

Stone v Long Is. R.R.
2011 NY Slip Op 31446(U)
May 19, 2011
Sup Ct, Nassau County
Docket Number: 2527-07
Judge: Arthur M. Diamond
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----x
**RICHARD STONE as executor of the estate of
MADELINE MINTZ, deceased,**

Plaintiff,

-against-

**LONG ISLAND RAIL ROAD, METROPOLITAN
TRANSPORTATION AUTHORITY, TOWN OF
OYSTER BAY and COUNTY OF NASSAU,
Defendants,**

-----x

TRIAL PART: 14

NASSAU COUNTY

INDEX NO: 2527-07

MOTION SEQ. NO:6, 7

SUBMIT DATE:04/18/11

The following papers having been read on this motion:

- Notice of Motion.....1**
- Notice of Motion.....2**

Motion pursuant to CPLR §3212 by defendants Long Island Rail Road and Metropolitan Transportation Authority (collectively LIRR) for summary judgment dismissing the complaint is granted.

Motion pursuant to CPLR §3212 by the Town of Oyster Bay for summary judgment dismissing the complaint and all cross-claims and/or counter-claims asserted against said defendant is granted.¹

BACKGROUND

This wrongful death action arises out of a fatal accident on February 15, 2006 at approximately 6:30 PM in which decedent, Madeline Mintz, suffered fatal injuries when the motor vehicle which she was operating was struck in the rear by Long Island Rail Road train #664 as it was

¹Pursuant to a stipulation executed July 30, 2010 the action and all cross claims were discontinued with prejudice as against defendant County of Nassau.

proceeding east bound at or near a grade crossing the Robbins Lane in Syosset, New York. It appears from the record that, at the time of the impact between the train and decedent's vehicle, the Mintz vehicle was not situated on the paved roadway (Robbins Lane) or on/at the at-grade crossing itself but, rather, was located on the railroad tracks approximately 25-50 feet east of the Robbins Lane grade crossing.

According to plaintiff's bill of particulars dated May 30, 2008, defendant LIRR was negligent, *inter alia*, in

“ownership, operation, maintenance and control of the aforesaid train and facility; in striking plaintiff's decedent's motor vehicle; in failing to see plaintiff's decedent's motor vehicle; in that the said train was being operated at an excessive rate of speed; in failing to blow a horn or other warning device; in failing to flash headlights; in that defendants failed to adequately test and train the motorman and failed to adequately supervise his conduct and ability to operate the said train; in that the motorman saw the plaintiff's decedent's motor vehicle prior to the time of impact and failed to react promptly to avoid the happening of the accident; in failing to stop the train; in failing to immediately dump the train upon seeing the plaintiff's decedent's motor vehicle; in failing to afford plaintiff's decedent a last clear chance; in that the said area was inadequately guarded; in that the railroad crossing, including but not limited to its gates, lights and signals, the parts and appurtenances relating thereto, were broken, dangerous and defective.”

Both defendant LIRR and defendant Town of Oyster Bay seek summary judgment dismissing the complaint. Defendant LIRR's motion is predicated on the contention that the record is devoid of any negligence on the part of LIRR either with respect to 1) the installation/maintenance of its

railroad crossing apparatus or 2) operation of the train by the locomotive engineer who was confronted with an emergency situation i.e., the presence of a motor vehicle on the tracks, which was the proximate cause of decedent's accident. Nor has plaintiff offered any evidence that defendant LIRR possessed notice of any defect in the condition of its apparatus or performance of its personnel. Rather, defendant LIRR maintains that the sole cause of the tragic accident was decedent's own negligence in turning off the roadway and entering upon the tracks despite what defendant LIRR characterizes as readily discernible crossing apparatus and warning signage in plain view. In short, it is defendant LIRR's contention that the sole cause of the accident herein was the decedent's own negligence in turning off the roadway onto the tracks despite her familiarity with the crossing, the presence of readily discernible crossing apparatus and warning signage which was in plain view.

Defendant LIRR has met its initial burden of establishing that locomotive engineer, Joseph Moscato, exercised reasonable care under the circumstances in operating train #664 and the accident was unavoidable, based on his deposition testimony.

Mr. Moscato was certified as a locomotive engineer in September 2001. He testified that, as the train approached the Robbins Lane crossing, it was traveling at approximately 78 mph - or less - within the allowable speed of 80 mph²; the blinking lights of the train were on, the bell and horn signals were sounding; and the crossing protection signal lights were flashing. Mr. Moscato stated that, as the train was between 200 - 400 feet west of the crossing, he saw what appeared to be an indecipherable mass/obstruction on the tracks whereupon he immediately put the train into emergency³ mode. Less than three seconds later the train impacted the decedent's car causing it to burst into flames.

²The M.T.A. Police Department Incident Report states that the download for train #664 indicates that the speed at which the train was traveling prior to impact was 69.65 mph.

³When the train is put into emergency mode, the emergency brake for the entire train is engaged and sand is applied onto the rails from the engines. The emergency brake remains on until the train is recharged and the emergency brake is turned off.

ANALYSIS

A plaintiff in a wrongful death action is not held to as high a degree of proof as a plaintiff in a personal injury action and is entitled to benefit from every favorable inference which can reasonably be drawn from the evidence in determining whether a *prima facie* case has been made out. *Noseworthy v New York*, 298 NY 76, 80 [1948]. Where, however, plaintiff and defendant are similarly situated insofar as accessibility to the facts of the deceased's death is concerned, the *Noseworthy* doctrine is inapplicable. *Aguilar v Anthony*, 80 AD3d 544, 545 [2nd Dept. 2011]; *Lynn v Lynn*, 216 AD2d 194, 195 [1st Dept. 1995].

While a deceased or unconscious plaintiff is held to a lesser standard of proof, that does not relieve plaintiff of the obligation to provide same proof from which negligence can reasonably be inferred. *Bacic v. New York City Transit Authority*, 64 AD3d 526, 527 [2nd Dept. 2009]. (Internal quotation marks and citations omitted). Here the only evidence supporting plaintiff's negligence claim is the entirely speculative opinion proffered by plaintiff's attorney that:

“the LIRR had notice for at least 2 minutes prior to the collision that there was some obstruction on the tracks in the vicinity of the Robbins Lane crossing by virtue of the initial power outage that occurred at 18:30:56. This disruption was significant enough to engage the lights and bells at the crossing, but there was no mechanism to alert the train's conductor of the potential for danger. Under these circumstances it was incumbent upon the LIRR at the very least to immediately slow down the approaching train to the area of the outage, if not stop them to determine if there was in fact an obstruction on the tracks as there was here.”

Defendant LIRR does not dispute the fact that decedent's vehicle made contact with the electrified third rail at some point after she drove her vehicle onto the tracks and continued down the right of way. Defendant asserts however, that although there was a brief outage, minor disruption

in third rail power happens for many reasons to wit: inclement weather, as well as animals and various kinds of debris coming into contact with the electrified train rail. Plaintiff offers no authority to support the theory that defendant LIRR had a duty to notify the train engineer of the brief disruption in power.

The theory advanced by plaintiff's attorney, unsupported by expert opinion, is conclusory in nature, lacks probative value and is insufficient to raise a factual issue sufficient to defeat defendant LIRR's *prima facie* showing of entitlement to summary judgment dismissing plaintiff's complaint. Decedent's own action of turning off the roadway onto the right of way along the railroad tracks was the proximate cause of the tragic accident herein. *Zenteno v. MTA Long Island R.R.*, 71 AD3d 673 [2nd Dept. 2010]; *Reeve v. Long Island Rail Road*; 27 AD3d 636 [2nd Dept. 2006]; *Wadhwa v. Long Island Rail Road*, 13 AD3d 615 [2nd Dept. 2004].

Under the circumstances of this case, the decedent's conduct in driving her car onto the right of way constitutes an intervening and superseding event which severed any causal connection between her death and any alleged negligence on the part of defendant LIRR. *Lynch v Metropolitan Transp. Authority*, 82 AD3d 716 [2nd Dept. 2011]; *Prysoch v. Metropolitan Transp. Authority*, 251 AD2d 308, 309 [2nd Dept. 1998], *lv to app den.* 92 NY 2d 817 [1998].

With respect to defendant Town of Oyster Bay, plaintiff's notice of claim, alleges that said defendant was negligent, *inter alia*, in failing to provide adequate lighting in said area, in allowing and/or causing a dangerous roadway condition at/about the Robbins Lane crossing and in failing to adequately and properly warn those lawfully traversing in their automobiles of the existence of oncoming trains."

In support of its motion for summary judgment, defendant Town of Oyster Bay has submitted the affidavit of a licensed professional engineer who opines, *inter alia*,

“[T]he warning signs, roadway markings and other traffic control devices that were in existence on the date of the accident, were proper, adequate and within the requirements of all regulations,

including the Federal and NYS Manuals of Traffic Control Devices current as of the date of the accident.”

In his affidavit, the expert quotes from the New York State Public Transportation Board’s Abbreviated Report of the accident stating that

“[p]ost accident testing of the grade crossing warning devices and the download of the grade crossing event recorder conducted by Long Island Rail Road’s Signal Department personnel revealed that all warning devices were operating as intended at the time of the accident.”

Plaintiff offers no rebuttal to the expert’s affidavit.

According to the deposition testimony of Joseph Tricarico, Assistant to the Superintendent of Highways at the time of the accident, the defendant Town of Oyster Bay received no prior written notice⁴ concerning any defects *vis-a-vis* the Robbins Lane railroad crossing; the Town was not responsible for the maintenance of gates, lights and signals at the crossing and the Town had no ability or duty to warn the train engineer of an obstruction on the tracks. Absent prior written notice of a dangerous or defective condition, where a written notice statute is in effect, a municipality cannot be held liable for injuries unless one of the two recognized exceptions to the prior written requirement is present. *Politis v Town of Islip*, 82 AD3d 1191 [2nd Dept. 2011].

In opposition to the motion by defendant Town of Oyster Bay, plaintiff made no attempt to raise a factual issue regarding any liability on the Town’s part for the accident at issue or, for that

⁴“At the time of the accident, § 160-1 of the Town of Oyster Bay Code stated, in pertinent part, as follows: “[N]o civil action shall be maintained against the Town of Oyster Bay for injuries or damages to persons or property sustained by reason of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out-of-repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, out-of-repair, dangerous or obstructed condition of such street, highway, bridge, culvert, sidewalk or crosswalk was actually served upon the Town Clerk, or the Superintendent of Highway, hereinafter designated as the ‘Deputy Commissioner of the Department of Public Works, Division of Highway.’ ”

matter, offer any viable opposition to the motion.

The record establishes that the decedent's own negligence was the sole proximate cause of the accident. There is no evidence in the record that the decedent's death was the result of any negligence on the part of either defendant LIRR or defendant Town of Oyster Bay.

Accordingly, defendant LIRR having established *prima facie* entitlement to judgment as a matter of law by establishing that its personnel exercised reasonable care, and the accident was unavoidable under the circumstances, and plaintiff having failed to raise a triable issue of fact in opposition, defendant LIRR's motion for summary judgment dismissing the complaint is granted.

Motion by defendant Town of Oyster Bay for summary judgment dismissing the complaint and any cross/counter-claims asserted against it is granted.

Only the existence of a *bona fide* issue raised by evidentiary facts, and not one based on conclusory or irrelevant allegations, will suffice to defeat summary judgment where movant has made a *prima facie* showing of entitlement to such relief. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978].

This constitutes the decision and order of this Court.

ENTER

HON. ARTHUR M. DIAZ
J. S.C.

ENTERED

DATED: May 19, 2011

To

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MAY 24 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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