

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

-----	Index No. 177/07
PAUL MURPHY,	Motion
Plaintiff,	Date March 17, 2009
-against-	Motion
NEW YORK CITY TRANSIT AUTHORITY,	Cal. No. 20
Defendant.	Motion
-----	Sequence No. 2

	PAPERS
	<u>NUMBERED</u>
Notice of Motion-Affidavits-Exhibits.....	1-4
Opposition.....	5-6
Reply.....	7-9

Upon the foregoing papers it is ordered that this motion by defendant, New York City Transit Authority ("NYCTA") for an order pursuant to CPLR 3211 and 3212 granting summary judgment and dismissing the plaintiff, Paul Murphy's Complaint on the grounds that the defendant breached no duty to the plaintiff, that no triable issues of fact exist, and that the plaintiff fails to state a cause of action is granted.

In this action, plaintiff seeks to recover damages from defendant for personal injuries arising from an alleged incident occurring on June 11, 2006 at approximately 7:00 a.m. at the 36th Street subway station in Queens, New York. Plaintiff maintains that at such time, he was assaulted by a third-party due to the negligence of the defendant. In plaintiff's Bill of Particulars, he states: "Defendants were negligent, reckless, and careless in allowing plaintiff to be intentionally, wrongfully, willfully, maliciously and with gross negligence, physically assaulted, beaten, battered and sustain severe and permanent injuries by reason in that the defendants agents, servants, employees and/or license in the ownership, operation, control and management and supervision of said subway station in that a subway booth operator in said station did nothing as plaintiff sustained said injuries through said assault by an un-apprehended male." At his

50-h hearing, plaintiff testified that as he was being assaulted, he saw personnel in a nearby token booth, that he wasn't sure if the person was a male or female, and that the personnel did nothing to help him.

Defendant asserts that at the examination before trial, plaintiff allegedly described the token booth agent as a heavy set African-American woman with dreads who "did nothing" to summon assistance. Defendant submits in support, inter alia, the examination before trial transcript testimony of Station Agent Kim Mergerdichian, who testified that he was assigned to the token booth in question from 11:00 p.m. to 7:00 a.m. on the date of the incident, and that during his shift, he heard a commotion, and looked but did not see anything. He further testified that he then saw plaintiff with a bloody face, at which point he pressed the EBCS button, which is part of the emergency system and advised that someone was injured. Defendant also includes accident reports which indicate that Station Agent Kim Mergerdichian activated the EBCS button to report that he witnessed an unknown male who was bleeding from the mouth. Defendant argues that the law establishes that the plaintiff has no cause of action against the defendant since there was no "special relationship" between plaintiff and defendant. Defendant cites to case law stating that the defendant does not have a special duty to protect passengers and is not liable for the criminal acts of third parties or for the intentional acts or from the intentional acts of third parties absent a "special relationship" between the defendant and the alleged victim. Defendant additionally cites to case law stating that a common carrier is not an insurer of safety of its passengers, and that a common carrier is not liable to passengers who suffer injuries as a result of sudden unanticipated attacks.

In opposition, plaintiff concedes that defendant "does not have a general duty to guarantee the safety of subway passengers and persons in the subway station" but maintains that there is an issue of fact as to whether defendant breached a special duty to plaintiff based upon the fact that one of defendant's employees sat in a token booth and watched as plaintiff was viciously beaten, citing as authority *Crossland v. NYCTA*, 68 NY2d 165 (1986). Plaintiff argues alternatively, that defendant's motion should be denied because defendant has failed to produce the token booth clerk who witnessed the assault and the absence of that testimony should be held against defendant. Plaintiff submits in opposition the examination before trial transcript testimony of plaintiff himself, wherein Mr. Murphy testified that just prior to the assault, he made eye contact with the token booth attendant, he looked scared, and he felt that he was showing

that he was in danger. Mr. Murphy further testified that during the attack, he called for help at least four times. He testified that the token booth attendant was an African American woman with dreadlocks. In his examination before trial transcript testimony, Kim Mergerdichian testified that his station supervisor, Theresa Williams, an African American female with "distinctive braids", was also on duty the night of the incident. Plaintiff maintains that since one of defendant's employees witnessed an assault in progress, defendant had a special duty to take reasonable steps to stop or mitigate the attack. Plaintiff's counsel states in his affirmation: "At the very least, when Ms. Williams witnessed the attack, she should and could have called the police and yelled 'Hey, stop that! The police are on their way!' through the token booth loudspeaker. Instead, however, she did nothing."

It is well-established law that a municipal agency cannot be held liable for acts of negligence committed in the performance of its governmental functions unless there exists a special relationship between the municipal agency and the plaintiff (*Pelaez v. Seide*, 2 NY 3d 186 [2004]; *Blanc v. City of New York*, 223 AD2d.) As a general rule, the Transit Authority "owes no duty to protect a person on its premises from assault by a third person, absent facts establishing a special relationship between the authority and the person assaulted." (*Weiner v. Metropolitan Transp. Auth.*, 55 NY 2d 175, 178 [1982]). The elements establishing a "special relationship" are: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking (*Cuffy v. City of New York*, 69 NY2d 255 [NY 1987] [internal citations omitted]).

In the instant case, it is clear that there has been no element of reliance on an affirmative undertaking. "[A]t the heart of most of these 'special duty' cases is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced him either to relax his own vigilance or to forgo other available avenues of protection." (*Id.* at 261). When the reliance element is absent, or when it is present, but not causally related to the ultimate harm, the special duty exception will be inapplicable and unjustified. (*Id.*). In this case, the reliance on an affirmative undertaking element is absent - there is no evidence

that plaintiff either was induced to relax his own vigilance or forgo other available avenues of protection. As the fourth element has not been met, the court need not examine the other three elements.

Moreover, to the extent that plaintiff relies upon the holding in *Crossland v. NYCTA*, 68 NY2d 165 (1986), the court finds such reliance is misplaced. In *Crossland*, a student was brutally beaten to death by a gang on a subway platform while Transit Authority employees stood by and did nothing to summon aid. The Court of Appeals found that such behavior was within the narrow range of circumstances that goes "beyond the boundary of the Weiner immunity." (68 NY2d at 170). The Court of Appeals found that in such an extreme and outrageous fact pattern, the burden that would be imposed upon the government authority by exposure to liability must be balanced against other policy considerations which include deterring the public authority from failing to insure that its employees "observe not only its own regulations, but also common standards of behavior" (Id. at 170).

Here, plaintiff concedes that the defendant had no "general duty to guarantee the safety of subway passengers and persons in the subway station (§ 12 Affirmation of Scott J. Kreppin in Opposition to defendant's Motion to Dismiss). Instead, plaintiff argues that defendant's employee who witnessed the assault in progress, had a special duty to take reasonable steps to stop or mitigate the attack: to wit, defendant's employee should have called the police and yelled "Hey, stop that! The police are on their way!" through the token booth loudspeaker (§ 12 Affirmation of Scott J. Kreppin in Opposition to defendant's Motion to Dismiss).

Defendant submitted evidence, and plaintiff does not dispute, that Station Agent Kim Mergerdichian did summon help assistance via the EBCS immediately upon observing plaintiff with a bloody face. The court notes that plaintiff submitted no evidence to show that any TA employee actually observed the assault and did nothing to summon help. Moreover, plaintiff makes no claim that defendant or the police were negligent in failing to promptly and decisively act or respond after receipt of the EBCS call. The facts here do not constitute extreme and outrageous fact pattern as the Court of Appeals found in *Crossland*. Plaintiff's contention that the attack might have been stopped or mitigated by the Station Agent calling out to the attacker (assuming that the Station Agent knew that plaintiff was a victim of attack) through his booth loudspeaker system and warning the attacker that the police are on their way amounts to mere speculation and fails to raise any triable issue of fact.

To the extent that plaintiff seeks additional deposition of defendant in its affirmation in opposition, as plaintiff has failed to affirmatively move for such relief, such relief is denied.

Accordingly, defendant's motion is granted and the plaintiff's complaint is dismissed.

This constitutes the decision and order of the Court.

Dated: June 15, 2009

.....
Howard G. Lane, J.S.C.