingly, it is

ORDERED that the motion of defendants New York City Transit Authority s/h/a The New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority s/h/a MABSTOA, Metropolitan Transportation Authority s/h/a Metropolitan Transit Authority and MTA BUS COMPANY s/h/a The MTA Bus Company for summary judgment dismissal of plaintiff's complaint is denied.

Dated: May 28, 2020

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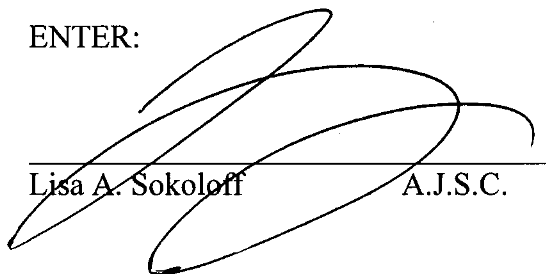

Lisa A. Sokoloff A.J.S.C.

CHECK ONE:	☐ CASE DISPOSED			☒ NON-FINAL DISPOSITION		
	☐ GRANTED	☒ DENIED		☐ GRANTED IN PART	☐ OTHER	
APPLICATION:	☐ SETTLE ORDER			☐ SUBMIT ORDER		
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