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

PRESENT: HON. PAUL G. FEINMAN Justice

PART 12

Index Number : 107940/2006

SMITH, ROBERT

VS

PORT AUTHORITY

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. 107940/2006

MOTION DATE 1-14-09

MOTION SEQ. NO. 002

MOTION CAL. NO. 6

; motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Memo | 1, 2 |
| Answering Affidavits — Exhibits Cross Motion + memo | 3, 4 |
| Replying Affidavits | 5, 6 |

**Cross-Motion:** [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

FILED
MAR 27 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/25/09

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

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ROBERT SMITH,

Plaintiff,

against

PORT AUTHORITY OF NEW YORK AND NEW JERSEY AND PORT AUTHORITY TRANS HUDSON, CORP.,

Defendants.

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Index Number 107940/2006
Submission Date Jan. 14, 2009
Mot. Seq. No. 002
Cal. No. 6

**DECISION AND ORDER**

Papers considered in review of this motion and cross-motion for summary judgment:

| Papers | Numbered |
|---|---|
| Pl. Notice of Motion and Affidavits Annexed | 1 |
| Memorandum of Law | 2 |
| Amended Cross-Motion | 3 |
| Memorandum of Law | 4 |
| Plaintiff's Reply Affirmation | 5 |
| Defendants' Reply Affirmation | 6 |



**PAUL G. FEINMAN, J.:**

The motion and cross-motion are consolidated for purposes of decision.

This personal injury action involves an employee of the Port Authority Trans Hudson Corp. (PATH), who was injured on the evening of January 17-18, 2005, as he attempted to climb onto a railroad flat and fell to the ground. Plaintiff moves for summary judgment against both defendants on the issue of liability . Defendants oppose and cross-move for partial summary judgment and to rescind a so-ordered stipulation dated March 5, 2008. For the reasons which follow, the motion is granted and the cross-motion is denied.

*Background*

On the evening of his accident, plaintiff was a part of the "Flat 19" work crew.[1] As

[1]At his deposition, plaintiff stated his work entailed passing out and collecting the tools such as jack hammers from the flat, making sure the tools were in working order, informing the

described by plaintiff in his April 2005 interview with defendants' claims examiner, the regular railroad flat on which the crew worked, which had railings and two grab bars, had been temporarily replaced by a flat that lacked "side things" and was missing a "tailgate" (Cross-Mot. Ex. E, Claims Transcript of 4/21/05, unnum. pp. 2, 3).[2] Smith testified at his deposition that he had previously complained about the flat's lack of safety features to his leadman and to the foreman, Ricky Rybakbeck, and had been told "more than once" by the foreman that it would be taken care of (Mot. Ex. E, EBT of Robert Smith [hereinafter Smith EBT] 88, 89).

On the work day in question, it had previously snowed, and when plaintiff attempted to hoist himself onto the flat by grabbing the one existing bar, his foot slipped, possibly from being wet, and he "messed up" his shoulder and back and fell to the ground (Cross-Mot. Ex. E, Claims Transcript of 4/21/05, unnum. 2). He suffered a torn rotator cuff which was surgically repaired. At his deposition in April 2007, plaintiff stated that he had to step up onto the flat nearly every day he worked, and on the night of his accident, he reached with his right foot and arm to grab the bar, put his foot in a "strap" of metal on the lower foothold, and as he pulled himself up with one arm and one leg, his foot slipped sideways; he could not keep his balance and fell backwards (Smith EBT 39, 41-42, 44). Because there was no siding on the flat, he had nothing to reach for when his foot slipped (Smith EBT 107, 108), and there was a hand hold only on one side of the step (Smith EBT 56). As he fell, he attempted to twist away from "boulders with the rebars sticking out of it" that

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leadman as to any need for tools or replacements, and following the leadman's directions (Mot. Ex. E, EBT of Robert Smith 45-46).

[2]Plaintiff's foreman, Ricky Rybak, described a "typical flat" as looking like a "barge," with a "flat deck with sideboards on it," but with "wheels just like a train," and with "step-up and grab bars to get up and down," and a "brake system" (Mot. Ex. 9, EBT of Ricky Rybak 11).

had been temporarily placed by the side of the flat, from a platform that had been chopped up (Smith EBT 108).

After the accident, plaintiff was required by the PATH rules to complete an accident report (Cross-Mot. Ex. E). His portion of the accident report indicates in part that the weather conditions were "cold," but does not mention wetness or melting snow. He noted that the injury involved Flat 24 in the D-Yard, which was "out of service" and "not moving." He described his injury occurring as, "climbing on flat and foot slipped, pain on back, and let go of rail, and fell down to [unreadable]" (*see* Smith EBT 38). He did not check the form's boxes to indicate that he reported the "alleged unsafe/defective tool or equipment" prior to the injury, or that he was aware of any unsafe conditions prior to beginning his work. He did not indicate that "weather" was an extenuating circumstance. In response to the question of what he could have done to prevent the accident, he wrote, "platform install," and at his deposition, he testified there never was a platform where he worked, but he had worked in other parts of the tunnel where there were platforms (Smith EBT 56-57). The portion of the report completed by the foreman, Ricky Rybak, indicated that at the time of the accident, Smith was "climbing onto flat 24 which would take him and the other employees to the work site," that Rybak inspected the location at 2:25 a.m. and found conditions to be "clear and dry," that safety rules and practices were being followed, and there was no unsafe condition involved (Cross-Mot. Ex. E).

At his deposition, plaintiff was asked about two sets of photographs. One set was taken by Foreman Rybak on Friday April 20, 2007, and Smith testified that the photographs depicted the

accident location but that he did not recognize the particular flat (Smith EBT 96, 97, 99, 102).[3] The other set consisted of four "hard to see" photos labeled "R. Smith 1/18/05," which Smith said appeared to show the flat on which he had been working because it was missing the sideboards and tailgates (Smith EBT 146-147).[4]

Rybak testified for defendants.[5] He said he was notified of plaintiff's accident by a telephone call from the leadman (Mot. Ex. 9, EBT of Ricky Rybak [hereinafter Rybak EBT] 56-57, 58). Rybak was aware that the accident occurred while the work crew was en route to their work location and that the flat was not yet in motion (Rybak EBT 56, 58). The flat was attached to a passenger car which would have been used to power the flat (Rybak EBT 63). Rybak did not recall whether Flat 24 had sideboards (Rybak EBT 88). He could not recall if any of the sideboards were missing when he inspected the flat after the accident, although he stated he would have canceled the use of the flat were there no sideboards, and he remembered that he had not canceled the flat's use (Rybak EBT 96-97, 98, 99). He "believed" the flat had sideboards because he "wouldn't let the flat go without sideboards because it's dangerous." (Rybak EBT 68). He did not recall the kind of sideboard used on the day of the accident nor did he remember what type of grab bars were used on Flat 24 (Ryback EBT 24, 48). He had not heard any complaints and would have inspected the flat had he been told of any complaints by the leadman or others (Rybak EBT 89, 90). The PATH train

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[3]Rybak testified these photographs were of Flat 24, the same flat that plaintiff fell from in 2005 (Mot. Ex. 9, EBT of Ricky Rybak 9-10).

[4]There are photocopies of three photographs attached as part of exhibit E of the Cross-Motion, that include the rubric "R. Smith 1/18/05" (*see* Smith EBT 146).

[5]Defendants also submit a May 2008 affidavit by Rybak which sets forth the same contentions as contained in his deposition testimony.

crew and leadman had the responsibility of inspecting the railroad flat to make sure it had sideboards (Rybak EBT 89). According to Rybak, plaintiff never complained to him about Flat 24, including that it lacked sideboards (Rybak EBT 87, 88, 100).

Rybak took Smith to the hospital after his injury (Rybak EBT 64). Smith did not explain to Rybak exactly how he fell, only that he fell while trying to climb onto the flat (Rybak EBT 60, 67, 94). Rybak did not ask the plaintiff what had caused the accident (EBT 67, 83, 84, 92). None of the other crew members witnessed the accident (Rybak EBT 95). According to Rybak, Smith did not engage in any unsafe practices (Rybak EBT 95, 96). Rybak advised Smith that if he had a problem climbing onto the flat, a "little extension ladder" would be provided to accommodate him (Rybak EBT 100:18-19).

Rybak took photographs in 2007 which he testified were an accurate depiction of Flat 24, and believed that other photographs depicted what a flat typically would have looked like on the date of plaintiff's accident (Rybak EBT 37, 38, 47-48). He was shown photocopies of four Polaroid photographs of a work flat, but he could not tell if the photographs were of Flat 24, nor did he know he took the photographs or whose handwriting was on the photographs (Rybak EBT 101-102).

Plaintiff filed his summons and complaint on June 8, 2006, and served defendants thereafter. The note of issue was filed in June 2007. The preliminary conference order directed that dispositive motions were to be made within 60 days of filing the note of issue (Motion Ex. 15). However, the justice then-assigned to the matter allowed post-note disclosure to continue on the issues of witnesses to the accident and the identity of the maker of the four photographs alleged to have been taken on the night of the accident. The parties entered into a so-ordered stipulation dated October 10, 2007, wherein defendants agreed to provided a detailed affidavit setting forth the particulars of

the search to identify witnesses and photographs of the accident scene, and a second so-ordered stipulation dated December 12, 2007, concerned identification of employees present at the accident site (Motion Ex. 13, 14). On March 5, 2008, another so-ordered stipulation was signed which in part precluded defendants from calling any witnesses at the time of trial other than Ricky Rybak, the foreman, to testify regarding liability, and precluded the use of photocopies of the four photographs apparently taken on the night of the accident but then lost, or the introduction of secondary evidence concerning the lost photographs (Motion. Ex. 11).

Plaintiff filed the instant motion for summary judgment on April 11, 2008, less than 45 days after the signing of the parties' stipulation precluding certain witnesses. His attorney explains that only after the signing of the March 5, 2008 stipulation, which acknowledged that certain photographs of the accident scene could not be produced and that the person who took the photographs could not be identified, was plaintiff in a position to move for summary judgment on liability (Mot. Ressler Aff. ¶¶ 24-25). He argues that under *Brill v The City of N.Y.*, 2 NY3d 648 (2004), plaintiff has established good cause for the lateness in filing the motion for summary judgment.

The parties then stipulated that defendants' papers were returnable on June 5, 2008, and according to the markings on the motion file, the motion was fully submitted on that date. Defendants originally cross-moved for an order rescinding the March 5, 2008 so-ordered stipulation, and such other relief as the court found proper (Ressler Reply Aff. Ex. 1). An amended cross-motion, dated July 7, 2008, specifies that defendants seek summary judgment. Defendants to not address the issue of their motion's timeliness and provide no good cause explanation for their lateness. Defendants' arguments for summary judgment rely on the contents of the accident report

completed by plaintiff on the night of the accident, and on the testimony of the foreman, Ricky Rybak, which they contend establish that plaintiff's injury did not occur as the result of negligence on the part of the Port Authority, or at the very least raise questions of fact concerning liability and preclude summary judgment. They also argue that the claims brought pursuant to the Boiler Inspection Act and the Safety Appliance Act should be dismissed because they are not applicable when a railroad flat is not in use.

The defendants' argument for summary judgment is premised entirely on evidence available at the time the note of issue was filed and not post-note discovery. As defendants have not argued, let alone established a good cause basis for the lateness of the branch of their cross-motion seeking summary judgment, this branch of the cross-motion is denied as untimely. *Brill v The City of N.Y.*, 2 NY3d 648 (2004). The other branch of the cross-motion concerning the so-ordered stipulation of March 5, 2008, which in part precludes defendants from introducing liability evidence other than by Rybak, will be considered by the court.

*Legal Analysis*

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

Plaintiff sues under the Federal Employer's Liability Act (45 USC §§ 51-60), the Boiler Inspection Act (45 USC §§ 22-34), and the Federal Safety Appliance Act (45 USC §§ 1-16). According to the commentary in the New York Pattern Jury Instructions, the Federal Employers'

Liability Act (FELA) imposes on a railroad the duty of using reasonable care to provide a reasonably safe place to work (1B NY PJI3d 2:180, at 953 [2009]). The cause of action sounds in negligence (45 USC § 51), but the concept is "much broader than the common law concept" (1B NY PJI3d 2:180, at 957). The burden is on the plaintiff to prove he was employed by the railroad at the time of the accident, that the defendant failed to use reasonable care, and that the negligence played some part, "however slight" in causing the occurrence (1B NY PJI3d 2:180, at 953). If the negligence by the plaintiff is a defense, then the defendant's burden is to prove the negligence and its causal relation to the injury (1B NY PJI3d 2:180, at 954).

The Federal Safety Appliance Act (SAA) and the Boiler Inspection Act (BIA), impose safety requirements for the benefit of employees, as described in the New York Pattern Jury Instructions (1B NY PJI3d 2:180, at 967). The SAA requires "any car" to have "grab irons or handholds," as well as other safety items such as secure sill steps, ladders, and running boards (45 USC §§ 4, 11). A violation may be shown by proving the absence of any required device or that a safety device was defective. "The duty imposed is absolute" (1B NY PJI3d 2:180, at 967, citations omitted). However, absolute liability will attach only if the train is "in use" at the time of the accident (*Bardin v Consolidated Rail Corp.*, 270 AD2d 696, 696 [3d Dept. 2000]). As explained in *Bardin*, the purpose of the "in use" limitation is to give rail car operators an opportunity to inspect and correct safety appliance defects before they are exposed to strict liability under the Act (270 AD2d 697, quotation and citation omitted). The Act excludes injuries directly resulting from inspection, repair, or servicing of railroad equipment. The courts focus on the location of the train and the activity of the injured party at the time of the accident (*Bardin*, 270 AD2d at 697, citations omitted). Here, there is little doubt that the flat was in use at the time plaintiff was injured. Flat 24 was used by the

workers as transport to their nightly work location, and when plaintiff fell, although it was not yet moving, according to the testimony of Ricky Rybak it was attached to a passenger car which was to power it to its location.

The evidence consists of plaintiff's testimony concerning the condition of Flat 24 and how the accident occurred, Rybak's testimony establishing that he did not see the accident and has little direct memory of the appearance of Flat 24, and the accident report completed by Smith and Rybak shortly after the accident. Plaintiff testified that there was an absence of safety items such as ladders or handholds, and that the flat lacked sideboards and tailgates that would have provided a grip. He was shown the Polaroid photographs from the night of the accident and noted that the flat pictured lacked sideboards and tailgates. He testified in addition that there was nearby construction debris which he tried to avoid when he fell and which possibly caused him to twist in a manner that contributed to his injury. He also testified that the ground was somewhat wet from melting snow and that his boots may have become slippery. His accident report failed to described an absence of sideboards, tailgates, or grab bars, but did note that a "platform" should be installed. Rybak's testimony establishes that he did not see the accident, and that he has few direct memories of Flat 24, in particular as to whether the flat was in fact equipped with sideboards, although he testified that had he known of any safety violations, he would not have let the flat be used. Whether the ground was wet, and whether Smith complained to Rybak of the lack of sideboards or grab bars, remain questions of fact.

As noted above, the standard for negligence under FELA is broader than that in common law negligence. The issue is whether defendants used reasonable care to provide plaintiff with a safe working environment. Given that Rybak told Smith he could be accommodated with a small

extension ladder, that Rybak does not actually remember the condition of the flat on the evening in question, and that plaintiff had to try to avoid construction debris piled by the side of the flat when he fell, plaintiff has sufficiently established that defendants failed to provide a reasonably safe working environment under FELA, and thus summary judgment as to liability is appropriate.

Defendants cross-move for an order rescinding the contents of the March 5, 2008 stipulation, based on the mistaken belief of the parties that the photographs of the accident site were permanently misplaced. As explained in the reply affirmation of defendants' attorney, the case was originally assigned to another attorney in the same office who is no longer with the firm, and the original photographs had been removed from the file unbeknownst to the attorney subsequently assigned to the matter (Hood Reply Aff. ¶¶ 4, 7). They were found in May 2008, although the identity of the photographer remains unknown (Cross-Mot. Ex. R, Hood letter to Ressler, 5/29/08).

It is well settled that a stipulation between parties or their attorneys, reduced to a writing subscribed by the parties or their attorneys or to an order which has been entered, becomes a binding agreement (*Hinds v Gulutz*, 61 Misc. 2d 384, 385 [Sup. Ct. Suffolk County 1969] citing CPLR 2104; *Yonkers Fur Dressing Co. Inc. v. Royal Ins. Co., Ltd.*, 247 N.Y. 435 [1928]). The court has control over stipulations and has the power to relieve the parties from the terms when they can be returned to their former position (*Matter of Estate of Frutiger*, 29 NY2d 143, 149-150 [1971]). A stipulation will not be vacated without good cause, such as a showing of fraud, collusion, mistake, accident, or similar ground (*Estate of Frutiger*, at 150).

Defendants argue that they agreed to the stipulation in the mistaken belief that the photographs were lost, although it is noted that they also have never been able to discover who took the photographs. They argue they will be prejudiced if they remain precluded from producing other

liability witnesses, presumably someone who could attest to the condition of Flat 24 on the evening in question. Plaintiff argues that if the stipulation were vacated he would be greatly prejudiced as he has now waived his rights to pursue testimony from other witnesses.

Although rescission of the stipulation might be appropriate in other circumstances, here the plaintiff has been granted summary judgment on the issue of liability under FELA, and the only issue remaining is that of damages. Therefore, defendants' cross-motion to rescind and vacate the March 5, 2008 stipulation is denied as academic. It is

ORDERED that plaintiff's motion is granted to the extent that defendants Port Authority of New York and New Jersey and Port Authority Trans Hudson Corp., are found liable to plaintiff under the Federal Employers Liability Act, the Boiler Inspection Act, and the Safety Appliance Act (45 U.S.C. §§ 1-51, et seq.), and it is further

ORDERED that the plaintiff shall serve a copy of this order upon the Clerk of Trial Support who shall promptly set this matter down on the appropriate trial calendar for an assessment of plaintiff's damages; and it is further

ORDERED that upon the completion of the assessment of damages, the Clerk of Court shall enter judgment in plaintiff's favor and against the defendants for the amount determined at the amount determined, together with costs and disbursements; and it is further

ORDERED that the cross-motion is denied.

This constitutes the decision and order of the court.

Dated: March 25, 2009
New York, New York

_____ J.S.C.