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| <b>Gardener v New York City Tr. Auth.</b>  |
| 2008 NY Slip Op 33307(U)   |
| December 4, 2008   |
| Supreme Court, New York County   |
| Docket Number: 106772/05   |
| 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**

GARDENER, JOANN

INDEX No. 106772/05

Plaintiff,

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

-v-

MOTION SEQ. No. 001

NEW YORK CITY TRANSIT AUTHORITY,  
Defendants.

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

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 \_\_\_\_\_

3

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

Upon the foregoing papers, it is ordered that this motion

**FILED**  
DEC 11 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

IS DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM OF DECISION WHICH IS ATTACHED.

Dated: 12/4/08

[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  
JOANN GARDENER,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

Index 106772/05

**FILED**  
DEC 11 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
Mills, J.:

In motion sequence 001, defendant New York City Transit Authority (NYCTA) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

**Background**

On January 13, 2005, at approximately 8:45 AM, plaintiff was riding the northbound number 4 train (the train), owned and operated by the NYCTA. Plaintiff alleges that she was riding in the second to last car of the train, which was very crowded due to rush hour. Plaintiff alleges that the train pulled into Bowling Green Station in Manhattan, and because of the crowd, she exited the train to let others off, even though it was not her stop. Plaintiff asserts that she stepped out of the train "straight, facing straight." Defendant's Notice of Motion, Exhibit F, p. 19. As plaintiff was exiting the train, she alleges that it "suddenly lurched forward, causing her foot and ankle to enter the gap between the subway car and platform."

Defendant's Notice of Motion, Exhibit B, ¶ 21.

Plaintiff alleges that her right foot and leg fell into the gap.

Plaintiff alleges that another passenger put his hand in the gap and pulled off her sneaker and took her foot out of the gap.

Defendant's Notice of Motion, Exhibit F, p. 22. As a result of the fall, plaintiff fractured her left leg, as well as sustaining other injuries, such as bruising.

### **Analysis**

In order to grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. The movant must make an initial prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. *Santiago v Filstein*, 35 AD3d 184, 185 (1<sup>st</sup> Dept 2006); *Pirrelli v Long Island R.R.*, 226 AD2d 166 (1<sup>st</sup> Dept 1996). After the movant makes a prima facie case, the burden shifts to the opposing party to produce evidentiary proof sufficient enough to establish the existence of material issues of fact that require a trial.

*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

The NYCTA argues that New York courts have recognized that some space between the platform and the subway car is necessary, because "[t]he cars must not scrape the platform of the station, and must be far enough away to allow for the oscillation and swaying of the train." *Ryan v Manhattan Ry. Co.*, 121 NY 126, 131

(1890); *McKinney v New York Consol. R.R. Co.*, 230 NY 194, 199 (1920). Therefore, the existence of a space between the platform and train car, which is necessary to the operation of the train, does not in and of itself constitute negligence. *Johnson v New York City Tr. Auth.*, 7 Misc 3d 42 (App Term, 2<sup>nd</sup> Dept 2005).

The NYCTA submits the Affidavit of Carmelite Cadet, a civil engineer employed by the NYCTA since 1986, to support its argument. See Defendant's Notice of Motion, Exhibit I. Cadet affirms that he examined the gap measurement records for the northbound number 4 train platform at Bowling Green, and the records show that, on April 9, 2004, the gap was four inches. Cadet also personally examined the site, and found the gap to be four inches. Cadet also affirms that the NYCTA's engineers have determined that the maximum allowable horizontal and vertical space between a subway car door threshold and a platform edge is six inches on all straight or tangent tracks in order to accommodate normal train car lateral and sway movement. Cadet affirms that the Bowling Green Station contains straight or tangent tracks. This policy is also evidenced by a May 1987 NYCTA memorandum. See Defendant's Notice of Motion, Exhibit J.

Based on the foregoing, the NYCTA established its entitlement to judgment as a matter of law, thereby shifting the burden to the plaintiff to submit admissible evidence raising a triable issue of fact. *Winegrad v New York Univ. Med. Ctr.*, 64

NY2d 851, *supra*.

Plaintiff does not address or oppose the allegations made by defendant in regard to the gap. Therefore, plaintiff fails to present any evidence that raises an issue of fact as to whether the mere existence of the gap between the train and platform constituted negligence. See *Yarde v New York City Tr. Auth.*, 4 AD3d 352 (2<sup>nd</sup> Dept 2004).

Plaintiff does argue, however, that the NYCTA's motion should be denied, because it does not address plaintiff's allegations that the train lurched forward, causing the plaintiff to fall. "To establish a prima facie case of negligence against a common carrier for injuries sustained by a passenger when the vehicle comes to a halt, the plaintiff must establish that the stop caused a jerk or lurch that was unusual and violent." *Delgiudice v Metropolitan Transportation Authority*, 36 AD3d 649 (2<sup>nd</sup> Dept 2007) quoting *Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 829-830 (1995).

Plaintiff's Notice of Claim states that as plaintiff stepped out of the train, the train suddenly lurched forward. The complaint states a similar allegation. The Bill of Particulars also states that defendant was negligent in allowing the train to lurch forward with the doors open. Plaintiff also submits an affidavit, in support of her opposition to this motion, in which she affirms that the train doors opened, and the train lurched

suddenly and forcefully, just enough to jostle her causing her to lose her footing. Finally, at the hearing conducted pursuant to General Municipal Law § 50-h, plaintiff testified that she remembered that there was an abrupt halt, the doors flew open, and the train moved slightly. Affirmation in Opposition, Exhibit 1, p. 12. It is important to note that there was no mention of any lurching or movement by the plaintiff in her deposition.

This evidence presented by plaintiff is not sufficient to demonstrate that the movement of the Train was "unusual and violent" and "different class than the jerks and jolts commonly experienced." *Urquhart v New York City Tr. Auth.*, supra at 830. Plaintiff merely alleges that the train "moved slightly" and "suddenly lurched." This is not enough. See *Banfield v New York City Tr. Auth.*, 36 AD3d 732 (2<sup>nd</sup> Dept 2007); *Golub v New York City Tr. Auth.*, 40 AD3d 581 (2<sup>nd</sup> Dept 2007); *Curley-Concepcion v New York City Tr. Auth.*, 276 AD2d 463 (2<sup>nd</sup> Dept 2000). Further, plaintiff completely omits any discussion of the alleged movement of the train in her deposition.

Accordingly, it is

ORDERED that the defendant New York City Transit Authority's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: ~~November~~ 4, 2008  
~~December~~

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**DONNA M. MILLS, J.S.C.**

**FILED**  
DEC 11 2008  
COUNTY CLERK'S OFFICE  
NEW YORK