

Ross v Long Is. R.R.

2011 NY Slip Op 30038(U)

January 6, 2011

Sup Ct, New York County

Docket Number: 108021/2008

Judge: Jane S. Solomon

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

JANE S. SOLOMON

PRESENT: _____

PART 55

Justice

Index Number : 108021/2008

ROSS, MARC

vs.

LONG ISLAND RAILROAD

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 9/13/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3

4-5

6

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed memoranda decision and order.

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*WB - Pretrial Conf
Feb 14, 2011 @*

*2 PM
set at end of session*

Dated: 1-6-11

[Signature]
J.S.C.
JANE S. SOLOMON

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

MARC ROSS and ALVARO MEZA,

Index No. 108021/2008
DECISION & ORDER

Plaintiffs,

-against-

LONG ISLAND RAILROAD, METROPOLITAN
TRANSPORTATION AUTHORITY and ROBERT
ZIMMARDI, JR.,

Defendants.

-----X

JANE S. SOLOMON, J.:

Plaintiffs Marc Ross (Ross) and Alvaro Meza (Meza) sue
defendants Long Island Railroad (LIRR), Metropolitan
Transportation Authority (MTA) and Robert Zimmardi, Jr.
(Zimmardi) for damages arising from an altercation instigated by
Zimmardi, that began on the train.

Ross, Meza and Zimmardi were passengers on LIRR train
#1234, traveling from Bay Shore, Long Island, to Penn Station, in
Manhattan. Ross, Meza and two non-party friends were returning
from a day trip to Fire Island. Zimmardi was drinking openly on
the train and admittedly was intoxicated. He began pacing the
aisle of the train car, shouting homophobic slurs. His shouts
were not directed to anyone in particular. A train conductor
witnessed Zimmardi's behavior, but did not confront him (Ross
EBT, attached to Motion, Ex. G., p. 56-7).

As the train approached Penn Station, Zimmardi
approached Ross and Meza and questioned their sexuality. When

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Ross and Meza rebuked him, Zimmardi threatened violence. This exchange did not occur in the presence of any LIRR or MTA employees, and Ross and Meza did not seek out assistance or attempt to move away from Zimmardi; in fact, all of them stood together in the same vestibule when the train pulled into Penn Station (Meza EBT, attached to Motion, Ex. F, p. 84). As they exited the train, Zimmardi punched Meza, and in the ensuing struggle, knocked himself, Meza and Ross off the platform and onto the tracks. LIRR employees immediately contacted MTA police and Zimmardi was arrested. He was convicted of assault and served three years probation (Zimmardi EBT, attached to motion, Ex. H, p. 51).

The LIRR and MTA argue that no evidence is presented showing that any of their employees had any warning or indication that Zimmardi would engage in physical violence against the plaintiffs, and that, as public authorities, they do not owe a duty to protect individuals on a train from assault by a third person absent a special relationship. Plaintiffs argue that this protection does not apply to the agencies when their employees negligently failed to timely and safely summon aid when presented with Zimmardi's "loud; biased; hateful; and threatening behavior while consuming alcohol in plain sight" (Opposition, ¶ 3).

DISCUSSION

A transit authority "owes no duty to protect a person on its premises from assault by a third person, absent facts

establishing a special relationship between the authority and the person assaulted" (*Weiner v. Metropolitan Transp. Authority*, 55 NY2d 175, 178 [1982]). "It is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability" (*Id.*, at 182). The Court of Appeals has defined a "special relationship" as it relates to municipal entities. The elements are: the assumption of an affirmative duty to act on behalf of the party who was injured; the agent's knowledge that inaction could lead to harm; some form of direct contact between the agents and the injured party; and that party's justifiable reliance on the agent's affirmative undertaking (*Kirschner v. City of Jamestown*, 74 NY2d 251, 257 [1989]).

The sole question before the court is whether Zimmardi's actions, as witnessed by the LIRR employees, created a special relationship between the conductor and the plaintiffs.

The evidence establishes that neither Ross nor Meza complained to the conductor about Zimmardi's behavior either time that he passed through the train car; and that, while the conductors were present, Zimmardi was loud and obnoxious, but not violent or confrontational, and no one requested assistance. Plaintiffs counter that their "pleading eyes" were their requests for assistance and were "met with cold indifference" by the conductor (Opposition, ¶ 38). This argument is unpersuasive. Neither plaintiff actively placed any conductor on notice of a

specific articulated danger to them.

Plaintiffs also rely on *Crosland v. NYCTA*, 68 NY2d 165 [1987] for the proposition that the conductor's failure to call for aid to quell Zimmardi's verbal slurs gives rise to liability. In *Crosland*, NYCTA was held liable because the evidence showed that several NYCTA employees watched from safety, and did nothing, while an individual was fatally assaulted on a subway platform. Here, it is uncontested that when Zimmardi turned violent, LIRR employees immediately contacted MTA police. Before then, the conductors only witnessed loud and rude behavior. Without a tangible warning from a passenger of an hostile action on the train, Zimmardi's actions at Penn Station cannot be said to have been foreseeable, so that LIRR and the MTA cannot be liable for them (*Panico v. Long Island R.R.*, 262 AD2d 293 [2nd Dept., 1999][plaintiff presented no evidence indicating that passenger who, with no provocation, indiscriminately shot other passengers]).

Finally, that the conductors called for assistance the moment they became aware of the fight, establishes movants' entitlement to summary judgment (*Besedina v. New York City Transit Authority*, 74 AD3d 857 [2nd Dept., 2010]).

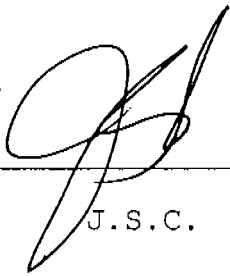
Accordingly, it hereby is

ORDERED that the motion for summary judgment dismissing the complaint as to defendants the Long Island Railroad and the Metropolitan Transportation Authority is granted, the case is

severed and dismissed as to both, and the Clerk of the Court is directed to enter judgment accordingly; and it further is

ORDERED that counsel for the remaining parties shall appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, NY, on February 14, 2011 at 2 PM.

Dated: January 6, 2011

ENTER: 

J.S.C.
JANE S. SOLOMON

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