SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DENISE M DOMINGUEZ** **PART** **21**

Justice

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INDEX NO. 157005/2018

ELIZABETH BERGER,

MOTION SEQ. NO. 002

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for JUDGMENT - SUMMARY.

For the reasons that follow, the Plaintiff's summary judgment motion is denied.

In this personal injury matter, the Plaintiff, ELIZABETH BERGER, alleges that on January 13, 2018 she sustained injuries as subway car doors closed against her without warning.

In her complaint, the Plaintiff asserts a single cause of action sounding in negligence against Defendants NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSIT AUTHORITY ("TRANSIT") for causing the Plaintiff to become trapped by the doors. (NYSCEF Doc. 1, 67). Although not entirely clear from the complaint, as per the Plaintiff's motion, the Plaintiff is claiming that TRANSIT is negligent because the doors should have stayed open 10 seconds as per TRANSIT's operating rules and because the conductor should have seen the Plaintiff stuck between the doors.

Upon review, the Plaintiff's evidence does not establish entitlement to judgment as a matter of law since the evidence does not eliminate all material facts as to how the accident happened and whether TRANSIT was the sole cause of the accident.

CPLR §3212 provides any party in any action, including in a negligence action, to move for summary judgment. (CPLR §3212 [a], *Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853 [1974]). The party seeking summary judgment, even if unopposed, has the high burden of establishing entitlement to judgment as a matter of law with evidence in admissible form (see CPLR §3212 [b], *Voss v Netherlands Ins. Co.*, 22 N.Y.3d 728, 734, 8 N.E.3d 823 [2014], *Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81, 790 N.E.2d 772 [2003], *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324–25, 501 N.E.2d 572, 574 [1986], see also *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Only "…once this showing has been made… [does] the burden shifts to the party opposing the motion for summary judgment 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* 68 N.Y.2d at 324).

Here, the Plaintiff's own testimony (which the Plaintiff neglected to submit) has raised questions as to what transpired on the subway car. The Plaintiff has offered varying accounts as to which car she was exiting, whether it was the fourth car, as she testified to at her Statutory Hearing (NYSCEF Doc. 83), the third or fourth car as she testified to at her deposition (NYSCEF Doc. 84) or the third car as she ultimately avers in her affidavit (NYSCEF Doc. 70). The Plaintiff has also provided conflicting testimony regarding how and when she changed her seat in relation to the doors and there appears to be no clear testimony, nor statement in the Plaintiff's affidavit, that identifies which door within the car she exited (NYSCEF Doc. 83, 70). The specific subway car and the specific doors are material and vital facts that have not been established by the Plaintiff. To the extent that the Plaintiff is alleging that the conductor failed to see her and/or that the doors were defective as they failed to open/retract, the specific car and set of doors are material and necessary in evaluating TRANSIT's potential negligence. As they are unknown this is a material question of fact that must be resolved by a trier of fact.

Moreover, the Plaintiff has offered contradictory evidence regarding how long the doors were open just prior to her accident. At her deposition, the Plaintiff testified that she almost no time, "zero", elapsed between when the doors opened and when they began to close on her (NYSCEF Doc. 84). However, in her affidavit, the Plaintiff avers that the doors were open for 2 to 3 seconds as she began to get up from her seat in order to exit (NYSCEF Doc. 84). Yet, at her Statutory Hearing, the Plaintiff testified that she had been sitting in the subway car for five minutes before deciding to exit through the open doors (NYSCEF Doc. 83). It is also unclear from the

testimony and affidavit how long the doors remained open permitting passengers to enter/exit while the subway was in the station prior to this incident (NYSCEF Doc. 83, 84, 70). This is also a material question of fact that has not been established by the Plaintiff, and which the Plaintiff herself has offered wildly different versions. As the Plaintiff focuses on the fact that the subway doors are to remain open for 10 seconds before the closing door announcement is made and they begin to close, it is vital that the Plaintiff actually establish now long the doors were open. The Plaintiff has not established this and she has been inconsistent and contradictory in her testimony.

Accordingly, upon review, the Plaintiff has not met her *prima facie* burden as there remain material issues of fact regarding the identification of the specific subway car and doors as well as how long the doors were open prior to closing. Thus, the sufficiently of the Defendants' opposition to the motion is immaterial as the Plaintiff has not met her burden in the first instance.

However, in Opposition to the motion, TRANSIT has submitted evidence which raises material questions of fact regarding this incident, for which, the Plaintiff is apparently the only witness. This Court recognizes that as the specific subway car and set of doors have not been identified, it appears that neither party, including the Plaintiff's expert Nicholas Bellizzi, has been able to conduct an inspection of the specific doors involved. However, both TRANSIT, and the Plaintiff, present arguments based upon the general operating procedures with respect to door closures. Here, TRANSIT has submitted the affidavit of Kyle Poinsette, a Professional Engineer since 2010 and a Mechanical Engineer with New York City Transit Authority who describes the general operation of the doors in the type of subway car involved in this incident. The doors in such a car close after 10 seconds. Door closing announcements are accompanied by flashing close door warnings and a two-town chime. If there was an obstacle in the doorway, the doors would automatically re-open three inches from the obstacle and attempt to re-close. If the doors cannot fully close, this cycle is repeated three times before the conductor can visually inspect to identify a problem. Based upon Poinsette's experience, and the Plaintiff's testimony, Poinsette avers that the incident could not have occurred as the Plaintiff has described. (NYSCEF Doc. 87). Poinsette's Affidavit is also supported by the testimony of the train conductor. (NYSCEF Doc. 72). Thus, to the extent that the Plaintiff is claiming that the conductor closed the doors too quickly, did not make an announcement and/or did not release the doors when the conductor could have, TRANSIT's affidavit and deposition testimony raise a material issue of fact as to the amount of control the conductor may have over the doors.

It has long been held that "… issues of proximate cause are fact questions to be decided by a jury. While it is appropriate to decide the question of legal cause as a matter of law 'where only one conclusion may be drawn from the established facts', where there is any doubt, confusion, or difficulty in deciding whether the issue ought to be decided as a matter of law, the better course is to leave the point for the jury to decide." (*White v. Diaz*, 49 A.D.3d 134, 139, 854 N.Y.S.2d 106 [1st Dept 2008] *quoting Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315, 414 N.E.2d 666 [1980]).

Upon review, there are material questions of fact concerning how this incident occurred and whether TRANSIT was solely responsible for the accident, thus precluding judgment as a matter of law.

Accordingly, it is hereby

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

ORDERED that counsel for the Plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the within; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby expressly denied.

9/5/2023
DATE

HON. DENISE M. DOMINGUEZ
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	, REFERENCE