

Guarton v Turner Constr. Co.

2009 NY Slip Op 30706(U)

March 27, 2009

Supreme Court, New York County

Docket Number: 114895/2005

Judge: Harold B. Beeler

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

PRESENT: _____
Justice

PART _____

Index Number : 114895/2005
GUARTON, DONNA
vs.
TURNER CONSTRUCTION
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is granted,

see Order annexed.

FILED

MAR 31 2009

COUNTY CLERK'S OFFICE
NEW YORK

*Conference on May 26, 2009
at 10:00 AM in Room 304,
717 Thomas Street.*

Dated: 3/27/09

HAROLD BEELER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
DONNA GUARTON, AS ADMINISTRATRIX OF THE
ESTATE OF ROLANDO H. GUARTON and DONNA
GUARTON, INDIVIDUALLY,

Plaintiffs,

-against-

TURNER CONSTRUCTION COMPANY, CITY OF NEW
YORK, and THE NEW YORK CITY TRANSIT
AUTHORITY,

Defendants.

-----X
Beeler, J.:

Index No. 114895/2005

FILED
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NEW YORK

This action arises out of an incident on March 29, 2005,
wherein decedent Rolando Guarton was struck and killed by a New
York City Transit Authority's (NYCTA) northbound C subway train
at the 59th Street/Columbus Circle Station in Manhattan (the
Station).

In motion sequence 002, defendant Turner Construction
Company (Turner) moves, pursuant to CPLR 3212, for summary
judgment in its favor on the grounds that (1) there is no
evidence that Rolando Guarton's incident was related to Turner's
work at the Station or any conceivable negligence of Turner; (2)
Turner's work was not the proximate cause of Rolando Guarton's
incident; (3) the barricade and the warning signs on the
barricade were in substantial compliance with the NYCTA's plans
and specifications and was approved by the NYCTA; (4) the
Industrial Code provisions that Turner allegedly violated are not

applicable; and (5) Turner owed no duty in tort to the plaintiffs.

Background

At the time of the incident, Turner was installing six staircases and three elevators at the Station. Plaintiff alleges that the construction site of one of the elevators, which was being installed on the platform servicing the northbound C train towards the southern end of the platform, contributed to decedent's death. This elevator installation site was enclosed by plywood barricades secured with metal studs, leaving less than five feet between the platform edge and the barricade. Plaintiff alleges that this construction and renovation work was performed in a negligent manner, so as to cause decedent's death.

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 (1st Dept 2006); *Pirrelli v Long Island R.R.*, 226 AD2d 166 (1st 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.

[* 4]
Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985).

Turner has made a prima facie showing that the construction work was not the proximate cause of decedent's death. Turner submits the deposition testimony of two non-party witnesses to the incident, Veronica Mulero and Mark Kermode, as well as the police investigation reports. Ms. Mulero and Mr. Kermode both testified that the decedent was not near the construction location at the time of the incident, and that from what they saw, it appeared the decedent jumped in front of the train.

Whether or not the decedent jumped is not an issue that this court needs to determine in order to decide this motion, because both eyewitnesses place decedent several feet from the construction area. If decedent was not in the area of the construction barricades, it cannot be said that they contributed to the incident.

Ms. Mulero stated that decedent was standing approximately six feet south of the construction barricades. See Notice of Motion, Exhibit E, p. 47. After reviewing a photograph of the area, in which the incident took place, Ms. Mulero marked the decedent as standing half-way between the construction barricades and the southern most staircase leading down to the platform. See Notice of Motion, Exhibit J. Mr. Kermode placed decedent further south from the construction barricade, estimating that decedent was one hundred feet away. See Notice of Motion,

Exhibit G, pp. 27-28. Mr. Kermode also stated that decedent was three to four feet south of the bottom of the southern most staircase. See Notice of Motion, Exhibit G, pp. 26 -27.

Plaintiff argues that these two testimonies are conflicting and create an issue of fact. Ms. Mulero and Mr. Kermode do conflict in regard to how many feet they estimated decedent to be from the barricade, but both place decedent in the general vicinity of the bottom of the staircase, and unequivocally several feet away from the construction barricades.

Further, when asked if the construction had anything to do with the incident, Ms. Mulero stated that it did not. See Notice of Motion, Exhibit E, p. 73. There is also no mention of the construction in any of the police reports and witness statements. Therefore, based on the above, the decedent was too far from the construction barricades for them to be the proximate cause of the incident. The burden now shifts to the plaintiff to raise an issue of fact.

Plaintiff submits the affidavit of her expert, Sal Cohen. Mr. Cohen is a licensed professional engineer with over forty years of experience. Mr. Cohen's affidavit states that is feasible that decedent was standing right outside the construction barricade, despite the eyewitness testimony. Mr. Cohen states that he based his opinion on the laws of physics and engineering, including the Law of Conservation of Linear

Momentum. While this court does not doubt Mr. Cohen's credentials, it is concerned with his affidavit. First, Mr. Cohen's opinion is based on the review of videotapes of the scene of the incident, photographs, deposition testimony, and conversations with his deceased partner, who was the original engineer who asked to review this case, but unfortunately passed away in December 2007. Mr. Cohen never conducted a physical review of the scene. His affidavit generally states his opinion on the safety issues regarding the construction barricades, but does not go into any specific detail as to how these alleged safety issues are related to the decedent's death.

Second, Mr. Cohen states that the laws of physics and engineering dictate that it is feasible that decedent was standing right outside the construction barricade when the incident happened. However, Mr. Cohen does not explain how these laws place the decedent in the location of the barricade. The court finds Mr. Cohen's statements to be conclusory. This affidavit is not adequate to raise an issue of fact as to whether the construction barricade was the proximate cause of the decedent's death.

Plaintiff also argues that the Medical Examiner's Office declared the decedent's death as an accident, but as stated above, it is not necessary for this court to determine whether this was an accident or that decedent jumped in order to conclude

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that the construction barricade was not a proximate cause of the death. Plaintiff has failed to raise a triable issue of fact. As a result of the foregoing, it is unnecessary to examine the remaining arguments of the parties.

Accordingly, it is

ORDERED that defendant Turner Construction Company's motion for summary judgment is granted and the complaint is hereby severed and dismissed against defendant Turner, and the Clerk of the Court is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue. A conference shall be held on Tuesday, May 26, 2009 at 10:00 AM in Room 304, 71 Thomas Street.

This constitutes the decision and order of the Court. Any other requested relief not expressly granted is denied.

DATE: March 27, 2009

ENTER:



HAROLD B. BEELER, J.S.C.

HAROLD BEELER

FILED

MAR 31 2009

COUNTY CLERK'S OFFICE
NEW YORK