Garcia v New York City Tr. Auth.
2007 NY Slip Op 33126(U)
September 25, 2007
Supreme Court, Queens County
Docket Number: 0006894/2005
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **Justice**

IAS PART 22

Index No. 6894/05

CARLOS GARCIA,
Plaintiff,

-against-

THE NEW YORK CITY TRANSIT AUTHORITY,
Defendant.

Motion Date September 11, 2007

Motion Cal. No. 2

Motion Sequence No. C 001

The following papers numbered 1 to 9 read on this motion by defendant for an order pursuant to CPLR 3211 and 3212 granting the defendant summary judgment and dismissing plaintiff's complaint on the grounds that plaintiff has failed to state a cause of action against the defendant and that there are no triable issues of material fact.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits......	1-4
Affirmation in Opposition................	5-7
Reply Affirmation........................	8-9

Upon the foregoing papers it is ordered that this motion is determined as follows:

Defendant, New York City Transit Authority's (NYCTA) motion pursuant to CPLR 3211 and 3212 dismissing plaintiff's Complaint on the grounds that plaintiff has failed to state a cause of action against defendant and that there are no triable issues of material fact is denied.

On December 10, 2004, plaintiff, Carlos Garcia was allegedly injured when while alighting from a Manhattan-bound "7" train at the 82nd Street subway station in Jackson Heights, New York, in an attempt to allow passengers to depart, he fell into a gap between the station platform and the train door, causing his left leg to become lodged in the gap. Plaintiff claims that defendant was negligent in the operation and maintenance of the subway station and train.

The NYCTA states that the existence of a space between a subway car and a platform, is not in and of itself, evidence of negligence as long as the space is no greater than that which is reasonably necessary for the operation of the subway cars. Defendant contends that plaintiff has not provided a specific measurement of the alleged gap which existed at the subject location at the time of the accident and also argues that defendant has qualified immunity under *Weiss v. Fote*, 7 NY2d 579 (1960), stating that under *Weiss*, the plans and designs the government adopts cannot be the basis for tort liability, as long as the government acts rationally; and defendant states that Courts have applied said doctrine to the NYCTA, granting it immunity from actions based on varied policy decisions affecting public safety. Defendant asserts that such immunity extends to policies concerning gaps. In support of its position, plaintiff submits, *inter alia*, the affidavit of Flander Julien, a Civil Engineer employed by NYCTA, and a NYCTA Policy Memorandum, addressing gap allowances, the Examination Before Trial Transcript of plaintiff, and copies of photographs of the alleged gap taken by plaintiff. The NYCTA concludes that on straight tracks, spaces of up to six inches are permissible, and asserts that the gap in question was less than six inches. It maintains that the gap was reasonable and necessary for the operation of the transit system and was designed and planned for the public's safety.

Plaintiff asserts that the NYCTA is not immune from liability and states that case law asserts that the measure of NYCTA's liability in gap cases is the foreseeable harm incidental to a particular gap. Plaintiff further asserts that "the law is well established that liability will be assessed where, under the totality of the circumstances pertaining to a particular case, a particular gap is an unreasonable danger about which NYCTA knows or should know but fails to take any reasonable ameliorative measures." Additionally, plaintiff contends that plaintiff's thigh measured over seven inches in diameter, and as such, the gap must have been at least that wide for plaintiff's leg to become lodged. Finally, plaintiff contends that defendant failed to make out a *prima facie* case since it is not based on documents in admissible form.

In opposition, plaintiff submits, *inter alia*, a sworn affidavit from plaintiff, Carlos Garcia and the Examination Before Trial Transcript of defendant's witness, Caremlite Cadet, a NYCTA engineer.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue

(*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]).

The rule governing summary judgment requires the proponent of a summary judgment motion to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering admissible evidence to eliminate any material issues of fact from the case (*Winegrad v. New York University Medical Center,* 64 NY2d 851 [1985]; *Torterello v. Carlin,* 260 AD2d 201 [1st Dept 1999]). 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; *Greenberg v. Manlon Realty,* 43 AD2d 968, 969*).* The burden of production as well as the burden of persuasion always rests on the proponent of the motion *(Alvarez v. Prospect Hospital,* 68 NY2d 320 [1986]).

The evidence in the record before this Court demonstrates that defendant failed to establish its *prima facie* burden. Defendant relies largely on the affidavit of Civil Engineer for the NYCTA, Flander Julian. It is well-established law that an expert's opinion must be based upon facts in the record or personally known to the witness, and that it must reflect an acceptable level of certainty in order to be admissible. (*Erbstein v. Savasatit*, 274 AD2d 445 [2d Dept 2000]) (citations omitted). "[W]here the expert states his conclusion unencumbered by any trace of facts or data, [the] testimony should be given no probative force whatsoever." (*Romano v. Stanley*, 90 NY2d 444 [N.Y. 1997]). Mr. Julien asserts in his affidavit that in reaching his expert opinion he relies on *inter alia*, the gap measurement records for the platform at the 82nd Street subway station, as well as on photographs of the gap which existed at the time of the accident. The Court notes that the gap measurement records are both uncertified and unsworn, and therefore, inadmissible evidence. Additionally, while said photographs of the gap are attached to the instant motion, they are completely unintelligible. As the affidavit of plaintiff's expert is without factual basis in the record, it is rendered inadmissible and insufficient to raise a triable issue of fact *(see, Erbstein, supra)*. Additionally, defendant submits a NYCTA Policy memorandum dated May 28, 1997, which addresses gap allowances. The Court notes that such a document is unsworn and

uncertified and therefore inadmissible, as well.

Furthermore, even *assuming arguendo*, that defendant had established a *prima facie* case, the instant motion for summary judgment would still be denied. The evidence in the record before this Court demonstrates that there are controverted issues of fact in connection with, *inter alia*, the precise dimensions of the subject gap, whether the gap was a dangerous defect, rendering the platform unsuitable for general use, whether the 82nd Street subway station (including the gap) was maintained in a safe and reasonable manner, whether defendant NYCTA breached a duty of care to plaintiff. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, defendant NYCTA's motion is denied.

Moreover, that branch of defendant NYCTA's motion which seeks dismissal on the basis of failure to state a cause of action against it pursuant to CPLR 3211(a)(7) is denied. On a motion to dismiss on the ground that the Complaint fails to state a cause of action, the issue is limited to ascertaining whether the pleading states any cause of action, not whether there is evidentiary support for the Complaint. For the purpose of such motions, plaintiff's Complaint is liberally construed in a light most favorable to the plaintiff and all factual allegations are accepted as true (*LoPinto v. J.W. Mays, Inc.*, 170 AD2d 582 [2d Dept 1991]). As such, this Court finds that plaintiff's Complaint states a cause of action against defendant, NYCTA.

The foregoing constitutes the decision and order of this Court.

Dated: September 25, 2007

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Howard G. Lane, J.S.C.