

Kelda v New York City Tr. Sequence No: 002

2013 NY Slip Op 31149(U)

May 22, 2013

Supreme Court, New York County

Docket Number: 103908/11

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number : 103908/2011
SPREIREGEN, KELDA
vs.
NEW YORK CITY TRANSIT
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

FILED
MAY 28 2013
NEW YORK
COUNTY CLERKS OFFICE

INDEX NO. 103908/11
MOTION DATE 2/13/13
MOTION SEQ. NO. 002

The following papers, numbered 1 to 10 were read in connection with the motion for summary judgment

- Notice of Motion —Affirmation of Service; Affirmation — Exhibits A-L No(s). 1-2; 3
- Affirmation in Opposition — Exhibit A [Affidavit], B-D —Affidavit of Service; No(s). 4-6; 7-8
Affirmation in Opposition—Affirmation of Service _____
- Reply Affirmation—Affirmation of Service _____ No(s). 9-10

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant New York City Transit Authority is granted, and the complaint is severed and dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that so much of the cross claim by defendant City of New York against defendant New York City Transit Authority for contribution is dismissed; and it is further

ORDERED that the remainder of the action shall continue.

In this action, plaintiff alleges that, on February 7, 2011, at approximately 8:15 a.m., she slipped and fell on ice on the sidewalk in front of the stairwell entrance to the Dyckman Street subway station of the no. 1 train, at the intersection of Hillside Avenue and Fort George Hill in Manhattan.

At her statutory hearing, plaintiff was asked, "Do you remember about how many feet it was from the steps?" (Coffey Affirm., Ex F, at 16.) Plaintiff

(Continued . . .)

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

answered, “Six feet; I – I don’t know. I’m –” (*Id.*) At her deposition, plaintiff testified that she slipped and fell before she reached three or four steps leading into the subway station. (Coffey Affirm., Ex G [Spreiregen EBT], at 44.) Plaintiff was asked, “What was the distance between the ice that you saw and the beginning of these three or four steps?” Plaintiff answered, “Say about a foot, two, three feet.” (*Id.*)

Defendant New York City Transit Authority (NYCTA) now moves for summary judgment dismissing the action and all cross claims as against it, on the grounds that plaintiff cannot establish that the NYCTA had notice of the ice, and that the NYCTA does not own or control the area where the plaintiff allegedly fell. Plaintiff opposes the motion.

“On September 14, 2003, with the passage of § 7–210 of the Administrative Code of the City of New York, the duty to maintain and repair public sidewalks, within the City of New York, and any liability for the failure to do so, was shifted, with certain exceptions, to owners, whose property abuts the sidewalk. Accordingly, owners of nonexempted properties must now keep the sidewalks abutting their properties in a reasonably safe condition, much in the same way they are obligated to maintain their respective premises.”

(*Early v Hilton Hotels Corp.*, 73 AD3d 559, 560 [1st Dept 2010].)

In this case, the above-ground subway station is located within a building that abuts the sidewalk where plaintiff allegedly slipped and fell. Louis Douglas, a NYCTA employee who was a cleaner assigned to the Dyckman subway station back in February 2011, testified that the Dyckman subway station is above ground. (Coffey Affirm., Ex H [Douglas EBT], at 10.) Douglas testified that, to enter the subway station, “you have to climb some steps to get to the stations [*sic*]”, “And then you enter into some form of building or enclosure.” (*Id.* at 11.)

Under a 1953 lease agreement between the City of New York and the New York City Transit Authority, “the City relinquished possession and control of

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all of its transit facilities to the Transit Authority.” (*McGuire v City of New York*, 211 AD2d 428, 429 [1st Dept 1995].)¹ Administrative Code § 7-210 does not impose a duty upon a lessee of the abutting premises, such as the NYCTA in this case, to maintain and repair the public sidewalks abutting the leased premises.

The Court agrees with the NYCTA that it had no duty under *Bingham v New York City Transit Authority* (8 NY3d 176 [2007]) to maintain the sidewalk area where plaintiff allegedly slipped and fell. In *Bingham*, the Court of Appeals held,

“Courts have long recognized that the duty of care imposed on a common carrier with respect to its passengers requires not only that it keep the transportation vehicle safe, but also that it maintain a safe means of ingress and egress for the use of its passengers. This duty has been applied to those areas owned and maintained by others if ‘constantly and notoriously’ used by passengers as means of approach.

* * *

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*, 8 NY3d at 180-181.)

Where a public sidewalk surrounds the entrance to a subway station, one must walk on that sidewalk in order to enter the subway station. If the duty

(Continued . . .)

¹ The testimony of a NYCTA cleaner and station agent, who believed that the abutting building was a NYCTA building, do not raise a triable issue of fact as to whether NYCTA is the owner of the abutting building, because they are not speaking agents on this issue of the NYCTA’s ownership.

under *Bingham* were held to apply to a public sidewalk, where would the duty to maintain the public sidewalk end? Would the NYCTA, as the common carrier, be required to maintain a continuous path directly to the subway entrance along an entire street block? To extend the duty under *Bingham* to a public sidewalk would make the NYCTA an insurer of the safety of sidewalks on all blocks where subway entrances are located.

The Court of Appeals noted in *Bingham* that “this duty of care imposed on a carrier to keep approaches and platforms safe has not been extended to common areas in a multi-carrier facility.” (*Id.* at 128 n.) Here, the public sidewalk is akin to a common area to which a duty under *Bingham* should not extend. (See *Ruffino v New York City Tr. Auth.*, 55 AD3d 819, 821 [2d Dept 2008] [duty under *Bingham* did not extend to a boardwalk located between a Long Island Rail Road station and a NYCTA subway station].) The fact that the public sidewalk leads to an exterior set of steps leading to the entrance of the Dyckman subway station therefore does not, without more, constitute an approach under *Bingham*.

Plaintiff indicates that Jose Moctezuma, a NYCTA station cleaner, testified at his deposition that “snow is usually cleaned 3 feet from the entrance.” (*Coffey Affirm.*, Ex I, at 11.) Moctezuma was asked, “Is there a general practice that when the temperature is below 32 degrees, that salting of the sidewalk is conducted 3 feet outside of the stairwell entering the subway?” (*Id.* at 17.) He answered, “Yes.” (*Id.*)

However, to the extent that plaintiff argues that the NYCTA voluntarily assumed a duty to remove snow and ice from the area where she allegedly slipped and fell, there is no evidence that the NYCTA voluntarily assumed such a duty that day. The NOAA weather report from the Central Park station indicates that the minimum temperature recorded on February 7, 2011 was 36 degrees Fahrenheit. (*Coffey Affirm.*, Ex L.)

Therefore, the NYCTA is granted summary judgment dismissing the complaint as against it, and dismissing the City’s cross claim seeking contribution against the NYCTA. The NYCTA did not meet its prima facie burden of demonstrating its entitlement to summary judgment dismissing the

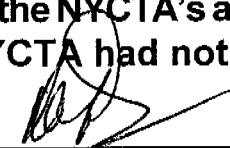
(Continued . . .)

Spreiregen v New York City Tr. Auth., Index No. 103908/2011

**City's cross claim for indemnity "on the basis of a contract between them."
(See Coffey Affirm., Ex D.)**

Given all the above, the Court need not address the NYCTA's alternative ground that plaintiff did not establish that the NYCTA had notice of the ice.

Dated: 5/22/13
New York, New York


_____, J.S.C.

HON. MICHAEL D. STALLMAN

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check if appropriate:..... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

FILED
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