

<b>Tracy v Metropolitan Tr. Auth.</b>
2010 NY Slip Op 30882(U)
April 7, 2010
Supreme Court, Nassau County
Docket Number: 013401/08
Judge: Daniel R. Palmieri
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**SHORT FORM ORDER**

*Sum*

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

**BEVON TRACY,**

**TRIAL TERM PART: 45**

**Plaintiff,**

**INDEX NO.: 013401/08**

**-against-**

**MOTION DATE: 2-1-10**

**SUBMIT DATE: 4-5-10**

**SEQ. NUMBER - 001**

**METROPOLITAN TRANSIT AUTHORITY and  
"JANE DOE",**

**Defendant.**

**The following papers have been read on this motion:**

- Notice of Motion, dated 1-8-10.....1
- Affirmation in Opposition, dated 3-12-10.....2
- Reply Affirmation, dated 4-2-10.....3

The prong of this motion by the defendant for summary judgment pursuant to CPLR 3212 dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as that term is defined by Insurance Law § 5102(d) is denied.

The portion of defendant's motion for summary judgment on the ground that it was not negligent is granted and the action is dismissed.

On May 20, 2008, plaintiff boarded defendant's bus as a passenger on a day that was damp and raining periodically. As he exited the bus by the rear door, and while doing so, slipped on water that was on the first stair. In his original deposition, plaintiff testified that

he noticed the wet stair when he stood up to exit. By errata sheet he changed his answer to say that it was 45 minutes to an hour. The questions went as follows:

Q. How long before you slipped did you first notice any wetness on the stairs?

A. When I first got up to stand up to get off the bus.

Q. Do you know how long that was, how many seconds before you slipped or some other amount of time?

A. No longer than five to ten minutes.

CHANGED ANSWER

A. About 45 minutes to an hour.

He also testified that he was on the bus for about an hour and 45 minutes and was seated in the middle at a window seat.

The bus operator testified that he had no memory or knowledge of the day, the accident or the weather.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief (*Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept. 1993)).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may

reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton*, 29 AD3d 975 (2d Dept. 2006); *Cicccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. See *Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006).

The plaintiff asserts in his Bill of Particulars (which was submitted by him) that he sustained an impinging disc herniation at L5-S1, left L5-S1 radiculopathy, lumbar and cervical radiculopathy and left ankle pain, thereby suffering a “serious injury” as defined by

Insurance Law § 5102(d) under the following categories established in the statute: a permanent loss of use of a body organ, member, function or system; a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a non-permanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days of the first 180 days immediately following the accident.

The defendant has failed to make out a *prima facie* showing that the plaintiff has not sustained an injury under any of the foregoing claimed categories. It submits affirmed reports of Dr. Miller, an orthopedist, and Dr. DeJesus a neurologist.

Dr. Miller examined the plaintiff on behalf of the defendant in June, 2009. However, he does not address the plaintiff's contention, clearly stated in his bill of particulars, regarding the ankle, herniation and radiculopathy and his testing of the lumbar spine and ankle revealed limitations in ranges of motion which are not explained. Moreover, he finds "evidence of an orthopedic disability in regards to the left ankle injury". Nor does he refer to the EMG/NCV study report of July 9, 2008 or plaintiff's X-ray.

Dr. DeJesus does not address the ankle injury or the herniation/radiculopathy at all and while he lists separate test results for the cervical spine and what he calls the thoracolumbar spine, he does not specifically address plaintiff's claims. His report yields a diagnosis of resolved lumbar strain/sprain and a normal neurological examination.

Based on the foregoing, it is evident that the medical evidence offered by defendant does not establish that plaintiff did not sustain a serious injury as defined by the insurance

law and thus, that portion of the motion should be denied without the need to consider whether the plaintiff's papers in opposition are sufficient to raise an issue of fact. *Kavanagh v. Singh*; 34 AD3d 744 (2d Dept. 2006); *Esony v. Benitez*, 2 AD3d 673 (2d Dept. 2003).

However, defendant's motion for summary judgment on the issue of liability is granted and the action is dismissed on that ground.

In order to impose liability upon a defendant in a slip and fall case, there must be evidence tending to show the existence of a dangerous condition and that the defendant either created the defect or had actual or constructive notice of it.

The mere fact of wetness from rain is generally held to be insufficient to establish the existence of a dangerous condition. *Medina v. Sears, Roebuck & Co.*, 41 AD3d 798 (2d Dept. 2007).

Here, as a matter of law defendant did not breach any duty owed to the plaintiff since under the weather conditions which existed at the time of the accident, it was unreasonable to expect the defendant to constantly clean the bus. *McKenzie v. County of Westchester*, 38 AD3d 855 (2d Dept. 2007). That the floor of a bus was wet during an ongoing rainstorm does not establish that there was a dangerous condition, *Spooner v. New York City Transit Authority*, 298 AD2d 575 (2d Dept. 2002), and it has been consistently held that under comparable weather conditions, there is no duty on the part of the bus operator to constantly clean the floor. *Robins v. Metropolitan Transit Authority*, 58 AD3d 711 (2d Dept. 2009).

The description of the condition of the rear steps as being wet does not establish the presence of a dangerous condition and the weather conditions were such that at the time of the accident, there was no duty to constantly attend to the area. Hence, it is not necessary for

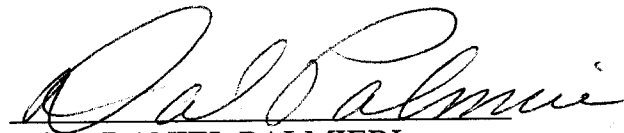
the Court to make any determination of how long the condition may have existed. Although defendant contends that the Court should not consider plaintiff's change in his deposition testimony, it is not necessary that the changed testimony be considered since the issue of notice of the condition is not reached in the absence of a duty or a dangerous condition.

Plaintiff has not submitted evidence sufficient to show that any issues of fact exist with respect to defendant's culpability for causing the accident and that prong of defendant's motion which is for summary judgment based on the absence of negligence is granted.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: April 7, 2010

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

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**ENTERED**  
**APR 09 2010**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**