

Torres v New York City Tr. Auth.

2009 NY Slip Op 31805(U)

August 5, 2009

Supreme Court, New York County

Docket Number: 112522/20085

Judge: Harold B. Beeler

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

PRESENT: HAROLD BEELER Justice
J.S.C.

PART 21

Blanca U. Jones

INDEX NO. 1125 22/05

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Nyck

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is granted as per annexed decision.

FILED

AUG 12 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/5/09

[Signature]
HAROLD BEELER J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

THIS MOTION 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
BLANCA TORRES, As Administratrix of the Estate of
MARTIN D. TORRES and BLANCA U. TORRES,
Individually,

Plaintiffs,

-against-

Index No. 112522/20085
SEQUENCE MS001
DECISION & ORDER

NEW YORK CITY TRANSIT AUTHORITY,
and "JOHN DOE," a fictitious name, the real name being
unknown,

Defendants,

-----X

HAROLD B. BEELER, J.S.C.:

FILED
AUG 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff moves for leave to file an amended verified bill of particulars to include additional allegations with respect to the cause of the accident which resulted in the death of decedent, Martin Torres. Defendant New York City Transit Authority ("Transit Authority") opposes the motion on the grounds that the proposed amended bill improperly sets forth an entirely new theory of liability, not previously alleged by plaintiff.

On June 13, 2004 at approximately 2:40 AM, Martin Torres was found lying on the northbound subway tracks at the 168th street No.1 IRT station. A customer on the northbound subway platform saw Torres' body on the tracks and flagged down an oncoming train, bringing that train to an immediate stop. The train operator saw a man lying in the trough in between the rails and roadbed. Police officers who arrived to investigate found Torres on the tracks, seventy five feet from the south end of the platform. He was alive but unconscious, and was suffering from severe head and foot injuries. He was transported to a hospital where he died thirteen days later. There were no reported eye witnesses to the incident.

Transit Authority conducted an immediate investigation of the accident. Victor Bynum was identified as the conductor of the last northbound train to pass through the station before the discovery of Torres on the tracks. Within hours of the discovery, Bynum told Transit Control Center that nothing unusual had happened at the 168th street station, that three people had gotten off the train there, and that there was no one on the platform when the train left the station. A. Waldron, the operator of the train, also reported to Control Center that there had been no incident at the 168th Street station.

Bynum reiterated his observations in a written report submitted later on the day of the accident. In the report, Bynum stated that:

“I didn’t observe my train operator going (BIE) or anyone on the platform or roadbed. We made a normal station stop. I made my announcement on the platform observe the station and then gave my T/O indication and I proceed northbound.”

Three days after the accident, Bynum told police investigators in a phone interview that he had no knowledge that the train had struck anyone until he reached the West 242nd Street station. He said that the train had made all the scheduled stops, that he had made his platform observations and that there had been no police conditions to report.

Soon after the accident, Transit Control also dispatched a Road Car Inspector to the 168th street station to check for a possible 12-9, code for a “Customer under the Train.” By the time the inspector arrived, all emergency personnel had left the scene and the train which Bynum conducted and which Waldron operated had traveled to the 242nd Street station where it was ordered to stop and then inspected by another Transit employee for a possible 12-9 incident.

Transit Authority’s inspection report entitled “Division of Car Equipment Post Incident

Inspection Report,” categorized the type of incident investigated as a “Person Under.” According to the inspection, the train’s brakes, horn, headlights, whistle and tripping device were found to be in working order but there was no evidence found of a person coming into contact with the train. Transit did not inspect the train for defects relating to the other two investigative categories which are “Person Between Cars or a “ Person between Car Body and Platform”

Plaintiff Blanca Torres, acting as administratrix of Mr. Torres’s estate and individually, served a Notice of Claim on defendant on June 2, 2005, alleging that defendant “was negligent, reckless and careless in failing to stop for the Decedent who had accidentally fallen onto the tracks,” and “in causing, creating and/or suffering a negligent, hazardous and dangerous condition to exist causing Decedent to fall onto the subway tracks.” A Summons and Complaint was served on September 8, 2005. Plaintiff’s verified bill of particulars, served on March 8, 2006, continued to allege that Mr. Torres was struck by the train. Plaintiff filed the Note of Issue and Certificate of Readiness on August 16, 2007.

In anticipation of trial, plaintiff hired Dr. Zafer Termanini, M.D., F.A.A.O.S., as an expert witness to testify as to the cause of plaintiff’s death and the resulting damages. Dr. Termanini conducted a thorough review of the case based on the parties’ depositions, bill of particulars, medical report from Dr. Gerard A. Catanese, medical records from New York Presbyterian, the accident report, and a folder of documents received from defendant. The autopsy report was not made available to him.

Based upon his review and analysis, Dr. Termanini concluded that Mr. Torres was not hit by the train after accidentally falling onto the tracks. He found that Mr. Torres’s multiple head injuries and leg twisting were inconsistent with such an accident. Furthermore, the train

conductor would have seen Mr. Torres on the tracks, because he was traveling 43 uninterrupted blocks in a straight, well-lit passageway.

Dr. Termanini concluded that the nature of Mr. Torres's injuries indicated he must have been dragged while on the subway platform, and not struck while on the tracks. He opined that Mr. Torres's left foot became caught, either in the subway door or the gap between the door and the platform, twisting his left leg. The train then dragged him along the platform, causing his multiple head injuries, before he was ultimately dragged onto the tracks.

The day after receiving Dr. Termanini's report, plaintiff exchanged the Expert Response with defendant, and the amended the bill of particulars to incorporate Dr. Termanini's conclusions. The amended bill of particulars alleges that defendant was negligent in causing plaintiff to "become entangled, ensnared and/or caught at the defendant's platform and/or train doors," and "in dragging the plaintiff and causing him to fall onto the tracks." Three days later, plaintiff filed an order to show cause with the court for leave to amend its bill of particulars as set forth.

At the parties' oral argument on plaintiff's motion, the Court requested that the parties submit supplemental affirmations regarding defendant's investigation of the incident, and asked the parties to argue whether or not defendant would be prejudiced by allowing the amendment of the bill of particulars. Upon receipt of defendant's supplemental affirmation, plaintiff discovered that defendant had included the "Division of Car Equipment Post Incident Inspection Report" referenced above, a significant document related to the investigation, which had not been previously disclosed. In a conference call with the Court, defendant agreed to review all the relevant documents and to disclose anything not previously provided to plaintiff.

Discussion

NY CPLR 3025 (b) permits a party to amend its pleadings, by leave of the court, at any point in the litigation. “Leave shall be freely given,” and is within discretion of this Court. NY CPLR 3025 (b); *Sahdala v. N.Y.C. Health & Hosp. Corp.*, 251 A.d.2d 70, 674 N.Y.S.2d 297 (1st Dept 1998); *Fischer v. RWSP Realty, LLC*, 53 A.D.3d 595, 596, 862 N.Y.S.2d 539, 542 (2d Dept 2008).

The defendants argue that plaintiff should have retained the expert witness sooner, and should not benefit from its own failure to do so. Defendants further argue that it has been prejudiced by the delay, and it cannot make a timely and meaningful investigation in its defense of plaintiff’s new allegations. *See Manns v. N.Y.C. Trans. Auth.*, 50 A.D.3d 860, 861, 855 N.Y.S.2d 665, 667 (2d Dept 2008) (holding that defendant cannot conduct a timely and meaningful investigation of the merits of the new legal theory, where plaintiff changed her story during her deposition). Plaintiff responds that a thorough review of all available information was necessary before the expert could reach his conclusions. Furthermore, at least one important document in the possession of defendant was not provided to plaintiff, and denial of leave would mean that defendant would benefit from its own non-disclosure.

To support its position, defendant argues further that it conducted an investigation of a “12-9” incident, for a person under the train, and not an “11-9,” which is for a person in between the car and the platform. Nothing in its investigation alerted it to a person getting caught in the doors of the train, or getting caught between the platform and the subway car.

Defendant mischaracterizes its “12-9” investigation as having been conducted in reliance

on plaintiff's claims. However, its investigation took place well before plaintiff served the notice of claim on defendant. Since there were no eyewitnesses to the incident, it was unclear what had led up to Torres' injuries. Transit Authority could have investigated numerous scenarios but chose only to investigate a person being hit by a train. Defendant also has the benefit of having immediately interviewed the conductor and motorman of the last train which left the station before Torres was discovered lying on the tracks. The conductor told investigators that three people had gotten off the train at the 168th Street station and that there was no one on the platform when the train left the station. The motorman reiterated that nothing unusual had happened at the station.

Defendant has not shown that it has been hindered in the preparation of its case, or that plaintiff's allegations have prevented it from taking measures in support of its position. *Loomis v. Civetta*, 54 N.Y.2d 18, 444 N.Y.S.2d 571 (1981). To the extent that there is any prejudice, it will be mitigated by allowing further discovery. *Sahdala*, 251 A.D.2d at 71, 674 N.Y.S.2d 297.

Moreover, plaintiff acted expeditiously, by notifying defendant immediately upon receipt of the expert's conclusion, and serving the order to show cause a few days thereafter. See *Cenzaoprano v. Vanderbaan*, 95 A.D.2d 767, 768, 463 N.Y.S.2d 246 (2d Dept 1983). And, unlike the plaintiff in *Dos Santos v. N.Y.C. Trans. Auth.*, 257 A.D.2d 468, 683 N.Y.S.2d 535 (1st Dept 1999), plaintiff presents competent factual evidence in support of its amended theory.

Lastly, defendant's supplemental affidavit contains a document that defendant acknowledges had not been previously disclosed to plaintiff. Defendant cannot now oppose plaintiff's motion for leave to amend on the basis of plaintiff's delay, when this delay may be attributed at least in part by defendant's own failure to provide relevant information.

For all of the aforesaid reasons, plaintiff is entitled to amend the verified bill of particulars. Defendant is entitled to conduct any discovery it would have been entitled to had plaintiff made the expert's report available prior to the filing of the note of issue. Under these circumstances, the case is not ready to proceed to trial. Accordingly, it is hereby

ORDERED that plaintiff's motion for leave to amend its verified bill of particulars is granted to the extent specified in its order to show cause;

ORDERED that the note of issue and certificate of readiness are stricken; and it is

ORDERED that the parties are to appear for a status conference on September 10 2009 at 2PM to schedule any outstanding discovery.

This constitutes the decision and order of the court.

All relief not expressly granted is denied.

Dated: New York, New York

August 5, 2009

FILED
AUG 12 2009
COUNTY CLERK'S OFFICE
NEW YORK
ENTER:



Harold B. Beeler, JSC

HAROLD BEELER
J.S.C.