

**Gonzalez v Port Auth. of NY & NJ**

2010 NY Slip Op 32550(U)

September 8, 2010

Supreme Court, New York County

Docket Number: 114796/05

Judge: Saliann Scarpulla

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SCANNED ON 9/14/2010  
SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: SCARPULLA  
Justice

PART 19

ENOS GONZALEZ  
- v -

Part Authority of New York  
New Jersey

INDEX NO. 114796/05  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 8  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.

**FILED**

SEP 14 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/7/10

Saliann Scarpulla  
J.S.C.  
SALIANN SCARPULLA

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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



On December 15, 2004 at approximately 1:00 p.m., plaintiff Enoos Gonzalez (“Gonzalez”) slipped and fell on ice and water on the north sidewalk of West 178<sup>th</sup> Street in front of the George Washington Bridge Bus Station (“Bus Station”). The Bus Station and abutting sidewalk were owned by the Port Authority.

Pursuant to a written agreement with the Port Authority, defendant T.U.C.S. was responsible for day-to-day janitorial services and general cleaning at the Bus Station and the abutting sidewalk, including the sidewalk where the accident occurred. T.U.C.S.’s responsibilities included debris removal, trash disposal, and power washing of the Bus Station. It was also required to remove grease and trash from the sidewalk and from the curb line to three feet of roadway outside of the Bus Station.

Gonzalez commenced this action in or about October 2005 seeking to recover damages for the injuries he sustained, alleging that the ice and water formed on the sidewalk as a result of water leaking down the facade of the Bus Station onto the sidewalk. According to the allegations of the complaint, the water was leaking from a loose valve in a fire hose cabinet attached to the wall of the Bus Station. Gonzalez claimed that Port Authority was negligent in failing to properly maintain and inspect the Bus Station and that T.U.C.S. was negligent in failing to properly secure the fire hose in the fire hose cabinet after performing power washing.

Port Authority Utility System Maintainer (“USM”) Henry Lopez (“Lopez”) testified at an examination before trial that as a USM, he was responsible for, among

other things, taking care of the heating and air conditioning, running the equipment, checking for leaks, checking the escalators, checking the fan rooms, checking the fire protection equipment, doing security checks, and checking the doors in the Bus Station. Initially, Lopez stated that it was routine for USMs to walk around the Bus Station building at the start of every shift. He then later testified that they mainly just walked around the building in inclement weather and whenever they got a chance. USMs would not always keep a log of when they walked around the building.

Lopez testified that he walked around the entire building sidewalk at approximately 11:00 p.m. on December 14, 2004. He then testified that he walked around the entire building sidewalk at approximately 6:00 a.m. on December 15, 2010. At that time he did not notice any ice condition on the sidewalk. Lopez also testified that as a USM, he was responsible for inspecting the bus station, including the fire hose cabinets. He explained that as part of that inspection, USMs would open the fire hose cabinets and check the inside of the cabinet, if they were not otherwise busy. However, if they were otherwise busy, they would just look through the glass door. They would check the fire hose cabinets twice or three times a week or sometimes less often. They would check that the fire hose was not full of water. Sometimes the inspections would be logged and sometimes they would not be logged. He testified that the last time he unlocked the subject fire hose cabinet was 3 or 4 months prior to the accident.

According to Lopez, on the day of the subject incident, he received notification about the accident from his supervisors. He responded to the scene of the accident and observed water leaking down the facade of the building. He then went to inspect the fire hose cabinet from which he believed the leak originated. According to Lopez, the leak was caused by a loose valve in the fire hose cabinets. He turned the wheel to tighten the valve. There was no water in the cabinet and no water on the floor. He noticed ice behind the pipe that went into the valve and noticed ice behind the cabinet. From the ground level, he could see a panel on the exterior facade of the building that looked like it had been pushed out. The fire hose cabinet with the valve he tightened was located directly behind the panel that was pushed out.

Lopez further testified that T.U.C.S. performed power washing all year-round on a consistent basis when the temperature was above 32 degrees. T.U.C.S. employees used water from the fire hose cabinets for the power washing. The fire hose cabinets were locked. The T.U.C.S. supervisor had a key to open the fire hose cabinets, and the key was given to T.U.C.S. employees as needed to gain access to the cabinets to use the water to power wash the platforms and bus shelters. They would disconnect the hose from the valve, use an adapter to connect the fire hose to their equipment and when they were finished, they would close the valve, take the adapter off, and reconnect the fire hose. The USMs also had keys to the fire hose cabinets but there would be nothing in their daily activities that would require them to get water from a fire hose cabinet. Lopez did not

think that T.U.C.S. did any power washing on December 14, 2004. Lopez further testified that there were no fires on the suburban level in 2004.

T.U.C.S. supervisor Imthurn Narain ("Narain") testified at an examination before trial that T.U.C.S. was responsible for policing the Bus Station to ensure that it was clean and free of debris and trash, but policing did not include inspecting the area for snow and ice conditions. It was not custom and practice for the Port Authority to instruct T.U.C.S. to remove snow or ice unless a special team was specifically requested by the Port Authority. Narain further testified that the Port Authority directed T.U.C.S. on when and what to power wash, yet power washing was only done if the weather permitted. He testified that there would be a log of every time T.U.C.S. employees power washed.<sup>1</sup>

While Narain never saw power washing take place, he testified that Port Authority instructed T.U.C.S. to connect the power washer to a stainless steel cylinder located directly on the bus station platform. There was a key to open the cylinder and release the water to flow through the power washer hose. According to Narain, the power washer was not to be connected to any hoses located within cabinets.

Port Authority General Maintenance Supervisor Frank Minervini ("Minervini") testified at an examination before trial that Port Authority USMs or watch engineers were responsible for inspecting the mechanical systems at the Bus Station, which included the

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<sup>1</sup> Production of these logs has been demanded by the Port Authority and Gonzalez, however T.U.C.S. has not produced these logs, claiming that they cannot be located.

hose cabinet valve and the fire standpipe system. He was not certain how often those inspections occurred.

T.U.C.S. now moves for summary judgment dismissing the complaint and any cross claims asserted against it, arguing that it did not create the allegedly defective condition that caused Gonzalez's fall, and it did not own, control, operate or repair the accident location or the subject fire hose cabinet.

In opposition, Gonzalez argues that issues of fact exist as to whether a T.U.C.S. employee negligently failed to tighten the valve in the fire hose cabinet after power washing, thereby causing water to leak and ice to form on the subject sidewalk. Gonzalez maintains that according to Lopez's testimony, T.U.C.S. employees were in constant possession of a key to open the fire hose cabinet from which the leak is alleged to have originated. Furthermore, no party other than T.U.C.S. had reason to access the subject hose and no one but T.U.C.S. had any reason to turn on the water.

Finally, Gonzalez submits the climatological data for the month of December, demonstrating that the temperature never reached below 32 degrees until the day before the accident. Gonzalez maintains that according to testimony that T.U.C.S. power washed on a consistent basis when the temperature was above 32 degrees, T.U.C.S. must have power washed during the month of December and therefore, could have created the dangerous condition that caused the accident.

In reply, T.U.C.S. first argues that no evidence has been presented that T.U.C.S. performed power washing at any time shortly before the subject accident and, in any event, according to Narain, T.U.C.S. did not use water from the fire hose cabinets when performing power washing, rather, it connected its power washers to a stainless steel cylinder located directly on the bus station platform.

T.U.C.S. further argues that no evidence has been presented to substantiate Lopez's testimony regarding the origin of the leak. T.U.C.S. submits the expert affidavit of professional engineer George H. Pfreunds Schuh ("Pfreunds Schuh") who reviewed the file and inspected the premises in February 2008. According to Pfreunds Schuh, as a layperson, Lopez could not definitively conclude how the leak was created. Lopez merely saw water leaking down the side of the building, and made the conclusion that water was leaking from the subject valve. However, he never testified that he observed water leakage from the subject valve, he testified that there was no water in the subject fire hose cabinet or on the floor nearby, and only testified that he noticed ice behind the pipe that went into the valve and behind the cabinet.

Pfreunds Schuh explained that the ice that Lopez saw in the cabinet was above the location where water could have leaked out of the valve, valve to fire hose connection or the nozzle at the end of the fire hose. He opined that the most probable cause of the water leakage was ice formation inside the pipes and fittings that were normally filled with

water, which caused freeze damage of some kind. If the heat tracing was working, it should have prevented ice formation inside the cabinet.

The Port Authority cross moves for summary judgment dismissing the complaint and any cross claims asserted against it, arguing that there is no evidence that it had actual or constructive notice of the allegedly defective condition that caused Gonzalez's fall. In support of its cross motion, the Port Authority refers to the Daily Maintenance Logs for the days immediately preceding Gonzalez's accident. The logs for December 13 and December 14 make no mention of any ice and/or water condition at the fire hose cabinet or the site of the accident. Port Authority also refers to its Aided Reports for the month of December which show that no other incident involving the fire hose cabinet or an ice condition were reported in the weeks prior to December 15, 2004.

In opposition, Gonzalez first argues that the Port Authority's cross motion is untimely. Gonzalez next argues that in any event, the Port Authority's cross motion must be denied because issues of fact exist as to whether (1) it failed to properly maintain and inspect its building, including the subject fire hose cabinet; (2) it can be held liable under the theory of *res ipsa loquitur* as the Port Authority was in sole custody and control of the pipes and water hose cabinet and such leaks do not occur without negligence; and (3) it violated Administrative Code 7-210 by failing to maintain the sidewalk abutting the bus station in a reasonably safe condition.

Gonzalez submits the affidavit of professional engineer Jeffrey Ketchman ("Ketchman"). According to Ketchman, who examined the location and nature of the subject fire hose cabinet in March 2007 and the case file, water leaked from the fire water system, out of the cabinet and made its way to the outer fascia of the terminal building wall. The water then dripped down to sidewalk level and froze. He provided that water likely escaped from the piping system through the valve stem packing and the root cause of the damage was defective maintenance of the fire hose system. Ketchman concluded that for sufficient ice to have accumulated to exert enough force to push out the panel, the water had to be leaking and dripping down the side of the building for many hours prior to the occurrence. It took a significant amount of time for the water to drip down the side of the building and also to cover the sidewalks and turn to ice.

### **Discussion**

A court may grant summary judgment pursuant to CPLR 3212 only if it finds that a case is devoid of issues of material fact. CPLR 3212(b); *see Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985). On a summary judgment motion, "all of the evidence must be viewed in the light most favorable to the opponent of the motion." *People v. Grasso*, 50 A.D.3d 535, 544 (1<sup>st</sup> Dept. 2008).

### **Port Authority**

A landowner has a duty to maintain its property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the

potential seriousness of the injury and the burden of avoiding the risk. *See Perez v. Bronx Park S. Assocs.*, 285 A.D.2d 402 (1<sup>st</sup> Dept. 2001). 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 of time to discover and remedy it. *See Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 (1986); *Roy v. City of New York*, 65 A.D.3d 1030 (2<sup>nd</sup> Dept. 2009).

Here, Port Authority is not entitled to judgment as a matter of law. First, issues of fact exist as to the origin of the leak. According to Pfreundschuh, the leak was the result of ice formation in the pipes and hoses and was not the result of a loose valve in the subject fire hose; according to Ketchman, the leak was the result of a defective fire hose system that was improperly maintained; and according to Lopez, the leak was the result of a loose valve in the subject fire hose.

Second, Port Authority has failed to prove that it properly maintained and inspected the subject fire hose cabinet and/or fire hose system and the subject sidewalk and that it lacked constructive notice of the allegedly dangerous conditions in the subject fire hose cabinet and/or fire hose system and on the subject sidewalk. Port Authority properly notes that no evidence has been presented to establish precisely how long the condition existed prior to the accident. Nevertheless, according to Ketchman, the condition existed for a significant length of time prior to the accident and the leak resulted

from defective maintenance of the fire hose system. Port Authority has not submitted any expert testimony to refute this opinion. Furthermore, Minervini was not sure how often the required inspections of the maintenance systems, which included the fire hose cabinets, occurred. Lopez explained that the USMs would check the fire hose cabinets twice or three times a week or sometimes less often, and during those inspections, would only sometimes actually open the glass door to the cabinet to look inside. He testified that he only unlocked the subject fire hose cabinet three or four months prior to the subject accident.

Lopez also explained that it was routine for USMs to walk around the Bus Station building at the start of every shift but then later testified that they mainly just walked around the building in inclement weather and whenever they got a chance. Lopez testified that he walked around the entire building sidewalk at approximately 11:00 p.m. on December 14, 2004, which was 14 hours prior to the accident. He later testified that he walked around the entire building sidewalk at approximately 6:00 a.m. on December 15, 2004 and observed no ice or water on the subject sidewalk. He made no log entries of either inspection.

Accordingly, based on the evidence presented, issues of fact exist as to the origin of the leak, whether Port Authority was negligent in its maintenance and inspection of its premises and whether Port Authority had constructive notice of the dangerous conditions

that caused Gonzalez's accident. Therefore, Port Authority's cross motion is denied. *See generally Villaurel v. City of New York*, 59 A.D.3d 709 (2<sup>nd</sup> Dept. 2009).<sup>2</sup>

### T.U.C.S.

The Court finds that T.U.C.S. is also not entitled to judgment as a matter of law. T.U.C.S. has failed to meet its burden of proving that it did not create the allegedly dangerous condition that caused Gonzalez's accident. Although the parties demanded production of T.U.C.S.'s power washing logs, T.U.C.S. has not produced said logs. At Narain's examination before trial, T.U.C.S.'s counsel maintained that the logs could not be located, however, it has not submitted any affidavit of an individual with personal knowledge indicating that a search for the logs was performed and that the search yielded no results. T.U.C.S. has not submitted any other evidence demonstrating the last time it performed power washing at the Bus Station. The only relevant evidence presented was that T.U.C.S. was required to perform power washing on a consistent basis when the temperature was above 32 degrees. Given the climatological data that the temperature

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<sup>2</sup> Notably, Port Authority does properly argue that Gonzalez can not recover under the doctrine of *res ipsa loquitur* in this case. To recover under the doctrine of *res ipsa loquitur*, a plaintiff must establish that "(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; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." *Ebanks v. New York City Transit Authority*, 70 N.Y.2d 621, 623 (1987). Here, Gonzalez alleges that the instrumentality that caused the accident was a dangerous condition in the fire hose cabinet. According to the evidence presented, both the Port Authority and T.U.C.S. had access to the fire hose cabinet. Because the fire hose cabinet is not within the exclusive control of the Port Authority, it can not be held liable under the theory of *res ipsa loquitur*.

only reached below 32 degrees on one day in the few weeks prior to the accident, it would be reasonable to assume that some power washing was performed in the weeks or days prior to the accident.

T.U.C.S. argues that even if it did perform power washing in the weeks or days prior to the accident, according to Narain, T.U.C.S. did not ever even access the fire hose cabinet to perform the power washing. However, given that Gonzalez presents evidence that T.U.C.S. did access the fire hose cabinets to perform power washing, issues of fact exist so as to preclude summary judgment at this time. T.U.C.S. further argues that even if it did perform power washing prior to the accident and even if it did access the subject fire hose cabinet to perform the power washing, according to Pfreundschuh, the leak was the result of ice formation in the pipes and hoses and was not the result of a loose valve in the subject fire hose. However, as discussed above, issues of fact exist as to the origin of the leak. Therefore, based on T.U.C.S.'s failure to meet its burden of proving that it did not create the dangerous condition that caused Gonzalez's accident and the multiple issues of fact that exist in this case, T.U.C.S.'s motion for summary judgment is denied.

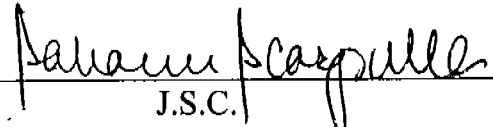
In accordance with the foregoing, it is hereby

ORDERED that defendant T.U.C.S. Cleaning Service, Inc.'s motion for summary judgment dismissing the complaint and any cross claims asserted against it is denied; and it is further

ORDERED that defendant The Port Authority of New York and New Jersey's cross motion for summary judgment dismissing the complaint and any cross claims asserted against it is denied.

This constitutes the decision and order of the court.

Dated: September 8, 2010  
New York, New York

  
\_\_\_\_\_  
J.S.C.  
**SALIANN SCARPULLA**

**FILED**  
SEP 14 2010  
NEW YORK  
COUNTY CLERK'S OFFICE