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| Schaeffer v New York City Tr. Auth. |
| 2008 NY Slip Op 31748(U) |
| June 17, 2008 |
| Supreme Court, New York County |
| Docket Number: 0115693/2004 |
| Judge: Donna M. Mills |
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

SCHAEFFER, JOSEPH

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY, et al.,

Defendants.

INDEX No. 115693/04

MOTION DATE _____

MOTION SEQ. No. 004

MOTION CAL No. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits 1

Answering Affidavits- Exhibits _____

Replying Affidavits _____

CROSS-MOTION: YES NO

FILED
JUN 24 2008

COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 6/17/08

J.S.C.
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

SCHAEFER, JOSEPH,

**INDEX NO.
115693/04**

Plaintiff,

- against -

CITY OF NEW YORK, et al.

DECISION/ORDER

DEFENDANTS,

DONNA M. MILLS, J:

FILED
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COUNTY CLERK'S OFFICE
NEW YORK

BACKGROUND

In this action for personal injuries, plaintiff Joseph Schaefer seeks damages allegedly resulting from a fall as he tried to extricate himself via the emergency escape hatch of an elevator located on the express tracks of the 1, 2 and 3 subway line, at Penn Station, 34th Street and 7th Avenue, in New York City. Plaintiff alleges that on August 14, 2003, during a blackout, passengers were stuck in an elevator owned and operated by the New York City Transit Authority and necessitated evacuation. Plaintiff further alleges that after the passengers were evacuated, he was caused to strike an exposed broken, defective, jagged, sharp or otherwise dangerous portion of the elevator causing him to fall to the elevator cab below, thereby sustaining injury. Plaintiff alleges that at no time was a ladder made available to him, nor was a key to the motor room, which could have eliminated the necessity of an evacuation through the emergency escape hatch. Plaintiff now moves for summary judgment as to liability on the grounds that the

failure to provide a ladder violated the Rescue Guide for Emergency Personnel as set forth in the American Society of Mechanical Engineers A17.4-1999 § 1.3.5 [a][3] and [4], and that the sharp edges along the emergency escape hatch, along with the failure to provide a key to the motor room, violated various rules, laws and ordinances of the New York City Administrative Code; and that such violations constitute a prima facie showing of negligence for the purpose of General Municipal Law § 205-e. Defendant, the NYCTA opposes the summary judgment motion.

APPLICABLE LAW & DISCUSSION

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1978). “But when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the trial calendar and thus deny to other litigants the right to have their claims promptly adjudicated.” Andre v. Pomeroy, 35 NY2d 361 (1974). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant’s entitlement to judgement as a matter of law (CPLR § 3212 [b]).

In support of its motion, plaintiff argues that a General Municipal Law § 205-e claim can be predicated on violations of the Administrative Code. See e.g., Pirraglia v. CCC Realty NY Corp., 35 AD3d 234 (1st Dept 2006). Plaintiff also contends that under GML § 205-e, plaintiffs are entitled to a lesser burden of proof on notice and that defendant’s violation need only constitute a “factor” in the chain of causality -- not a “substantial factor.” Giuffrida v. Citibank,

100 NY2d 72, 81 (2003). Furthermore, plaintiff contends that a police officer needs not prove actual or constructive notice to establish a prima facie claim. Lusenskas v. Axelrod, 183 AD2d 244 (1st Dept 1992). Plaintiff also contends that based on the NYCTA's acknowledged duty to inspect for "every unsafe condition that could exist," [Exhibit J. p. 26-27] "[a] negligent failure to discover a condition that should have been discovered can be no less a breach of due care than a failure to respond to actual notice." Black v. City of Albany, 48 NY2d 875, 877 (1979). Plaintiff further contends that summary judgment is appropriate in negligence cases where the evidence is so overwhelming as to make the inference of negligence inescapable. George Foltis Inc. v. NYC, 287 NY 108, 121 (1941). Plaintiff also contends that in GML § 205-e cases, issues relating to comparative negligence or assumption of risk do not serve as a bar to summary judgment. Mullen v. Zoebe, Inc., 86 NY2d 135 (1995).

In opposition, defendant contends that it is an issue of fact as to how the injury occurred, which should be resolved by a jury. More specifically, defendant contends that the plaintiff injured himself on a piece of construction metal on top of the elevator and not on the escape hatch. Defendant also contends that plaintiff has not proved that the NYCTA created the defective condition in question or had notice of the defective condition for a sufficient length of time prior to the accident. Ruisi v. Frank's Nursery and Crafts, Inc., 272 AD2d 314 (2nd Dept 2000). Defendant also contends that there is no proof that a proper request was made for the ladder and that plaintiff waited for the ladder to be provided.

Based upon plaintiff's GML 50-h testimony, there are issues of fact as to whether plaintiff's arm came into contact with the emergency hatch or metal on the top of the elevator. In

his deposition, plaintiff stated that he was injured by what he described as “a piece of protruding metal that was part of the elevator structure, you know, in the hatch area.” (73-74). There is an issue of fact as to whether the metal was part of the hatch. As such, it is a question of fact whether defendant’s alleged violations are causally related to the injury. Fahey v. Serota, 23 AD3d 335, 336 (2nd Dept 2005), held that in order “[t]o establish a prima facie case under General Municipal Law § 205-e, a plaintiff, in addition to demonstrating a violation of a relevant statute, ordinance, or regulation, must also establish a practical or reasonable connection between the violation and the injury or death of the police officer” (citing Abbadessa v. City of New York, 269 AD2d 341 (2000)). The NYCTA is also correct in stating that plaintiff has not proved that New York City Administrative Code Sections 27-127 and 27-128 were violated, as there is no mention of a requirement to provide access to the motor room or the hydraulic lift.

Furthermore, there is an issue of fact as to whether defendant was negligent in providing a ladder. It is unclear as to when plaintiff requested a ladder and whether defendant negligently failed to provide one. According to plaintiff’s GML 50-h testimony, there was a ladder available somewhere on the platform, but it is not clear who failed to retrieve or whether plaintiff waited for the ladder to be provided. The Rescue Guide for Emergency Personnel does not impose clear legal duties, and GML 205-e “was intended to provide police officers with an avenue of recourse ‘where injury is the result of negligent non-compliance with *well-developed bodies of law and regulation*’ which ‘impose *clear duties*.’” Desmond v. City of New York, 88 NY2d 455, 464 (1996) (citing Mem of State Executive Dept, reprinted in 1989 McKinney’s Session Laws of NY, at 2140, 2141). As such, a GML 205-e claim cannot be predicated on an alleged failure to

comply with the guide.

In this case, there are triable issues of fact as to whether the cited provisions of the Administrative Code and various ordinances applied to the area where plaintiff was injured and whether the defendant violated those provisions. Additionally, there are triable issues of fact as to whether defendant created the allegedly defective condition, or had actual or constructive notice of that condition and whether defendant was negligent by failing to provide a ladder.

Accordingly, it is

ORDERED that the plaintiff Joseph Schaefer's motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated:

6/17/08

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

FILED
JUN 24 2008
COUNTY CLERK'S OFFICE
NEW YORK