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

PRESENT: HAROLD BEELER J.S.C. PART 21

Justice

Index Number : 103667/2007
SPIVEY, NATASHA
VS.
TRANSIT AUTHORITY
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 103667/2007
MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.

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 as per annexed decision and order.

It is ordered that plaintiff's complaint is dismissed and the clerk shall enter judgment accordingly

FILED
AUG 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/18/09

HAROLD BEELER J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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NATASHA SPIVEY,

Plaintiff,

Index No. 103667/2007
SEQUENCE MS001
DECISION & ORDER

-against-

NEW YORK CITY TRANSIT AUTHORITY

Defendant

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

Defendant New York City Transit Authority ("Transit Authority") moves for summary judgment dismissing the complaint against it. Plaintiff Natasha Spivey opposes. For the reasons discussed herein, the motion is granted.

FACTUAL BACKGROUND

On October 25, 2006, plaintiff and her two children were traveling on the northbound # 6 train. Plaintiff stood by the first set of doors in the first car of the train because the car was crowded. When the doors opened at the 59th Street station, plaintiff stepped off the train to let passengers exit. According to Plaintiff, she could not see where she was stepping because of the car's congestion. As she stepped off the train her left leg fell through a gap between the train and the platform. Her leg fell up to approximately five inches below her kneecap. Two passengers immediately helped pull her out of the gap. Throughout this time, passengers continued to enter

and exit the train.

On June 24, 2006, four months prior to the accident, Transit Authority had measured the gap between the platform and the first door of the first car on the northbound local train at the 59th Street station. The gap measured four inches horizontally and one inch vertically.

Plaintiff's complaint alleges that the gap measured four inches wide between the edge of the platform and the edge of the train floor, although she did not measure the gap immediately after the accident. Plaintiff took a photograph of the gap, which shows a space of just over four inches. Plaintiff is not able to determine whether the width of the gap at time of the accident differed from the width depicted in the photograph. However, in plaintiff's deposition, she answered affirmatively when asked if the photograph fairly and accurately showed the "distance of [the] gap between the train and the platform as it existed on [her] accident date." Plaintiff now contends that at the time of the accident, the gap was greater than six inches in length.

In support of its motion for summary judgment, the Transit Authority alleges that because the gap was less than six inches, there was no dangerous condition as a matter of law. In opposing the motion, plaintiff argues that there is a triable issue of fact as to whether the size of the gap exceeded six inches, and that such a gap constitutes a dangerous condition and imposes a duty to warn. The court finds that there is no triable issue of fact.

DISCUSSION

The existence of a gap between a train and a platform is insufficient, on its own, to establish a common carrier's negligence. *Ryan v. The Manhattan Railway Company*, 121 NY

126 (1890). This is because "the train cars must not scrape the platform and must be far enough away to allow for the oscillation and swaying of the train." *Id* at 131.

Public entities are afforded qualified immunity as to its policy decisions where a governmental planning body has passed judgment on the same question of risk as would ordinarily be placed in the "inexpert" hands of the jury. *Weiss v. Foote*, 7 NYS2d 579. *Pemberton v. New York City Transit Authority*, 304 AD2d 340 (1st Dep't 2003). Therefore, a negligence claim predicated on an allegedly unreasonable gap between the subway car and station platform cannot stand where the gap is within Transit Authorities self-imposed regulations.

According to Transit Authority's guidelines, there is a six inch tolerance in horizontal and vertical measurements on a straight track. Courts have consistently held that there can be no cause of action for a dangerous gap where such gap is shorter than the six inches permitted by Transit Authority. For example, in *Yarde v. New York City Transit Authority*, 4 AD3d 352 (2d Dep't 2004), the court affirmed the Transit Authority's entitlement to summary judgment, because the plaintiff "failed to come forward with evidence sufficient to raise a triable issue of fact as to whether the mere existence of a five-inch gap between the platform of the subway station and the door of the subway car constituted negligence." Likewise, in *Glover v. New York City Trans. Auth.* , 60 AD3d 587 (1st Dept 2009), the plaintiff slipped in a gap between a train and subway platform. The First Department reversed a jury verdict and dismissed the complaint because the plaintiff failed to produce non-speculative evidence that the gap was greater than six inches. *Id.*

Accordingly, Transit Authority is granted qualified immunity as to plaintiff's cause of action, so long there is no issue of fact that the gap between the car and platform was greater than six inches.

Transit Authority has satisfied its burden by demonstrating the gap between this train and tracks was less than six inches. It submitted measurements taken four months prior to the accident, indicating a gap of four inches horizontally and one inch vertically at the location of the accident. Definite and precise figures, taken by an engineer, outweigh a plaintiff's opinion of the size of a gap. *Trudnowski v. New York Cent. R. Co.*, 220 AD 503 (4th Dep't 1927). *See also Glover*, 60 AD3d 587.

Plaintiff's reliance on *Pemberton v. New York City Transit Authority*, 304 AD2d 340 (1st Dep't 2003) is misplaced. In *Pemberton*, the plaintiff's right leg fell into a gap up to the middle of his thigh as he was stepping off the train to allow other passengers to exit. Measurements taken by the Transit Authority showed a horizontal gap of 4.75 inches prior to the accident and a gap of six inches after the accident. Plaintiff's expert's measurements showed a gap of at least 6.7 inches. In denying the defendant's motion for summary judgment, the First Department held that the difference in these measurements was sufficient to raise an issue of fact as to the size of the gap and whether it constituted an unsafe condition. In the instant case, unlike in *Pemberton*, none of the measurements taken either before, after, or at the time of the accident indicate a gap larger than six inches. In fact, plaintiff alleged in her complaint that at the time of the accident, the gap measured four inches.

Despite her initial claim that the gap measured only four inches, plaintiff now seeks to introduce evidence that the gap was greater than six inches. Plaintiff argues that based on the report of her treating physician, Dr. Kaplan, her calf measured 6.14 inches in diameter, indicating that the gap exceeded six inches. Plaintiff further contends that because she was wearing size 8 ½ shoes and her left foot was almost perpendicular to the platform when she fell through it, the gap was greater than six inches.

These measurements, even if accurate, do not indicate that the gap was large enough to create an unreasonably dangerous condition. Dr. Kaplan's report notes that at the time he measured plaintiff's calf, her calf was swollen. His report does not indicate the extent that this swelling contributed to the measurement, casting doubt on the conclusion that her calf was six inches in diameter at the time she fell through the gap.

Even if Dr. Kaplan's measurements are accurate measurements of plaintiff's calf at the time she fell, they are insufficient as a matter of law to raise a question of fact as to the size of the gap. In *Glover*, the plaintiff's testimony that her leg went into the gap above the knee, and that the circumference of her thigh measured just above the knee was more than 16 inches, was insufficient in of itself to raise an issue of fact as to whether the space between the train and the subway platform was greater than six inches at the time of the accident. 60 AD 587 at 41. The court held that additional reliable evidence, such as measurements of the gap, was necessary to defeat defendant's motion for summary judgment. *Id.* Here, the size of plaintiff's calf, where measurements of the gap indicate that the gap was no more than four inches, is insufficient to raise an issue of fact that the gap measured more than six inches.

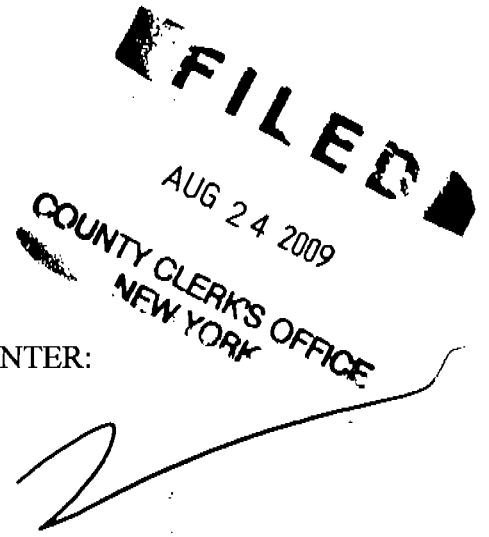
Plaintiff's claim that the Transit Authority breached its duty by failing to warn plaintiff of a gap when circumstances prevented her from observing the gap is similarly unavailing. A duty to warn of a gap is imposed if it is found that the gap between the subway and platform is excessive. *Lang v. Interborough Rapid Transit Co.*, 193 AD 56 (1st Dep't 1920). However, there is no duty to warn without a dangerous condition to warn about. *Lopes v. Sears Roebuck and Co,* 273 AD2d 360 (2d Dep't 2000) (holding that because the door was not an inherently dangerous instrument, the defendant was not obligated to warn plaintiff that the door would not open). Because plaintiff failed to raise a question of fact as to whether the gap was above the allowable limit, there is no evidence of a dangerous condition and the Transit Authority had no duty to warn.

Accordingly, it is hereby ORDERED that defendant New York City Transit Authority's motion for summary judgment is granted.

This constitutes the decision and order of the court.

Dated: New York, New York

August 18, 2009



ENTER:

HAROLD B. BEELER, JSC