

**Harwin v Metropolitan Transportation Authority**

2006 NY Slip Op 30405(U)

October 18, 2006

Supreme Court, New York County

Docket Number: 121169/03

Judge: Nicholas Figueroa

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. NICHOLAS FLORENCA

PART 46

Index Number : 121169/2003

HARWIN, CHARLOTTE

vs

METROPOLITAN TRANSPORTATION

Sequence Number : 002

TRIAL DE NOVO

INDEX NO. 121169/03

MOTION DATE 5/23/00

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2, 3

4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

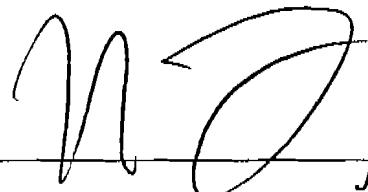
*be accompanied decision and order*

**FILED**

OCT 25 2006

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: October 18, 2006



J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

NOT FOR CIRCULATION TO BE RETURNED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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CHARLOTTE HARWIN,

Plaintiff,

- against -

METROPOLITAN TRANSPORTATION  
AUTHORITY and NEW YORK TRANSIT  
AUTHORITY,

Defendants.

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Index No. 121169/03

**DECISION  
AND ORDER**

**FILED**  
OCT 25 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Nicholas Figueroa, J.:

Defendants move to set aside the jury's liability verdict in favor of plaintiff as being inconsistent and against the weight of the evidence; or, alternatively, dismissing the complaint because plaintiff failed to prove a *prima facie* case.

Plaintiff testified that she was injured when defendants' subway car lurched causing her fall. The alleged lurch occurred shortly after plaintiff entered the car and began walking to a seat. Plaintiff did not hold on to a pole or other device; although, railings were available. The jury found that defendants were negligent and that their negligence was a substantial factor in causing the accident. While the jury found that plaintiff was negligent, it found that her negligence was not a substantial factor in causing the accident.

Defendants argue that the verdict was inconsistent as it was logically impossible for the jury to find that plaintiff's negligence was not a substantial factor in causing the accident. They argue that this portion of the verdict could not have been reached on any fair interpretation of the

evidence. Defendants next argue that the entire liability verdict ought to be set aside and a new trial granted; or, that the complaint should be dismissed as a matter of law. Defendants argue that there was no objective evidence that the train lurched with unusual or unnecessary force. Rather, according to defendants, the only evidence of an unusual movement was plaintiff's description of the events. Defendants argue that no witnesses confirmed the plaintiff's description of the accident and that no other passengers, including a woman who entered the car immediately before plaintiff, were affected.

Defendants argue that the facts do not show that the train had been traveling at a high rate of speed. They assert that plaintiff's testimony that she was thrown forward as she entered is inconsistent with a fall caused by a train moving in a forward direction perpendicular to the fall.

Plaintiff argues that defendants waived any challenge to the verdict because they failed to object to the inconsistency before the court discharged the jury.

Plaintiff then argues that the motion is defective because defendants moved under CPLR §4403, not §4404, and because defendants failed to submit trial pages and exhibits with their motion papers.

Plaintiff next argues that the jury finding that she was negligent was not based on her failure to hold a railing. Rather, she argues that there are no facts justifying that conclusion, as the verdict sheet does not recite why plaintiff was negligent. Moreover, plaintiff argues that if plaintiff did not have an opportunity to grasp a support railing, she could not have been negligent.

Continuing, plaintiff argues that the objective evidence supports the verdict. Plaintiff argues that based on plaintiff's "...detailed characterization and description of the movement of the carrier and the injury caused thereby was, in itself, sufficient to support a verdict in [her]

favor.”

Plaintiff testified that she took one or two steps into the car and moved diagonally to her right, as she approached a seat on the car’s opposite side. According to plaintiff, the train “lurched” and she “...lost [her] balance and was thrown.” According to plaintiff, prior to the accident, she had been able to ride a subway and “hold on to one of those things that hang down and close my eyes and take a couple of little catnaps.” She had never experienced a lurch similar to the one on the accident day. Subsequently, over objection, she answered “very different” when her attorney asked her if the lurch was different from a normal jolt.

The train was moving to plaintiff’s right; however, plaintiff fell forward.

Plaintiff testified that she was thrown across the car’s width. Plaintiff fell on her right side; her head was “very close to the door” opposite the door she entered from.

Plaintiff estimated that the car was twelve feet wide. Plaintiff is five feet, four inches tall.

Plaintiff testified, on cross examination, that a woman entered the car “just prior to my entering.” The woman did not take a seat; rather, she stood, holding the pole in the middle of the car. According to plaintiff, the woman “...blocked the way for me. So I had to kind of skirt around her to get to a seat. And that’s when the accident occurred, the doors had already closed, and the train lurched violently.”

Plaintiff testified that the woman holding the center pole took only two steps from the car’s entrance to the pole. Plaintiff agreed that the pole was only two or three feet from the door. She also agreed that there were handrails attached to the seats near the door. However, plaintiff contended that she could not grasp the pole because of the woman holding on to it, and that the train lurched violently as she was walking to a seat.

Plaintiff testified that the woman holding the pole did not fall when the train lurched “because she was standing there, standing firmly, holding on to the pole.”

The issue that emerges, based on these facts, is whether the verdict should stand; and, if not, whether it should be set aside and a new trial ordered; or, should the complaint be dismissed because the facts established at trial are legally insufficient to establish defendants’ liability.

The facts, giving plaintiff all favorable inferences, do not establish a *prima facie* case of negligence. Therefore, the verdict must be set aside and the complaint dismissed (see *Curly-Conception v. New York City Transit Authority*, 276 AD3d 463).

Plaintiff has the burden of proving that the lurch allegedly causing her fall was “unusual and violent” (*Urquart v. New York City Transit Authority*, 85 NY 2d 828,830). Plaintiff’s own description of the movement as “violent” did not satisfy her burden, as it was not corroborated by objective evidence corroborating her conclusory description of the event (*Urquart v. New York City Transit Authority*, *id.* at 830). Her testimony does not show that the train moved unusually; rather, it shows ordinary movement from a stop.

Nor does the testimony establish a violent lurch. Plaintiff’s description does not show that she was thrown a great distance. Plaintiff described the car as being twelve feet wide. Plaintiff was two or three steps into the car when she fell forward, toward the opposite door. Her head did not strike that door. Plaintiff is five feet four inches tall. Assuming the car’s width was twelve feet, and subtracting plaintiff’s height, the fact that she landed without making contact with the opposite door after toppling over shows that the lurch did not propel her a great distance. Notably, she fell forward, perpendicular, not parallel to the direction of the train’s movement.

In *Urquart v. New York City Transit Authority, id.*, the plaintiff was propelled the length of a bus thereby corroborating the suddenness of the stop at a speed estimated at twenty-five to thirty miles an hour (*id.* at 829). Plaintiff, in the instant case, was not propelled a significant distance. Nor were any of the other passengers adversely affected by the lurch (*cf. Harris v. Manhattan and Bronx Surface Transit Operating Authority*, 138 AD2d 56, 61).

The facts in *Curly-Conception v. New York City Transit Authority, id.*, as revealed in the briefs of counsel, although not in the Second Department's memorandum decision, are similar to those in the instant case. The plaintiff fell from a seat that was parallel to the side of the bus, and landed on her knees, "in a praying position", when the bus stopped. The Appellate Division granted defendant's motion for summary judgment and dismissed the complaint.

Similarly, in the instant case plaintiff also fell forward a short distance, perpendicular to the car's direction. These facts made it impossible for the jury to have found that the lurch was violent and unusual. "Sudden jerks and jolts in the movement of railroad trains or streetcars are accepted as among the usual incidents of travel, which every passenger by experience has learned to expect to some extent" (*Harris v. Manhattan Surface Transit Operating Authority, id.* at 58, citing Annotation, *Motor Carrier's Liability for Injury to Passenger by Sudden Stopping, Starting, or Lurching of Conveyance*, 57 ALR2d 5, §1, at 11). Had the lurch been violent, it is unlikely that plaintiff, after toppling over, would have landed short of the car's door opposite her.

The evidence shows that plaintiff fell because of an ordinary, not unusual, movement at a time when, as the evidence also reveals, she did not secure herself by holding on to one of the several available rails. The jury's determination to the contrary was not based on any valid line of reasoning (see *Cohen v. Hallmark Cards*, 45 NY2d 493, 499).

Although the issue is academic, as the complaint is being dismissed, the jury finding that plaintiff's negligence was not a substantial factor in causing her injury was not based on a fair interpretation of the evidence. Plaintiff was negligent in not holding on to a pole or railing. The issue of negligence and proximate cause were "so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" (*Muniz v. New York City Transit Authority*, 30 AD3d 388, 389).

Plaintiff's argument that the motion should be denied because of the lack of a transcript and defendants' reliance on an incorrect CPLR provision are without merit. CPLR §4404 does not require a transcript. Plaintiff erroneously relies on cases requiring adequate papers, such as transcripts, to be made part of a appendix of record on appeal. Moreover, it is apparent that defendants were moving under the applicable statute.


Accordingly, it is

ORDERED that the motion is granted, the verdict set aside, and the complaint dismissed.

This constitutes the decision and order of the court.

Dated: October 18, 2006

ENTER

  
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S.S.C.

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