

**Moore v New York City Tr. Auth.**

2007 NY Slip Op 32359(U)

July 25, 2007

Supreme Court, New York County

Docket Number: 0107843/2004

Judge: Donna Marie Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 21

MOORE, MARCO

INDEX NO. 107843/04

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. NO. 001

*NEW YORK CITY TRANSIT AUTHORITY,  
SCHIAVONE CONSTRUCTION COMPANY, INC.,  
BOVIS LEND LEASE, HOLDINGS, INC. and BOVIS,  
LEND LEASE INC.,*

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

Defendants.

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

PAPERS NUMBERED

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

1

Answering Affidavits- Exhibits \_\_\_\_\_

2

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

**FILED**

CROSS-MOTION: \_\_\_\_\_ YES  NO

JUL 31 2007

Upon the foregoing papers, it is ordered that this motion is:

NEW YORK  
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 7-26-07

*[Signature]*  
J.S.C.

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 21

-----X  
MARCO MOORE,

Plaintiff,

- against -

Index No. 107843/04

Mot. Seq. Nos. 001 & 002

NEW YORK CITY TRANSIT AUTHORITY,  
SCHIAVONE CONSTRUCTION COMPANY, INC.,  
BOVIS LEND LEASE HOLDINGS, INC. and  
BOVIS LEND LEASE, INC.,

Defendants.  
-----X

HON. DONNA M. MILLS, J.:

Motions designated sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 001, defendants New York City Transit Authority ("NYCTA") and Schiavone Construction Company, Inc. ("Schiavone") move (1) pursuant to CPLR 3212, for summary judgment dismissing the Amended Complaint as to Schiavone; (2) for the imposition of sanctions against defendants Bovis Lease Lend Holdings, Inc. and Bovis Lease Lend, Inc. (collectively, "Bovis") based on their refusal to discontinue the action as to Schiavone; and (3) for common-law indemnification for NYCTA from Bovis.

In motion sequence number 002, Bovis moves and NYCTA and Schiavone cross-move to vacate the Note of Issue and strike the action from the Court's trial calendar based on plaintiff's failure to comply with certain disclosure requests.

### BACKGROUND

Plaintiff commenced this action seeking to recover damages for personal injuries he allegedly sustained on May 7, 2003, when he fell into an opened subway ventilation grating upon exiting the Times Square subway station. The subway ventilation grating is located on the west side of Seventh Avenue between West 42<sup>nd</sup> and West 43<sup>rd</sup> Streets, in front of Three Times Square, in Manhattan. NYCTA owns and operates the Times Square subway station. Although the parties do not provide copies of the contracts, it is undisputed that NYCTA retained Schiavone as the general contractor and Bovis as the construction manager for a rehabilitation project at Time Square subway station.

The original Complaint alleged a claim for negligence against NYCTA and Schiavone. Issue was joined as to said defendants with the service of an answer generally denying the allegations in the Complaint and asserting numerous affirmative defenses.

Thereafter, plaintiff filed an Amended Complaint adding Bovis as defendants and alleging a negligence claim against all defendants. The Amended Complaint, as well as the Bill of Particulars, alleges that plaintiff's injuries were caused solely by defendants' negligence in leaving the subway ventilation grating open and unattended at the time of the incident.

NYCTA and Schiavone amended their answer to include crossclaims for contribution or indemnification against Bovis.

In addition, Bovis answered generally denying the allegations in the Amended Complaint, asserting numerous affirmative defenses, and alleging a crossclaim for contribution or indemnification against NYCTA and Schiavone.

NYCTA and Schiavone now seek summary judgment dismissing the Amended Complaint as to Schiavone, sanctions against Bovis for failure to discontinue the action against Schiavone, and common-law indemnification for NYCTA from Bovis. Defendants also seek to vacate the Note of Issue and strike the action from the Court's trial calendar based on plaintiff's refusal to comply with disclosure requests for documents pertaining to injuries sustained by plaintiff in two motor vehicle accidents.

**DISCUSSION**

Preliminarily, the branch of motion sequence number 001 that seeks summary judgment dismissing the Amended Complaint as to Schiavone and the imposition of sanctions against Bovis for failure to discontinue the action as to Schiavone is rendered moot by the Stipulation, dated March 28, 2007, among the parties, discontinuing all claims and crossclaims against Schiavone. Thus, that branch of the motion is denied. Furthermore, defendants' motion and cross motion to vacate the Note of Issue and strike the action from the Court's trial calendar was resolved by Stipulation, dated May 24, 2007, essentially requiring plaintiff to comply with the defendants' disclosure

[\* 5 ]

requests. The Stipulation was "so ordered" by the Court. Thus, that motion and cross motion are also denied.

The request for common-law indemnification for NYCTA from Bovis remains. NYCTA essentially asserts that despite the inability to locate its contract with Bovis, and in the absence of proof an indemnification agreement, it is nevertheless entitled to common-law indemnification from Bovis since it did not actively cause plaintiff's injuries.

Generally, a defendant whose liability to an injured plaintiff is merely secondary or vicarious is entitled to common-law indemnification from the actual wrongdoer who by actual misconduct caused the plaintiff's injuries, and whose liability to the plaintiff is therefore primary (see *Menorah Nursing Home, Inc. v Zukov*, 153 AD2d 13, 23 [2d Dept 1989]).

As stated, the Amended Complaint alleges a negligence claim against defendants and seeks damages for personal injuries sustained by plaintiff when he fell onto an opened subway ventilation grating upon exiting the Times Square subway station. Negligence consists of a duty of care owed to another, and the breach of that duty resulting in injury (see *Pulka v Edelman*, 40 NY2d 781, 782 [1976], citing *Palsgraf v Long Is. R.R. Co.*, 249 NY 339 [1928]).

Furthermore, it is well established that a landowner has a duty to exercise reasonable care under the circumstances in maintaining its property in a safe condition (see *Miller v State*

of New York, 62 NY2d 506, 513 [1984]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). In order to recover damages for the alleged breach of this duty, the plaintiff must demonstrate that the owner created or had actual or constructive notice of the hazardous condition which precipitated the injury (*Piacquadio v Racine Realty Corp.*, 84 NY2d 967, 969 [1994]). Additionally, in order to constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the owner, or its employees, to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Affording the pleadings a liberal construction, accepting the facts alleged therein as true, and according plaintiff the benefit of every favorable inference, the Amended Complaint sets forth a valid negligence claim (see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Furthermore, at his examination before trial ("EBT"), held on July 19, 2005 and June 19, 2006, plaintiff essentially testified that he exited the Times Square subway station at West 42<sup>nd</sup> Street and Seventh Avenue, stopped to look into a store window at the corner of West 42<sup>nd</sup> Street and Seventh Avenue, briefly walked north along Seventh Avenue before attempting to cross Seventh Avenue, and tripped and fell into the opened subway ventilation grating (Moore EBT, Not of Mot, Exh C, p. 13).

[\* 7]

Here, however, NYCTA essentially argues that any liability to plaintiff would be entirely vicarious, based upon its legal duty as a property owner to maintain its premises in a reasonably safe condition, and that the injuries alleged by plaintiff resulted from personnel from Bovis opening the subway ventilation grating without any direction or supervision from it. NYCTA also asserts that it had no notice of the alleged condition that caused plaintiff's injuries.

To support its position, NYCTA offers, *inter alia*, transcripts of the examination before trial ("EBT") of the Bovis personnel who opened the subway ventilation grating. In particular, at an EBT held on October 31, 2006, Eyob Tesemma, a Senior Site Inspector for Bovis, testified that on the date of the alleged incident, he and Ashok Patel, an electrical inspector for Bovis, met with a prospective station tenant and the tenant's contractor to inspect the station's HVAC system; that the inspection involved going to the street level to inspect the station's ventilation grating; and that at least two people from the group opened the ventilation grating during the inspection (EBT of Tesemma, Not of Mot, Exh I, pp. 10, 12, 19-20). He also testified that no one from NYCTA or Schiavone accompanied them to the subway ventilation grating for inspection (*id.* at 45). He further testified that the grating was open for about 10 minutes before he first saw plaintiff, and that he observed plaintiff "kneeling down on his left leg, trying to make himself

[\* 8]

comfortable to lay down" in the opened ventilation grating (*id.* at 22, 23). In addition, he testified that when he inquired as to plaintiff's well-being, plaintiff looked at him smiling, stated that he twisted his ankle, and requested an ambulance (*id.* at 24-25). Ashok Patel essentially corroborated Tesemma's testimony at an EBT held on the same day (Patel EBT, Not of Mot, Exh J).

In opposition to the request for common-law indemnification, Bovis does not deny opening the subway ventilation grating, but insists that it had no contractual obligation to do so. Bovis maintains that it performed the task only as an accommodation to NYCTA and its prospective tenant, and at the request of a NYCTA representative. Bovis notes that the written agreement between it and NYCTA has not been located and, as such, the scope of Bovis' contractual duty to NYCTA cannot be conclusively established at this time. Moreover, Bovis contends that the submissions are devoid of any evidence to establish that its contractual duties included assisting NYCTA in leasing its retail space by facilitating the inspection of the subway's ventilation system.

Bovis relies, *inter alia*, on the transcript of the EBT of Helene Cinque, an employee in NYCTA's Real Estate Department, taken on October 12, 2006. Helene Cinque testified, in part, that on the date of the alleged incident, she visited the Times Square subway station to show retail space and the HVAC system

[\*9]  
within the station to a prospective station tenant (Cinque EBT, Not of Mot, Exh H, p. 9, 20). She also testified that meetings with prospective tenants usually involved opening the subway ventilation grating; that there was no specific process for opening the grates; and that typically, a designated "Transit" employee or a "contractor on the site" was responsible for opening the grates (*id.* at 19). She further testified that she does not know who opened the subway ventilation grating for the prospective tenant with whom she met, but that she received a telephone call informing her of the incident involving plaintiff upon her return to her office (*id.* at 20).

The Court simply cannot conclude from the submissions that NYCTA was free from any negligence in connection with the opened subway ventilation grating that allegedly caused plaintiff's injuries, and that any liability to plaintiff would be merely vicarious by virtue as NYCTA's status as property owner. Thus, the request for common law indemnification must be denied.

Accordingly, it is

ORDERED that the motions and cross motion are denied.

Dated: 7/25/07

ENTER:

FILED

JUL 31 2007

NEW YORK  
COUNTY CLERK'S OFFICE

*James J. Hill*  
J. S. C.