

**Sebastiano v New York City Tr. Auth.**

2010 NY Slip Op 33878(U)

January 5, 2010

Supreme Court, Bronx County

Docket Number: 20936/05

Judge: Wilma Guzman

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This opinion is uncorrected and not selected for official publication.

PART 07

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF BRONX:

Sebastian, Rosario B. X

-against-

Index No. 20936/2005

Hon. WILMA GUZMAN

Justice.

N.Y.C. Transit Authority x

The following papers numbered 1 to      Read on this motion. Annul, Set. Aside + VACATE  
 Noticed on 4.27.09 and duly submitted as No.      on the Motion Calendar of     

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	RECEIVED BRONX COUNTY CLERK'S OFFICE JAN 07 2010	
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
<u>    </u> Affidavits and Exhibits		
Pleadings - Exhibit	PAID	NO FEE <input type="checkbox"/>
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this Motion by Defendant New York City Transit Authority is decided in accordance with the attached Decision/Order.

Motion is Respectfully Referred to:  
 Justice:  
 Dated:

Dated: 1/15/10

Hon. [Signature]  
 J.S.C.  
WILMA GUZMAN

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

Index No. **20936/05**  
Motion Calendar No. 15  
Motion Date: 6/15/09

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ROSARIO SEBASTIANO and ALLESANDRO  
SEBASTIANO,

Plaintiff(s),

-against-

**DECISION/ ORDER**  
**Present:**  
**Hon. Wilma Guzman**  
Justice Supreme Court

NEW YORK CITY TRANSIT AUTHORITY  
Defendants.

\_\_\_\_\_  
Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for summary judgment:

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion, Affirmation in Support,</b>	
<b>Exhibits Thereto.....</b>	<b>1</b>
<b>Affirmation in Opposition .....</b>	<b>2</b>

*Upon the foregoing papers and after due deliberation, and following oral argument, the Decision/Order on this motion is as follows:*

Defendant New York City Transit Authority (hereinafter referred to as "NYCTA") moves this Court for an Order setting aside the jury verdict pursuant to C.P.L.R. § 4404(a). Plaintiff submitted written opposition.

Plaintiff Rosario Sebastiano was a New York City Police Officer assigned to the Woodlawn Station on July 10, 2004. Plaintiff commenced this action alleging injuries caused as the result of a trip and fall accident brought under General Municipal Law 205-e, that occurred on July 10, 2004 when she fell on a stairway located at the Woodlawn #4 train station. Plaintiff R. Sebastiano alleged a defective condition as the direct or indirect cause of her fall.<sup>1</sup> This Court conducted a trial by jury which reached a verdict on December 17, 2008. After the presentment of witness and evidence, the jury returned a verdict holding the defendant NYCTA 100% liable for plaintiff R. Sebastiano's injuries based upon violations of the New York City Administrative Code 27-127, 27-128 and 27-

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<sup>1</sup> Plaintiff Allesandro Sebastiano has a derivative cause of action for loss of services.

375(h), New York State Building Code 1003.3.6 and New York State Property Maintenance Code 304.4.<sup>2</sup> As a result of finding that defendant NYCTA violations were the direct or indirect cause of plaintiff's injuries, the jury awarded plaintiffs damages in the following amount: \$100,000 for past pain and suffering, \$152,383 for (past) loss of earnings; \$100,00 for future pain and suffering including the loss of enjoyment of life and the permanency of the injury, \$593,579 for loss of (future) earnings; \$1,957,971 for loss of pension benefits, \$46,067 for future medical expenses; and \$50,000 for plaintiff A. Sebastiano's derivative claim.

Defendants argue that this Court erred in allowing plaintiffs expert to opine on purported violations of the New York City Building Code and various state code provisions, and pursuant to Garcia v. New York City Transit Authority, 63 A.D.3d 1100 (2<sup>nd</sup> Dept. 2009), that defendant NYCTA is not liable as NYC Administrative Code does not apply to the NYCTA and that the verdict was against the weight of the evidence.

C.P.L.R. § 4404(a) states:

After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

At the outset, it should be noted that the applicability of the New York City Administrative Code was argued before Judge Schachner when the amendment to the complaint to include said violations was granted on October 3, 2008.

During motions *in limine*, this Court also issued an Order denying defendant NYCTA's motion to dismiss the New York City Administrative Code violations. This Court also addressed the legal issue of the applicability of the Building Code to the Transit Authority based upon the

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<sup>2</sup> Defendant NYCTA's memorandum of law also argues the inapplicability of the Uniform Fire Prevention Code section 765.4(9). However, this Code was not submitted to the jury as it was determined on the record that this Code had been repealed. As such, this Court will not address this Code herein.

Public Authorities Law. (Tr. pgs 63, ln. 22-pg 65). Finally, this Court previously ruled on the State Code being analogous to the City Codes and therefore requiring judicial notice under C.P.L.R. § 4441. (Tr. pg. 383-384).

NYC Administrative Code 27-375(h) states in pertinent part:

Interior Stairs shall comply with the following requirements. (H)Risers, Treads, Stingers landings, platforms and guards: Treads and landings shall be built of or surfaced with nonskid materials.

Defendant NYCTA submitted the case of Garcia v. New York City Transit Authority, supra in support of the argument that the NYCTA is not subject to the New York City Building Code and thus not liable for the plaintiff's injuries. In Garcia, the Appellate Division, Second Department held that staircase was a "structure wholly contained with a subway station and is inseparable from the function of that station, it is "appurtenant" to a subway within the meaning of section 643 of the City Charter.(*cf* Huerta v. New York City Tr. Authority, 290 A.D.2d 33, 735 N.Y.2d 5 [1<sup>st</sup> Dept. 2001])." As such, the NYCTA was exempt from the Building Code. Contrary to the defendants interpretation, this Court does not find that the Appellate Division, Second Department held that the New York City Transit Authority is exempt from the Building Code in it's entirety. Rather, this Court reads that the staircase in question in Garcia, was not subject to the Building Code due to it's location. The facts of Garcia lends itself to believe that the staircase in Garcia was in a different location comparatively to the staircase in the instant case. The Garcia staircase was located within the subway (the Garcia plaintiff is alleged to have fell on a stair case after passing through a turnstile, taking an elevator from the street to the mezzanine, walking down a corridor and then descending the stairs). The staircase in the instant case served as a manner of ingress and egress to the subway station. The issue presented to this Court in regards to the Woodlawn station staircase is factually distinctive from the facts of the Garcia and its staircase. Interior stairs are defined in 27-232 as a stair "that serves as a required exit." Furthermore, this Court would note that the Garcia Court did not disagree with or decline the argument set forth in Huerta v. City of New York Tr. Authority, 290 A.D.2d 33, (ie. *contra*) but rather indicated that the Huerta opinion supports the Garcia decision by analogy

The Appellate Division, First Department addressed the arguments raised by defendant NYCTA, and cited in the Garcia decision, in Huerta Prior to the recent Garcia decision, the same

argument of the applicability of the Building Code to the NYCTA was made by defendant NYCTA during the trial and denied based upon the Huerta decision and its First Department progeny as well as Terranova v. New York City Transit Authority, 49 A.D.3d 10 (2<sup>nd</sup> Dept. 2007)

As this Court noted during motions *in limine*, the Huerta court chose to remain silent as to the issue of the Public Authorities Law, even though it was decided in 2001 *after* the 2000 amendment to the Public Authorities Law. In Terranova, the 2<sup>nd</sup> Department specifically addressed the issue of the Public Authorities Law holding that it does not preclude lawsuits against the New York City Transit Authority acting in a proprietary interest. Garcia did not address the issue of the Public Authorities Law. Nor did it contradict or decline to follow the holding of Terranova.

This Court previously addressed the issue of plaintiff's expert Scott Silberman, P.E., testimony as it relates to Building Code 27-375(h), 27-127 and 27-128. Deciding motion's *in limine*, and citing Franco v. Jay Cee Corp. Of New York, 36 A.D.3d 445; Dufel v. Green, 84 N.Y.2d 795; Rodriguez v. New York City Housing Authority, 209 A.D.2d 260 (1994), this Court determined that Mr. Silberman inspected the steps within 10 days of plaintiff's accident and based upon his personal observations he would be able to testify as to the unsafe and hazardous conditions of the steps. This Court further held that the violation of the statute is the ultimate question for the jury. Plaintiff's counsel was instructed to refrain from use of the word "violation" and to elicit the required information through other means of questioning. This Court previously determined that whether the violation is charged to the jury, is a question to be determined by this Court. (Tr. Proc. Pgs 74-77). "Expert testimony on the question of whether a certain condition or omission is in violation of a statute or regulation is permissible." Boruch v. Morawiec, 51 A.D.3d 429 (1<sup>st</sup> Dept. 2008); Franco v. Jay Cee of New York, 36 A.D.3d 445.

Notwithstanding the foregoing, the defendant's motion to set aside the verdict must be granted under Barbul v. Matsia Properties, Corp., 47 A.d.3d 459 (1<sup>st</sup> Dept. 2008). In Barbul, the Appellate Division held that the plaintiff's expert was properly precluded from referring to the city building code where "there was no proof of the year the subject building and ramp were constructed and thus no foundation for the applicability of different versions of the code and its individual provisions." In the instant matter, plaintiff's expert Scott, Silberman, P.E. never testified to the year the building was constructed. Nor did any plaintiff witness prior to him. When questioned on cross-examination as to the year the building was constructed, Mr. Silberman testified as follows:

Q: By the way, do you know when this train station was built?

A: No, I do not.

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Q: The entire station.

A: I have no idea.

Q: Nineteen fifty?

A: I am not a historian on the transit facilities.

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Q: Do you know, Mr. Silberman, when the staircase that you examined was installed or built or created by the New York City Transit Authority?

A: Do I know that for a fact? No

(Silberman Transcript. Pg. 935, ln. 22-24, pg. 936, ln. 8-12, pg. 938, ln. 17-20).

However, as no proof was presented by the plaintiff's expert as to when the building was constructed, any reference to the applicability of the city building codes made by Mr. Silberman should have been precluded. Where an expert witness fails to testify as to the year of construction, as in Barbul and the instant case, the remedy is preclusion of that expert's testimony as to the Building Codes applicability. "The trial court properly precluded plaintiff's expert from referring to the New York City Building Code, since there was no proof of the year the subject building and ramp were constructed and thus no foundation for the applicability of different versions of the Code and its individual provisions." Barbul supra (internal citations omitted). In the instant case, plaintiff's expert's testimony should have been precluded as to the Building Code violations. As such, the submission of the statutory violations to the jury was in error. As noted above the jury verdict indicated that liability was found only as to the statutory violations.

Accordingly, it is

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ORDERED that the defendants motion to set aside the verdict is hereby granted. It is further

ORDERED that the jury's verdict is set aside and a new trial is ordered. It is further

ORDERED that this matter is referred to Part 3F before the Honorable Judge Schacner on

February 23, 2010, at 9:30 am for a trial. It is further

ORDERED that defendants shall serve a copy of this Order with Notice of entry upon plaintiff within thirty (30) days of this entry of this Order.

1/5/10  
\_\_\_\_\_  
DATE

*[Signature]*  
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HON. WILMA GUZMAN  
Justice Supreme Court.