

Manfredi v Metropolitan Transp. Auth.

2009 NY Slip Op 33366(U)

April 27, 2009

Supreme Court, Bronx County

Docket Number: 21751/04

Judge: Stanley B. Green

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NEW YORK SUPREME COURT - COUNTY OF BRONX

LA-27

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: LA-27

-----X
JOSEPH MANFREDI, as administrator of the estate of
LAURA S. MANFREDI,

Plaintiffs,

-against-

THE METROPOLITAN TRANSPORTATION
AUTHORITY, METRO-NORTH COMMUTER
RAILROAD COMPANY, NEW YORK CITY TRANSIT
AUTHORITY, MANHATTAN and BRONX SURFACE
TRANSIT OPERATING AUTHORITY and ECCO III
ENTERPRISES, INC. and THE RIVERDALE YACHT
CLUB, INC.,

Defendant.

Index no. 21751/04

Present:
HON. STANLEY GREEN
J.S.C.

-----X

The following papers numbered 1 to 4 read on this motion
No. on the Calendar of February 5, 2009

PAPERS NUMBERED

Notice of Motion -Exhibits and Affidavits Annexed.....	1
Answering Affidavit and Exhibits.....	2,3
Replying Affidavit and Exhibits.....	4
Sur-reply Affidavits and Exhibits.....	
Stipulation(s) - Referee's Report - Minutes.....	
Memoranda of Law.....	

Upon the foregoing papers, this motion is decided in accordance with the attached memorandum decision

Dated: April 27, 2009



STANLEY GREEN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-27

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TRANSIT OPERATING AUTHORITY and ECCO III
ENTERPRISES, INC. and THE RIVERDALE YACHT
CLUB, INC.,

Index no. 21751/04

Defendants.

DECISION

-----X

HON. STANLEY GREEN

The motion by Ecco III Enterprises, Inc. for an order granting summary judgment dismissing all claims against it is granted.

Plaintiff commenced this action to recover damages for personal injuries and wrongful death sustained by decedent Laura Manfredi on February 16, 2004, at approximately 9:45 p.m., when her vehicle was struck by an Amtrak train after she inadvertently drove onto a railroad right of way and her vehicle became struck on the tracks. It is undisputed that Mrs. Manfredi entered the right of way by driving through open gates that separated the parking lot of the Riverdale Yacht Club from the railroad right of way that runs parallel to the train tracks. Her vehicle then traveled south on the gravel path/road that runs alongside the tracks until she came to a bridge and her vehicle became stuck on the tracks.

Metro-North owns and operates the right of way. At the time of the accident, a

construction project known as the "Nine Stations Project" was being performed by Ecco III, pursuant to a contract with Metro-North. Ecco's workers gained access to the work area via the gates, which are part of a fence that separates the Riverdale Yacht Club's parking facility from the train tracks.

Defendants MTA, MABSTOA, NYCTA and Riverdale Yacht Club were previously dismissed from the case by order of Justice Walker, dated December 21, 2007. Ecco had not filed a formal motion, but requested that the court search the record and grant summary judgment in its favor. However, the court declined to do so "in the absence of any motion papers from Ecco establishing that they are not liable..."

Plaintiff alleges that defendants were negligent in the ownership, operation and control of the premises in that they allowed the gate, which had the only sign warning motorists not to enter the area, to remain open so that decedent entered the area and could not see the sign because when the gate was open, the sign was not visible.

Ecco seeks dismissal of the complaint against it on the ground that plaintiff cannot establish a prima facie case of negligence against it.

In support of the motion, Ecco submits portions of the deposition testimony of Peter Coleman, a witness for Metro-North, the testimony of Victor Aviles, a former MTA police officer and a copy of the contract with Metro-North.

Coleman's testimony shows, inter alia, that: (1) he was responsible for unlocking and opening the gates in the morning to allow Ecco's workers in and for locking the gate after the last workman left; (2) the gates had a "switch lock" that could be opened by a key that was common to thousands of other locks in the Metro-North system; (3) he did not know of any ECCO

employee who had a "switch lock" key; (4) on February 16, 2004, he locked the gate before he left; and (5) on occasion, an Ecco foreman named "Dell" had operated the "switch lock" on the gate, but it was only after Coleman asked him to do so and while Coleman was watching; and (6) a key was not required to lock the actual "switch lock."

The testimony of Aviles shows that the gate being left open was an ongoing problem and he had reported it to his headquarters on a number of occasions. His testimony also shows that if he found the gate open, he was supposed to close it.

A review of the contract shows that there was no contract requirement for Ecco to lock or unlock the subject gate.

Ecco also submits a copy of a Daily Report which shows that "Dell" Da Silva, the Ecco foreman to whom Mr. Coleman referred, was on vacation at the time of the accident.

Metro-North and plaintiff contend that Ecco has failed to establish prima facie entitlement to judgment as a matter of law and that the Daily Report is not in admissible form. They also contend that Coleman's testimony that various individuals and entities, including Ecco, were responsible for securing the track level gate, coupled with the fact that Ecco was performing work at the accident location and had a contractual obligation to exercise precaution "for the protection of person and property" are sufficient to raise triable issues of fact as to whether Ecco: (1) had control over the track level gate; (2) was contractually obligated to ensure that the gate was locked; and (3) failed to follow a previously adopted custom and practice by not closing the gates thereby allowing decedent to drive onto the railroad right of way, where her car became stuck on the train tracks and was truck by the train.

In reply, Ecco points out that the Daily Record, which shows that Dell DaSilva was on

vacation on the day of the accident, was previously marked as Defendants' Exhibit "A" at the deposition of Ecco Project Superintendent Christopher Byrne on March 12, 2007, at which time he testified that it was a record made and kept by Ecco in its regular course of business.

Liability for a dangerous condition on property is predicated on occupancy, ownership, control or a special use of such premises (Balsam v. Delma Engineering Corp., 139 AD2d 292)

Generally, a contractor owes no duty of care to a non-contracting third party. However, liability to a non-contracting third party may arise out of a contractual obligation or the performance thereof when: (1) the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others or increases that risk (Espinal v. Melville Snow Contrs., 98 NY2d 136; H.R. Moch Co. v. Rensselaer Water Co., 247 NY 160); (2) the plaintiff has suffered injury as a result of reasonable reliance on the defendant's continuing performance of a contractual obligation (Church v. Callanan Indus., 99 NY2d 104); or (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely (Espinal, supra).

While plaintiff and Metro-North contend that there exist triable issues of fact as to whether Ecco exercised control over the track level gate and whether Ecco was contractually obligated to ensure that the gate was locked, a review of the agreement shows that there is no provision requiring Ecco to lock the gate nor is there competent evidence that Ecco exercised control over the operation of the gate or that a custom and practice was established whereby Ecco employees undertook the obligation to ensure that the gate was locked. Rather, Coleman's testimony leaves no doubt that he, an employee of Metro-North, was responsible for opening the gate in the morning and locking it after the last workman left. In fact, he testified that he locked

the gate at the end of the day prior to plaintiff's accident.

While Coleman's testimony shows that on occasion, an Ecco foreman named "Dell" had locked the gate, it also shows that Dell locked the gate at Coleman's request and that Coleman watched him as he locked the gates. In addition, the Daily Report shows that Dell DaSilva, the foreman, was on vacation on the date of the accident. Thus, there is no competent evidence that Ecco exercised control over the subject gate or that there was a custom and practice of Ecco's employees locking the gate. Based upon the evidence presented, plaintiff cannot establish a prima facie cause of action against Ecco. Accordingly, Ecco is entitled to summary judgment dismissing the complaint.

Movant shall serve a copy of this order with notice of entry on the Clerk of the Court who shall enter judgment dismissing the complaint and all cross-claims against Ecco III Enterprises, Inc.

This constitutes the decision and order of the court.

Dated: April 27, 2009



STANLEY GREEN, J.S.C.