

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

2007 NY Slip Op 32562(U)

August 9, 2007

Supreme Court, New York County

Docket Number: 0107106/2004

Judge: Donna Marie Mills

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 21

MCFADDEN, ALPHONSO

INDEX No. 107106/04

Plaintiff,

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

-v-

MOTION SEQ. No. 001

NEW YORK CITY TRANSIT AUTHORITY, et. al.,  
Defendant.

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion to compel disclosure.

PAPERS NUMBERED

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

1 + 2

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

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

CROSS-MOTION:  YES  NO

**FILED**  
AUG 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 8-9-07

*Donna M. Mills*  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

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

-----X  
ALPHONSO MCFADDEN,

Plaintiff,

-against-

Index No 107106/04

NEW YORK CITY TRANSIT AUTHORITY and CITY  
OF NEW YORK,

Defendants.

-----  
DONNA MILLS, J.:

In this personal injury action, defendant New York City Transit Authority (TA) moves, under motion sequence 001, for an order: (1) vacating the note of issue; (2) directing plaintiff to complete discovery; and (3) extending defendant's time to move for summary judgment. Plaintiff Alphonso McFadden (McFadden) cross-moves for an order: (1) striking the note of issue and removing the matter from the trial calendar; (2) scheduling a compliance conference; (3) striking the answer of the TA for failing to provide outstanding discovery; or in the alternative, for an order (4) compelling the TA to provide the previously demanded discovery including specific documents and depositions. The TA also submits a motion, under motion sequence 002, for an order, pursuant to CPLR 3212, granting summary judgment in its favor and dismissing the complaint, and the City of New York cross-moves for an order, pursuant to CPLR 3212, dismissing the complaint and all cross claims against it. Motion sequence numbers 001 and 002 are consolidated for disposition.

It is undisputed that on January 16, 2004, McFadden, a 28-year-old blind male, slipped and fell on the landing of a New York City subway station located at West 23<sup>rd</sup> Street and 7<sup>th</sup> Avenue in Manhattan, and that plaintiff sustained injuries to his right arm during the fall. It is

**FILED**  
AUG 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

[\* 3 ]

also undisputed that McFadden timely filed a Notice of Claim pursuant to General Municipal Law § 50-e, and that, what is commonly referred to as a “50-h” hearing [General Municipal Law § 50-h], was held on February 9, 2004. Thereafter, by service of a summons and complaint on or about May 7, 2004, McFadden commenced the instant action in order to recover damages for the injuries he sustained. Issue was joined by the service of the City’s answer and combined demands on or about June 14, 2004, and by the service of the TA’s answer and combined demands on or about October 22, 2004. A preliminary conference (PC) was held on November 4, 2004, and discovery, including the exchange of documents and various examinations before trial (EBTs) ensued.

The PC order directed plaintiff to provide, within 45 days, medical records and HIPAA compliant authorizations for: medical reports; MRI’s, X-rays; diagnostic tests; physical therapy records; pharmacy records; tax returns for 2003 to date; collateral sources; and special damages. The PC order directed the TA to provide, within 45 days, accident report(s) pertaining to McFadden, and the cleaning schedule(s) for the subject subway station in effect on the date of accident. Among the disclosure directives spelled out in the PC order were the depositions of the parties’ witnesses which were scheduled to take place on March 2, 2005. The parties, however, did not timely and orderly conduct discovery, triggering the instant discovery-related motion and cross motion under motion sequence number 001.

A review of the follow-up compliance conference orders and so-ordered stipulations, reveals the multiple failures of the parties to meet their various discovery obligations, coupled with their tolerance for each other’s failings, as demonstrated by the willingness of each party to repeatedly stipulate to extensions of time. Each time this matter was conferenced, the parties

[ 4 ]

signed off on extensions of either 30 or 45 days for the completion of routine discovery matters, and the record reveals that this matter was scheduled for conferences, compliance and otherwise, approximately 26 times prior to full submission on May 3, 2007 of the instant discovery and summary judgment motions.

The TA's discovery motion seeks an order striking the note of issue, ostensibly because the TA lacks certain authorizations, a number of which were previously provided by plaintiff back in August 2004. Plaintiff, likewise, seeks relief because of the failure of the parties to complete discovery. Specifically, plaintiff moves, in the alternative, for an order: striking the note of issue; striking the TA's answer; or for an order compelling the TA to provide the names, work logs and cleaning schedules of all of its employees who cleaned the 7<sup>th</sup> Avenue 28<sup>th</sup> Street subway within a 24-hour period prior to the accident and for the TA to produce the subway station supervisor for an EBT.

The TA acknowledges that it was slow to provide certain discovery, but explains that its tardiness was either due to its inability to locate its file, or due to the fact that it transferred the reconstructed file to outside counsel for a period of time and so was unable to access its file in order to provide the demanded discovery. Therefore, according to the TA, its inability to meet various discovery deadlines was neither willful nor contumacious, and should not result in the striking of its answer.

A review of the discovery orders reveals that the repeated failure of the TA to comply with discovery orders demonstrates the TA's lack of concern for following the timely prosecution

of this action. However, it is also clear that plaintiff and the City of New York<sup>1</sup> consented to the repeated adjournments and that the long-sought-after discovery has now been provided. By the time these motions were fully submitted, the TA had produced copies of: (1) the TA Accident Report; (2) the Customer Accident Report Unusual Occurrence; (3) the TA cleaner's report; (4) the cleaning and maintenance records/schedules, including the MTA New York City Transit Division of Station Operation - Cleaners Job Schedule representing the schedule for various days of the week and times of the day, as well as the "WEP" Station Operations schedule in effect at the time of the accident; and (5) the names and job titles of TA employees working at the 23<sup>rd</sup> Street station on January 16, 2004. Furthermore, the TA produced the station cleaner, Brian Brooks, for deposition on March 8, 2006. Having done so, the TA fulfilled its EBT obligation under the February 2, 2006 so-ordered stipulation, and is not obligated to produce the station supervisor for deposition as that so-ordered stipulation states "TA to produce CTA [station cleaner] on duty at time of incident. If no longer employed, TA to provide last known address and TA to produce for EBT station supervisor of subject station."

A number of months have passed since the discovery motion and cross motion were served, filed and fully submitted together with the TA's motion for summary judgment. The parties' responsive submissions contain copies of demanded materials including several authorizations, cleaning schedules and accident reports. Because discovery is substantially complete, and the discovery requests contained in the motions no longer appear to be legitimate and pending, those aspects of the motions which seek an order striking the note of issue and/or an

---

<sup>1</sup>By written stipulation, dated September 9, 2006, plaintiff and the TA agreed to a dismissal, with prejudice, of all claims and cross claims then pending, under index number 107106/04, against the City of New York.

6] order striking the TA's answer, are denied. At this late juncture, the question of what discovery, if any, remains outstanding, will be addressed at the pretrial conference.

Turning to the motion for summary judgment, it is the TA's contention that plaintiff cannot substantiate his claim of having fallen due to an icy condition, and/or that he cannot establish that the icy condition existed for a sufficient length of time to permit the TA to discover and remedy the situation. The TA asserts that, because McFadden is blind, his testimony as to what caused him to fall (allegedly, ice) and whether that substance was visible and present long enough to constitute constructive notice, amounts to mere speculation which is insufficient to make out a prima facie case of negligence. Specifically, the TA states that "[McFadden] testified at his deposition that he 'believes' that he fell on ice but was unable to unequivocally affirm that there was ice in the area due to his blindness" (Aff., ¶ 5).

In a slip and fall action, such as this, in order to establish a prima facie case of negligence, plaintiff must show that the defendant either created a dangerous condition or had actual or constructive knowledge of the condition (Segretti v Shorenstein Co., E., 256 AD2d 234, 235 [1<sup>st</sup> Dept 1998]). Furthermore, "[t]o 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 defendant's employees to discover and remedy it" (Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986]). To this end, plaintiff offers not only his own testimony, but that of nonparty deposition witness Carmen LaMar (LaMar), who was present at the subway station, witnessed plaintiff fall, and came to his aid. In response to questions about the conditions, LaMar testified that on the date and at the time of the accident, there were both snow and ice by the top of the subway stairs, although she was unable to specify the exact location of

[\* 7 ]

either. LaMar also testified that it did not snow on the date of the accident, but that she recalls it being cold and that there was a lot of snow around, some of which had settled into ice (LaMar deposition, at 18-21).

The TA has moved for a summary dismissal of this action, and it is well settled that summary judgment is a drastic remedy which “should not be granted where there is any doubt as to the existence of a triable issue” (Moskowitz v Garlock, 23 AD2d 943, 944 [3<sup>rd</sup> Dept 1965]). It is also well settled that on a motion for summary judgment, the court “should draw all reasonable inferences in favor of the nonmoving party . . . since it serves to deprive a party of his day in court” (Assaf v Ropog Cab Corp., 153 AD2d 520, 521 [1<sup>st</sup> Dept 1989]).

To the extent that defendant questions McFadden’s accuracy (because he is blind) as to what caused him to fall, determinations surrounding plaintiff’s accuracy and credibility are best left to the trier of fact and are not a proper subject for determination by the motion court (S.J. Capelin Assoc. v Globe Mfg. Corp., 34 NY2d 338, 341 [1974]). Furthermore, the testimonial evidence of LaMar, the nonparty disinterested witness, regarding conditions at the subway station “would support an inference that the complained-of ice hazard existed for a sufficient time before the alleged accident to permit its discovery and remediation in advance of the accident” (Rodriguez v 326-338 E. 100<sup>th</sup> St. Partners, 40 AD3d 439, 439-440 [1<sup>st</sup> Dept 2007]). The motion for summary judgment is, therefore, denied.

Finally, the cross motion by the City of New York is denied as moot based upon the written stipulation of the parties, dated September 9, 2006, in both plaintiff and the TA agreed to a dismissal, with prejudice, of all claims and cross claims pending against the City.

Accordingly, it is

ORDERED that the motion by the New York City Transit Authority, under motion sequence 002, for an order granting summary judgment is denied; and it is further

ORDERED that the cross motion by the City of New York, under motion sequence 002, for an order granting summary judgment dismissing the complaint and all cross claims against it is denied as moot; and it is further

ORDERED that the discovery motion and cross motion under motion sequence 001 are denied; and it is further

ORDERED that the parties appear on Sept. 18, 2007 at 9:30 a.m. at Part 21, in Room 574, 111 Centre Street, New York, New York for a pretrial conference to conclude any remaining discovery issues and thereafter proceed to trial.

Dated:

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
AUG 20 2007  
NEW YORK  
COUNTY CLERK'S OFFICE