Kuinova v New York Tr. Auth.
2009 NY Slip Op 33438(U)
February 23, 2009
Supreme Court, New York County
Docket Number: 100967/04
Judge: Harold Beeler

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

----------X

RAISA KUINOVA and MIKHAIL KUINOV,

Plaintiffs,

Index No. 100967/04

-against-

NEW YORK TRANSIT AUTHORITY,

Defendant.

----------X

BEELER, J.:

In this personal injury action, plaintiff Raisa Kuinova alleges that at approximately 10:00 A.M. on January 26, 2003 she sustained severe injuries when she slipped and fell on the "A" train subway platform located at 34th Street in Manhattan. Her husband, Mikhail Kuinov, is suing for loss of consortium.

Defendant New York Transit Authority has moved for an order dismissing the complaint, pursuant to CPLR 3212.

A party moving for summary judgment, pursuant to CPLR 3212, must demonstrate its entitlement thereto as a matter of law and it must do so by tender of evidentiary proof in admissible form (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To defeat summary judgment, the party opposing the motion must show that there is a material question of fact that requires a trial (*id.*).

As discussed below, although defendant has established its prima facie entitlement to judgment as a matter of law, plaintiffs have demonstrated that material questions of fact remain. Therefore, the motion is denied.

"A defendant who moves for summary judgment in a slip-and-fall case has the initial

burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length to discover and remedy it'" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *see Aguirre v Paul,* 54 AD3d 302, 303 [1st Dept 2008]).

Defendant met its burden of demonstrating that it did not have actual or constructive notice of the slippery condition of the platform. Defendant presented evidence from Kuinova's statutory hearing pursuant to General Municipal Law § 50-h, wherein plaintiff admitted that she didn't perceive the platform to be wet or slippery at the time of her fall (Exhibit E, pages 26-28 to Affirmation of John FK Coffey, Esq., dated July 3, 2008) (Coffey Aff.). Plaintiff further testified that she could not identify the substance or object that allegedly caused her accident (*id.*). Defendant also submitted testimony from a representative of the Metropolitan Transit Authority (MTA), who declared that he was unaware of any slippery condition on the north-side "A" platform at the subject train station on the date in question (Exhibit G to Coffey Aff.).

Defendant has also made a prima facie showing that it did not create the alleged hazardous condition. In that regard, defendant submitted evidence in the form of deposition testimony from William Burgos, a plumber in defendant's employ, who attested that he had no knowledge of any complaints of leaks or any other water condition on the northbound "A" train platform for a period of three months leading up to Kuinova's accident (*id.*). Burgos testified that at 34th Street, the "C" and "E" lines are separate and apart from the "A" platform. The "A" line is an island platform and the local "C" and "E" lines are up against the structured wall (*id.* at 35). Burgos stated that the water lines above the subway platform could not have caused Kuinova's accident because there are no water pipes running above the platform of the

northbound "A" train (*id.*, 25-30). Although there are drain lines that run above the subway platforms, they are only found to run from the roof of the structure, and they discharge at the edge of the platform on the "C" and "E" lines (*id.*, 26-45). Burgos further testified that, after receiving notice of Kuinova's injury, he inspected the platform area where she fell and found no water leaks (*id.* at 35-41). Although plaintiffs point to a segment of Burgos' testimony where he admits to the presence of clogged drainage pipes in the MTA offices located on the lower level of the 34th Street station during the month of Kuinova's accident, that situation was separate and apart from the alleged condition complained of by plaintiffs (*id.* at 38). The above-referenced offices are several levels below the "A" platform and are not located in an area accessible to the general public (*id.*). Based on the evidence submitted, defendant has made a prima facie showing of its entitlement to summary judgment.

In opposition, plaintiffs attempt to raise an issue of fact based upon a theory of res ipsa loquitur. However, the doctrine of res ipsa loquitur is inapplicable in the case at bar (*Mayer v New York City Tr. Auth.*, 39 AD3d 349 [1st Dept 2007]). Submission of a case on a theory of res ipsa loquitur is warranted only when the plaintiff can establish three elements: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of plaintiff (*Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987]).

Kuinova failed to establish that her fall was of a kind which ordinarily does not occur in the absence of someone's negligence (*id.*). Furthermore, the second requirement-- the issue of exclusive control-- is lacking. Kuinova failed to demonstrate that one of the tens of thousands of

riders on that subway line did not create the condition she complained of and therefore, she failed to establish that the likelihood of such an occurrence was so reduced "'that the greater probability lies at defendant's door'"(*id.*). Finally, Kuinova did not submit evidence demonstrating that her alleged injury could not have been caused by any voluntary action or contribution on her part (*Marszalkiewicz v Waterside Plaza, LLC*, 35 AD3d 176, 177 [1st Dept 2006]).

Although Kuinova could not identify the source of her injury at her 50-h hearing, she subsequently submitted detailed testimony from her examination before trial wherein she stated that her injury was due to water dripping from the ceiling (Exhibit F to Coffey Aff.). Plaintiffs also submitted an affidavit from Mikhail Kuinov in which he averred that on the day of the accident, he observed a large puddle on the platform where his wife fell (Exhibit A to Frekhtman Aff.). Kuinov stated that while he was attending to his wife's injury, he saw water dripping from the ceiling of the subway platform onto the puddle where his wife fell and that he believed the puddle had been there for more than an hour due to the size of the pool of water and its dingy color (*id.*). According to Kuinov, the puddle was full of "mushy looking stuff" which was "dirty looking" and that the puddle contained several smudged footprints pointing in several different directions (*id.*).

The record further reveals that Kuinova slipped and fell at about 9:00 A.M., but defendant offered no evidence as to when and if the platform was swept, cleaned, or inspected on that day. Other than testimony that the platform was cleaned daily, defendant produced no schedule for maintaining the platforms. It appears from the testimony that employees were instructed to clean the platform when necessary, but the evidence does not show which employee had that particular duty on that day (Exhibits D and G to Frekhtman Aff.). Furthermore,

defendant's supervisory log and station inspection report demonstrates that the mezzanine platforms, booths, turnstiles, and exit gates at the 34th Street station received an unsatisfactory rating on the day of Kuinova's accident (Exhibit F to Frekhtman Aff.). Hence, on the issues of whether defendant created the alleged hazardous condition or had constructive notice of its existence for a sufficient length to discover and remedy it, plaintiffs have submitted evidence sufficient to raise triable issues of fact. (*Joachim v 1824 Church Ave., Inc.*, 12 AD3d 409, 410 [2d Dept 2004]). .

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied.

Dated: FEB 23 2009

ENTER:

J.S.C.

HAROLD BEELER
J.S.C.

FILED
MAR - 2 2009
COUNTY CLERK'S OFFICE
NEW YORK