

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

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PATRICIA BURNS,	No. 11388/03
Plaintiff,	Motion
-against-	Date November 20, 2007
THE LONG ISLAND RAILROAD	Motion
COMPANY,	Cal. No. 4
Defendant.	Motion
-----	Seq. No. 1

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Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained on May 5, 2002 due to a slip, trip and fall into a hole on the sidewalk located on the west side of Nassau Boulevard underneath the overpass between Merillon Avenue and Atlantic Avenue, Garden City, in the County of Nassau, State of New York.

Defendant moves for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint on the ground that plaintiff is unable to sustain a prima facie case of negligence against the defendant.

Contentions of the Parties

Defendant asserts that plaintiff's complaint alleges that, at about 12:30 a.m., "while walking through the then unlit and darkened underpass that leads from the South side of the tracks to the North side parking lot, she was caused to slip, trip and fall into an open hole in the pavement."

Plaintiff further alleges that defendant "owned, operated, maintained, managed and/or controlled the Merrilon Avenue train station in Garden City Park, NY, inclusive of its tracks, rails, sidings, roadbeds, platforms and all appurtenances thereto, over through, and upon which defendant and its passengers gained ingress and egress to defendant's trains and facilities."

Defendant's answer denied that it owned or exercised any control over the subject sidewalk. In his affidavit, Matthew Kellers, defendant's director of planning and administration, stated that the sidewalk is not defendant's property and it does not own, maintain or control the sidewalk and storm drains located under the overpass. A FOIL response from the Village of Garden City, in a letter dated August 1, 2007, stated that the "sidewalk area located under the Nassau Boulevard overpass is owned and controlled by Nassau County."

Defendant submits the deposition testimony of plaintiff who testified that she had descended the stairs and made a left to go under the overpass. She was walking through the overpass to the parking lot to get her car. It was pitch black and she fell. Walking under the overpass was the only way she knew to get from the South side platform to the parking lot on the North side. Defendant argues, therefore, that it cannot be held liable as no duty of care existed on its part to the plaintiff as it did not own, control or maintain the sidewalk upon which plaintiff fell.

The motion by defendant is denied.

It is well settled 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 from the case (see, Zuckerman v City of New York, 49 NY2d 557, 562, 427 NYS2d 595, 404, NE2d 718; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 165 NYS2d 498, 144 NE2d 387). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Matter of Redemption Church of Christ v Williams, 84 AD2d 648, 649, 444 NYS2d 305; Greenberg v Manlon Realty, 43 AD2d 968, 969, 352 NYS2d 494)." (Winegrad v New York University Medical Center, 64 NY2d 851 at 853).

In the instant case, defendant has not sustained its initial burden of establishing its entitlement to judgment

as a matter of law.

As noted by the court in Bingham v. New York City Transit Authority, 8 NY3d 176 at 180-182: "Where, as here, a stairwell or approach is primarily used as a means of access to and egress from the common carrier, that carrier has a duty to exercise reasonable care to see that such means of approach remain in a safe condition or, where appropriate, to take such precautions or give such warnings as would protect those using such area against unforeseen danger. Whether those means of ingress or egress are used primarily for that purpose would generally be a question of fact."

The court further stated at 182: "In the case before us, the evidence at trial was sufficient to establish that the stairway in question was used primarily as a means of access to and from the subway. Therefore, defendants had a duty to maintain the stairway or to warn patrons of any dangerous condition. So imperative is the duty to provide a safe means of access to and from the subway that such duty may not be delegated to another. Thus, even if the responsibility to maintain the stairway resides in another entity, defendants may not avoid their responsibility to 'at least provide against injury to its passengers by erecting such barricades, or giving such warning, as [would] guard against accidents' (Schlessinger, 49 Misc. at 505, 98 NYS 840)."

In the instant case, plaintiff is alleged to have tripped and fallen on a sidewalk under defendant's overpass and tracks. Plaintiff testified that a passenger, exiting the train on the Garden City side of the tracks, must walk under the overpass on the subject sidewalk to the Garden City Park side where the parking lot is located. Defendant has only addressed the issue of ownership of the sidewalk in its motion papers. Questions of fact still exist as to whether the sidewalk, under defendant's overpass, which allows access to defendant's parking lot which is provided for its passenger's cars, is used primarily for the purpose of ingress and egress to its train station.

In addition, plaintiff's complaint alleges a failure to "provide proper and adequate lighting at said location." Plaintiff testified that, while the train platform and the staircase to the sidewalk were lit, under the overpass was "pitch black." Defendant has not set forth any evidence with respect to whether it provided any lighting under its overpass and, if provided, whether such lighting was in

working condition or that no lighting was necessary.

Accordingly, the motion by defendant is denied.

Dated: March 20, 2008

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HON. DAVID ELLIOT