[* 1] SCANNED ON 6/15/2010

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

PRESENT: Edmead Justice PART 35

Index Number : 119241/2006
DUNN, GAETANA P.
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE 5/20/10
MOTION SEQ. NO. ____
MOTION CAL. NO. ____

this motion to/for ____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... ____
Answering Affidavits — Exhibits ____
Replying Affidavits ____

FILED
JUN 15 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendants Metropolitan Transportation Authority and Long Island Railroad for an order, pursuant to CPLR §3212, for summary judgment dismissing the Complaint of plaintiff Gaetana P. Dunn is denied; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

This constitutes the decision and order of the Court.

Dated: 6/14/10

HON. CAROL EDMEAD 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 ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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GAETANA P. DUNN,

Index No. 119241/06

Plaintiff,

-against-

DECISION/ORDER

THE CITY OF NEW YORK and
METROPOLITAN TRANSPORTATION AUTHORITY
d/b/a LONG ISLAND RAILROAD,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, defendants Metropolitan Transportation Authority ("MTA") and Long Island Railroad ("LIRR") (collectively "defendants") move for an order, pursuant to CPLR §3212, for summary judgment dismissing the Complaint of plaintiff Gaetana P. Dunn ("plaintiff").[1]

Background

Plaintiff contends that on Dec 21, 2005 at about 2:00 p.m., she was walking on the platform of the Long Island Rail Road-Pennsylvania Station at 34th Street between 7th and 8th Avenues (the "premises"), when she slipped on a "vomit-like" substance and fell.[2] She alleges that defendants had a duty to maintain the premises in a safe and diligent manner, and that they had actual or constructive notice of the dangerous and hazardous condition of the premises. Plaintiff further alleges as a result of defendants' negligence in allowing the premises to become

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[1]The Court notes that this action has been discontinued as against the City of New York.

[2]*See* plaintiff's Complaint, Bill of Particulars ("BOP") and examination before trial ("plaintiff's EBT").

and remain in a dangerous and hazardous condition, she suffered serious injuries. Accordingly, plaintiff seeks to recover damages, together with the costs and disbursements of this action.

In their motion, defendants contend that they had no duty to maintain the premises where plaintiff fell. Relying on the examination before trial of Casey Arasa ("Mr. Arasa"), LIRR's Terminal Manager for Penn Station on the date of the accident, defendants contend that Amtrak controls the premises where plaintiff fell (*see* the "Arasa EBT"). Defendants further allege that on June 12, 2009, they communicated this information to plaintiff's counsel and requested a Stipulation of Discontinuance (*see* the "June 12, 2009 Letter").

In opposition, plaintiff argues that regardless of the issue of ownership, LIRR was responsible for maintaining the premises; therefore, defendants' motion should be denied. First, plaintiff argues that LIRR had an implied obligation to transport her safely to her destination, and it breached its duty to do so. Specifically, LIRR, as a common carrier, was under a contractual obligation to furnish plaintiff with "suitable and proper accommodations." Such an obligation extends beyond the confines of the carriage, and includes the duty to maintain the immediate area surrounding the carrier's final destination point, plaintiff contends. LIRR breached its duty to plaintiff by negligently dropping her off at a platform where a dangerous condition existed. Thus, LIRR is liable for plaintiff's injuries.

Plaintiff further contends that the premises consists of an underground passageway with limited exit points. Plaintiff entered the exit nearest to where the train dropped her off. LIRR should have foreseen that plaintiff would have exited at this location. Further, a reasonably prudent person would not expect a carrier's responsibilities to end at the underground platform without any reasonable means of exit, plaintiff argues. Although a common carrier is not an

absolute insurer, the question of negligence here is best left for a jury to decide.

Second, plaintiff argues that LIRR should be estopped from denying liability for any purported negligence of Amtrak because LIRR outwardly manifested control over the premises. LIRR has billboards, brochures, and television screens proclaiming its control over the premises. For example, the new entranceway on 34th Street between 7th and 8th Avenues contains large signs indicating that it is an entrance to LIRR's concourse. As passengers proceed through this entranceway, they are greeted by a pre-recorded voice welcoming them to the LIRR. Passengers also are greeted with signs informing them of LIRR's rules and regulations. Farther along this entranceway is a large museum exhibit that tells LIRR's history. In addition, on LIRR's website, "Penn Station" is listed under "LIRR Stations."

Plaintiff further argues that for most LIRR passengers, it is obvious that LIRR controls the underground platforms on which it drops off its passengers. LIRR always uses the same tracks, and the font on the signs throughout the platform areas is consistent with the distinctive LIRR font used on LIRR's brochures and signs. Since LIRR portrayed its area of Pennsylvania Station to be its own, plaintiff justifiably relied upon such information to conclude that LIRR controlled the premises. Therefore, LIRR should be estopped from denying liability.

Third, plaintiff argues that triable issues of fact exist that defeat summary judgment, *i.e.* whether LIRR's outward manifestations of control were done in bad faith, and whether there exists a carriage agreement between LIRR and plaintiff that includes an implied obligation to safely transport plaintiff to her destination.[3]

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[3]In a conference call conducted on May 24, 2010, defendants' counsel confirmed to the Court and plaintiff's counsel that no reply papers were submitted.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ivanov v City of New York*, 21 Misc 3d 1148, 875 NYS2d 820 [Sup Ct, New York County 2008]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any material issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562).

Here, defendants have failed to sustain their initial burden of establishing their entitlement to judgment as a matter of law.

It is well settled that negligence for a dangerous or defective condition on property is predicated upon the ownership, occupancy, or control of the property, and where none of these

elements is present, a party may not be held liable for injuries caused by the dangerous or defective condition (*Balsam v Delma Engineering Corp.*, 139 AD2d 292, 296-297 [1st Dept 1988]; *Gibbs v Port Authority of New York*, 17 AD3d 252, 254 [1st Dept 2005]). However, the Courts also make clear that in cases involving common carriers: "Where a stairwell *or approach* is primarily used as a means of access to and egress from the common carrier, that carrier has a duty to exercise reasonable care to see that such means of approach remain in a safe condition or, where appropriate, to take such precautions or give such warnings as would protect those using such area against unforeseen danger. *Whether those means of ingress or egress are used primarily for that purpose would generally be a question of fact*"(*Bingham v New York City Transit Authority*, 8 NY3d 176, 180-181 [2007] [emphasis added]; *Conway v American Airlines, Inc.*, 2009 WL 645994 [Sup Ct New York County 2009]; *see also Cozzi v County of Nassau*, 2008 WL 1771533 [Trial Order] [Sup Ct Nassau County 2008] ["A common carrier, such as defendant LIRR, must maintain a safe means of ingress and egress for its passengers. This duty *applies even to areas owned and maintained by others if 'constantly and notoriously' used by passengers as a means of approach, and such duty may not be delegated to another*'] [emphasis added]; *Burns v the Long Island Railroad Co.*, 2008 WL 1694817 [Sup Ct Queens County 2008]; *Tavis v The New York City Transit Auth.*, 2007 WL 2988389 [Trial Order] [Sup Ct New York County 2007]).

Here, plaintiff testified that after the LIRR train arrived at Penn Station, she and other passengers were walking on the platform toward the exit:

> Q. When you got off the train, did you go up or down?
> A. When I got off the train, I walked down the platform looking for the exit out.
> Q. Okay.
> A. When I found it, I went through the double doors to the escalator.

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Q. You had your accident after you went through the double doors going towards the escalator?
A. Yes.
Q. Now, the double doors that you described, were they open or closed?
A. They were closed.

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Q. Did you have your accident before you got on the escalator?
A. Yes.
Q. What happened, did you trip on something?
A. Somebody threw up and I didn't see it.
(Plaintiff's EBT, pp. 12-18).

While defendants rely on plaintiff's testimony in their motion,[4] they fail to set forth any evidence as to whether the area in which plaintiff fell was used by passengers primarily as a means of access to and from LIRR trains. Instead, they merely offer Mr. Arasa's testimony in support of their sole argument that Amtrak, a nonparty to this proceeding, is responsible for maintaining the area where plaintiff fell:

Q. Based on the escalator and the location of the accident below the escalator, it would not have been the responsibility, maintenance responsibility of the Long Island Rail Road?
A. That's correct. Once you go through the doors, regardless where it is on the platform, it's Amtrak property, once you go through those doors, the bottom red doors she mentioned, regardless where you are on the platform, it's now Amtrak property.
Q. Those doors were identified by [petitioner] as the doors she went through --
A. Once she went through the doors, regardless where the escalator is, regardless where the platform is, it's maintained by Amtrak, maintained by Amtrak crews, escalator crews.
(Arasa EBT, pp. 18-19).

However, the Arasa EBT and defendants' motion are silent as to the dispositive issue of whether the disputed area was "constantly and notoriously" used by passengers as a means of access to and egress from LIRR trains arriving at Penn Station [*Cozzi v County of Nassau, supra*; *see also Burns v The Long Island Railroad Co., supra* [where plaintiff allegedly tripped and fell

[4]Motion, ¶ 10.

on a sidewalk under the defendant's overpass and tracks, and testified that a passenger, exiting the train on the Garden City side of the tracks, must walk under the overpass on the subject sidewalk to the Garden City Park side where the parking lot is located, the Court denied LIRR's motion for summary judgment on the ground that it had "only addressed the issue of ownership" in its motion papers, and questions of fact still existed as to whether the situs of the accident was "used primarily for the purpose of ingress and egress to its train station"]).

Further, Mr. Arasa's testimony falls short of demonstrating that LIRR had no duty to maintain the platform where plaintiff fell. Mr. Arasa testified that LIRR's presence at the station was governed by "a lease" with Amtrak (Arasa EBT, pp. 7-8).[5] He explained that, pursuant to the lease, LIRR is responsible for maintaining some platforms at Penn Station, *i.e.* platforms 8-11, but not others, *i.e.* platforms 1-7. However, Mr. Arasa also testified that Amtrak and New Jersey Transit also used platforms 8-11 (*id.* at 10). Further, defendants do not provide a copy of the lease, and it is not clear from Mr. Arasa's testimony exactly what are LIRR's maintenance responsibilities regarding platforms 8-11:

> Q. In regards to the lease, there are provisions in the lease that do specifically designate Long Island Rail Road has responsibilities for Platforms 8, 9, 10 and 11; is that to your knowledge?
> A. Well, the answer to that question is, yes, Platforms 8, 9, 10 and 11 are maintained by Long Island Rail Road management. *However, if we are speaking strictly of the actual people who do the physical work, then there is, as part of the lease, forces that are utilized that are Amtrak forces for certain parts of whatever the maintenance issues are. However, there are other forces utilized to maintain that the Long Island Rail Road manages.*
> Q. Well, the picking up of debris, sweeping the platforms, would that be handled by Amtrak, Long Island Rail Road or are there other forces who handle that?
> A. Amtrak manages a third-party contractor who does the work.

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[5]Although Mr. Arasa testified that he was "familiar with parts of the lease," he did not have a copy of the lease with him at the EBT (Arasa EBT, p. 8).

(*Id.* at 10-11) (Emphasis added).

Importantly, neither defendants nor Mr. Arasa identifies the number of the platform on which plaintiff fell.

> Q. From looking at any of the photos, can you make a determination as to what platform number would be involved?
> A. No, I would have to guess.
> (Arasa EBT, p. 16)

Nevertheless, defendants rely on Mr. Arasa's conclusion that Amtrak controlled the platform where plaintiff fell (motion, ¶¶ 12-13).

> Q. *Whether or not you can identify the numbered platform involved,* what would have been 1-7, is that the responsibility of Amtrak[?]
> A. Correct.
> Q. Yes or no?
> A. The answer to your question is, "yes."
> (Arasa EBT, p.18-19) (Emphasis added).

As the evidence in the record is vague as to the exact terms of the LIRR-Amtrak lease, and silent as to the number of the platform where the accident occurred, the record, at this juncture, fails to establish that LIRR was not responsible for maintaining the platform on which plaintiff fell.

Finally, the Court notes that defendants fails to contest any of plaintiff's arguments raising this issue in reply (*see John William Costello Associates, Inc. v Standard Metals Corp.*, 99 AD2d 227, 229 [1st Dept 1984], citing *Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975] [holding that "facts appearing . . . which the opposing party does not controvert, may be deemed to be admitted"]; *Arteaga v 231/249 W 39 Street Corp.*, 45 AD3d 320, 321 [1st Dept 2007]).

As defendants have failed to meet their burden of making a *prima facie* showing of

entitlement to judgment as a matter of law, the Court does not reach plaintiff's arguments in opposition, and defendants' motion is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendants Metropolitan Transportation Authority and Long Island Railroad for an order, pursuant to CPLR §3212, for summary judgment dismissing the Complaint of plaintiff Gaetana P. Dunn is denied; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

This constitutes the decision and order of the Court.

Dated: June 14, 2010

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD