Leon v New York City Tr. Auth.
2009 NY Slip Op 32824(U)
November 20, 2009
Supreme Court, New York County
Docket Number: 115641/2007
Judge: Harold B. Beeler
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SCANNED ON 12/3/2009

[* 1]

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

PRESENT: HAROLD BEELER J.S.C. Justice

PART 21

LEON, FRANTZ J.

- v -

NEW YORK CITY TRANSIT

INDEX NO. 115641/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on 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 attached decision and order.

plaintiff's complaint, and the clerk is directed to enter judgment in favor of defendant

FILED
DEC 03 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/24/09

HAROLD BEELER J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

--X

FRANTZ J. LEON,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY

Defendant

--X

Index No. 115641/2007
SEQUENCE MS001
DECISION & ORDER

FILED
DEC 03 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

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

FACTUAL BACKGROUND

On May 2, 2007, at approximately 5:00 PM, at the northern platform of the 14th Street Union Square subway station, plaintiff was entering the first car of the uptown # 4 train. He had consumed three beers that afternoon, prior to entering the train station. He heard no announcements before entering the train. Two passengers entered before plaintiff. Plaintiff looked straight ahead, and not down, as he attempted to enter. As plaintiff stepped to enter the train, his left leg fell into the gap between the platform and the train door, straight through to his

buttocks. A transit employee helped him get up, and an ambulance took him to the hospital. Plaintiff believes that the gap measured eight to nine inches.

Transit Authority's train service supervisor, Yvonne Higgins, appeared for a deposition. Although she had no specific recollection of plaintiff's accident, she testified that a few times in her eight year history, she has responded to an accident involving someone falling through the gap at the front car in the 14th Street station.

Defendants submit a Space Measurement Survey taken prior to the accident, which indicated that the horizontal gap between the first subway car's doors and the concrete platform was six inches. A subsequent measurement, on July 19, 2008 indicated that the gap was seven inches. However, at oral argument, defendants' counsel conceded that the gap in question measured greater than seven inches.

In response to the instant motion, plaintiffs submit an affidavit by Herbert W. Braunstein, a licensed professional engineer. Mr. Braunstein inspected the location of the accident, and measured the horizontal gap from the entry door threshold to the concrete station platform. Each of his measurements was greater than six inches, ranging from six and a half to eight inches, and averaging seven inches.

DISCUSSION

In support of its motion for summary judgment, the Transit Authority alleges that when a train passes through a curved platform, the *maximum allowable gap is 9.2 inches.* If plaintiff does not present evidence that the gap exceeded that amount, there is 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 seven inches, that such a gap constitutes a dangerous condition and imposes a duty to warn, and that defendants could have installed devices to minimize the danger to passengers.

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 Co.*, 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 their 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. Fote*, 7 NYS2d 579 (1960); *Pemberton v. New York City Trans. Auth.*, 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 if 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 on a straight track where such gap is less than the six inches permitted by Transit Authority. For example, in *Yarde v. New York City Trans. Auth.*, 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.*

Plaintiffs argue that because the gap at the 14th Street station exceeds seven inches, a fact that defendant concedes, the condition was dangerous and summary judgment must be denied. Defendant, however, submits an affidavit from its engineer Carmelite Cadet explaining how a train needs more room where the platform is curved. According to the Transit Authority exhibit titled "Memorandum of Understanding: Car and Line Equipment Clearances," dated March 7, 2001, Transit Authority's engineers take into account all relevant factors in determining the allowable gap on curved platforms, including the length of the platform, length of the subway car, number of cars, platform angle curve, empty and loaded weight, car motion shift, norms of entry, and norms of entry and exit. The engineers have determined that the gap on curved platforms cannot be uniformly set, and that the gap must be as much as necessary to prevent the train from striking the platform. Transit employees regularly measure the gaps at stations with curved platforms, and apply a precise mathematical equation to determine the maximum allowable gap. The engineers have determined that the maximum for the gap in question is 9.2 inches.

The 9.2 inch allowance is precisely the kind of determination, supported by research and testing of engineering experts, for which a government body enjoys qualified immunity. *See Weiss*, 7 NYS2d 759. Plaintiffs argue that notwithstanding Transit Authority's allowance for a greater gap for a curved platform, the gap could have been minimized in a number of ways to prevent the accident. In support of this argument, plaintiffs submit an affidavit from engineer

Herbert W. Braunstein. Mr. Braunstein avers that the gap is dangerous, and that it could have been minimized by utilizing retractable platforms akin to those used by the Long Island Railroad. However, where a public entity is afforded governmental immunity, the jury may not choose between the findings of an independent plaintiff's expert and that of the public entity's experts. Therefore, plaintiff's expert does not raise a triable issue of fact.

Plaintiff's claim that the Transit Authority breached its duty by failing to warn plaintiff of a gap when circumstances prevented him 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 & 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
November 20, 2009

ENTER:

HAROLD B. BEELER, JSC

FILED
DEC 03 2009
NEW YORK
COUNTY CLERK'S OFFICE

HAROLD BEELER
J.S.C.