SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden PART 11
Justice

E 1/10/13

Index Number : 103354/2010
BARNEY-YEBOAH, ROSEMOND
vs.
METRO-NORTH COMMUTER RAILROAD
SEQUENCE NUMBER : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order.

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

Dated: January 7, 2013

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

ROSEMOND BARNEY-YEBOAH,

INDEX No. 103354/10

Plaintiffs

- against -

METRO-NORTH COMMUTER RAILROAD d/b/a MTA METRO-NORTH COMMUTER RAILROAD (METRO-NORTH),

Defendants.

----------X

JOAN A. MADDEN, J

In this personal injury action, plaintiff Rosemond Barney-Yeboah ("Barney-Yeboah) moves for partial summary judgment on the issue of liability against defendant Metro-North Commuter Railroad d/b/a MTA Metro-North Railroad ("Metro-North"). Barney-Yeboah argues that summary judgment is warranted on the basis of the theory of *res ipsa loquitor*, as she alleges that she can establish the following elements: (1) the accident was of a type that does not occur in the absence of negligence, (2) the accident was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the accident was not due to any voluntary action or contribution on the part of the plaintiff. See, Dermatossian v. New York City Tr. Auth., 67 NY2d 219 (1986). Metro-North opposes the motion.

Background

In this action, Barney-Yeboah seeks to recover damages from Metro-North for injuries she allegedly sustained as a result of an accident that occurred on July 13, 2009, at approximately 6:25 a.m. At that time, Barney-Yeboah was a lawfully seated passenger on a Metro-North train when a ceiling panel unexpectedly suddenly swung open and struck her in the head.

At her deposition, Barney-Yeboah testified that she was sitting in the middle of the train car when she heard a loud sound. She testified, "I heard a sound, a loud sound, and after the sound all I saw was that I was on my knee with people all around me yelling." (Barney-Yeboah dep. at 51). She testified that she believes she lost consciousness because she does not recall how she got on her knees in the train. Barney-Yeboah stated, "After the commotion...I looked up and saw what was going on around me, I saw a hanging panel, and people from behind me, people I never met before." (Barney-Yeboah dep. at 52). She testified that a utility cabinet door hit her, which she believes was about two inches thick and approximately three by three feet wide. At the examination before trial, Barney-Yeboah testified, "I was sitting on the train going to work and I felt something hit me on the head." (Barney-Yeboah exam. at 33).

In support of her motion, Barney-Yeboah submits the deposition testimony of Robert J. Burke ("Burke"), a passenger on the train who assisted her after the accident. Burke testified that Barney-Yeboah was seated on the train about three to five feet in front of him and he was talking to a gentleman on his left when he observed the accident. He testified, "[t]he panel seemed to pop loose, came down on its hinge...it swung inwards away from the door of the car, and in the process, struck the woman in the head. (Burke dep. at 12). He stated, "[t]he panel swung down fairly rapidly on the hinge" and probably had "a medium impact." Burke also testified that he heard "squeaking, vibration type noises" coming from the ceiling that morning, but explained "...it didn't seem like anything out of the ordinary given the number of switches in that area and the fact that it's not uncommon to hear a lot of squeaks and things like that." (Burke dep. at 21-22). He testified that the panel "did seem to move ever so slightly, but again on occasion ceiling panels do that on a train, a lot of weight and moving, bouncing up and

down." (Burke dep. at 22). He also stated that the panel was held up by four bolts and "when the swinging was going on, it appeared to me as though the middle bolts – I can remember the middle left one, I'm not sure about the right one. They didn't appear to be completely screwed down, like the heads weren't completely flush with the surface of the material, and I think that might be why the thing came out." (Burke dep. at 24).

Barney-Yeboah also submits the deposition testimony of Julia Alvarez ("Alvarez"), who she knew from commuting and who was seated next to her at the time of the accident. Alvarez testified, "when we were sitting and talking, I was putting on, I think some lipstick, and suddenly I saw something that fell, and I heard a noise, and I saw that it was the panel that fell from the ceiling of the train and it hit directly on Rosemond's head." (Alvarez dep. at 12). Alvarez stated, "[i]t was very fast. I've heard something that hit on her head and she fell on the floor." Alvarez testified that she noticed one of the screws was loose and "the panel didn't fell completely, it opened up and flipped." (Alvarez dep. at 13). Alvarez testified that she had noticed loose screws on the train panels before, but she did not know if it was in the same train car because "all of the wagons are similar." (Alvarez dep. at 15). Alvarez testified that she did not inform anyone from Metro-North since "there are so many mechanics that worked there, they were going to notice it" and "after seeing it several times, it was kind of normal." (Alvarez dep. at 16).

Barney-Yeboah also submits the deposition testimony of Jack Curtis, who is a general foreman at Metro-North and whose duties include supervising the work force of the shoreline maintenance equipment. Curtis testified that he has been the general foreman for approximately seven years and previously worked as an electrician for fifteen years. Curtis testified that the train car ceiling panels are fastened to the ceiling

with "quarter turn screws, four per panel" and also have "two safety latches, and a safety chain." (Curtis dep. at 13). Curtis testified that in order for a panel to fall, someone would have to "reach up on each side of the panel, depress [the screws] in and the panel would drop." (Curtis dep. at 18). He further explained there is one metal safety chain per panel, which does not prevent the panels from opening, but prevents them from swinging all the way down. (Curtis dep. at 19). Curtis testified that the panels are inspected on a regular basis for maintenance every 184 days and a Calendar Day Maintenance Inspection is conducted once every 24 hours. (Curtis dep. at 26, 42).

Metro-North opposes the motion and relies on the deposition testimony of general foreman Jack Curtis. Metro-North asserts that Barney-Yeboah has misread Curtis' testimony to suggest that it establishes, as a matter of law, that the defendant had exclusive control of the ceiling panel. Metro-North claims it is undisputed that the ceiling panel was in a publicly accessible area. Metro-North highlights that when Curtis was asked, "Is there anybody, other than Metro-North employees, that access these ceiling panels?" he responded, "Not to my knowledge" (Curtis dep. at 33-34). Additionally, when asked, "We talked about accessing the panels in Croton for maintenance purposes and Highbridge for cleaning purposes, does anybody access these panels that is not an employee of Metro-North?" Curtis responded, "I don't know." (Curtis dep. at 41-42). Metro-North argues that Curtis' deposition testimony is insufficient to establish Metro-North's exclusive control and that the accessibility of the panels is sufficient to raise an issue of fact as to Metro-North's exclusive control.

In reply, Barney-Yeboah argues that defendant has asserted nothing more than speculation in his opposition. Barney-Yeboah argues that Curtis was given multiple opportunities to explain how the accident occurred and has failed to do so. Barney-

Yeboah further asserts that many of the mechanisms designed to prevent this type of accident, such as the safety laches, screws, and safety chain were under the panel and therefore were not immediately accessible to the general public.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case..." Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986).

Three elements must be established in order to apply the doctrine of *res ipsa loquitur*. "First, the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third, it must not have been due to any voluntary action or contribution on the part of the plaintiff." Kambat v. St. Francis Hosp., 89 NY2d 489, 494 (1997)(citation omitted). To rely on the doctrine of *res ipsa loquitur*, a plaintiff does not have to eliminate the possibility of all other causes of the accident. "It is enough that the evidence supporting three conditions affords a rational basis for concluding that 'it is more likely than not' that the injury was caused by defendant's negligence." Id., at 494, citing from Restatement [Second] of Torts §§328 D, comment e. "When the doctrine is invoked, an inference of negligence may be drawn solely from the happening of the accident." Dermatossian, 67 NY2d 219 at 226.

The requirement that a defendant have exclusive control of the instrumentality causing injury "is not an absolutely rigid concept, but is subordinate to its general purpose, that of indicating that it was probably the defendant's negligence which caused the accident in question." Pavon v. Rudin, 254 AD2d 143, 145 (1st Dept 1998)(citations omitted). "It is not necessary for plaintiff to rule out all other possible causes, only to show that they are less likely." Id. In accidents involving items exposed to significant public traffic, the appropriate target of inquiry is whether the general public handled the specific mechanism that malfunctioned. (Pavon, 254 AD2d 143 at 146; Wen-Yu Chang v. F. W. Woolworth Co., 196 AD2d 708, 709 (1st Dep't 1993).

Here, the first element and third elements are clearly established since train car ceiling panels with multiple safety mechanisms do not generally fall on passengers in the absence of negligence and the occurrence was not due to any voluntary action or contribution on the part of Barney-Yeboah. Metro-North does not dispute that Barney-Yeboah did not contribute to the accident.

With regard to the second element of *res ipsa loquitur*, it appears from the record that Metro-North may have had sufficient control of the instrumentality, in this case the ceiling panel, which caused the accident, so that the doctrine should be applied in determining whether Metro-North is liable.. In particular, even if the panels were accessible from ground level, it seems unlikely that a passenger would tamper with them in view of passengers to undo the panel's multiple safety mechanisms (see Nesbit v. New York City Transit Auth., 170 AD2d 92, 96 (1st Dep't 1991)(holding that trial court erred in setting aside jury verdict in favor of plaintiff who was injured by a bar and chain that fell from defendant's overhead train on the ground that the exclusive control criterion had not been met, writing that "[i]t is most difficult to accept the hypothesis that a person on

a moving train had the tools or inclination to stand between moving cars to force apart the chain, in view of the other passengers while the train was on this journey.")

That being said, however, summary judgment as to liability based on *res ipsa loquitur* is not warranted. *Res ipsa loquitur* does not create the presumption of negligence, but "merely permits the jury to infer negligence from the circumstances of the occurrence. The jury is thus allowed-- but not compelled--to draw the permissible inference." Kambat v. St. Francis Hospital, 89 NY2d at 495. Thus, the application of *res ipsa loquitur* may only provide the basis for granting summary judgment in favor of a plaintiff "in the rarest of ... cases may ... when the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable." Morejon v. Rais Constr. Corp., 7 NY3d 203, 209 (2006).

The court finds that under this standard summary judgment is not warranted as while the jury may find that Metro-North had exclusive control of the panel and infer that the panel would not have fallen in the absence of negligence, the circumstances here do not compel these findings as a matter of law. See Nesbit v. New York City Transit Auth., 170 AD2d 92.

Conclusion

In view of the above, it is

ORDERED that the plaintiff's motion for summary judgment is denied.

The parties shall contact the mediation part.

DATED: January 7, 2013

J.S.C.