

Curtin v Metro N. R.R.
2013 NY Slip Op 31559(U)
July 9, 2013
Supreme Court, New York County
Docket Number: 112527/10
Judge: Joan A. Madden
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
J.S.C.
Justice

PART 11

T. Curtin
v.
Metro Nat'l, et al

INDEX NO. 112527/10
MOTION DATE _____
MOTION SEQ. NO. 001

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 *determined in accordance with the annexed decision and order.*

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

FILED

JUL 17 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 9, 2013

[Signature], 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
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
TIMOTHY CURTIN,

Plaintiff,

INDEX NO. 112527/10

-against-

METRO NORTH RAILROAD and METROPOLITAN
TRANSIT AUTHORITY,

Defendants.

-----X
JOAN A. MADDEN, J.:

FILED

JUL 17 2013

COUNTY CLERK'S OFFICE
NEW YORK

In this action for damages for personal injuries, defendants Metro-North Railroad (“Metro-North”) and Metropolitan Transit Authority (“MTA”) are moving for summary judgment dismissing the complaint. Plaintiff opposes the motion only to the extent defendant Metro-North seeks dismissal and does not oppose MTA’s motion. In the absence of opposition, the motion is granted to the extent of dismissing the complaint as against defendant MTA.

Plaintiff testified that on September 15, 2009, he was stepping off and existing a Metro North train at the station at Hastings-on-Hudson when he tripped on the edge of the station platform. He testified that the floor of the train car was 6 to 8 inches below the station platform, and as a result of that vertical height differential or gap, his foot “got caught” on the platform, “like a ledge,” and he tripped and fell, and suffered personal injuries.

In support of summary judgment, defendant Metro-North argues that the vertical height differential at the Hastings station falls “well within the national standard for commuter railroads recently established by the FRA [the Federal Railroad Administration].” Metro-North explains that in 2011, the U.S. Department of Transportation amended its Americans with Disabilities

(“ADA”) regulations pertaining to passenger railroads, and the new regulation, effective October 19, 2011, requires a boarding platform design in which the horizontal gap between a train car and the platform is no more than 10 inches wide and the vertical height of the car floor is no more than 5.5 inches above the boarding platform. Metro-North asserts that the most recent gap measurements at the Hastings station were taken in 2007 and show a maximum horizontal gap distance of 5.5 inches and a maximum vertical gap distance of 1.5 inches, both of which comply with the new standards. Metro-North acknowledges that the new standards are not retroactive, and apply only to stations constructed or altered on or after February 12, 2012. Metro-North asserts that even though the new standards were not in place at the time of plaintiff’s accident in September 2009, they still “show that the FRA has never held railroads nationwide to a stricter standard even when it comes to ADA standards.” Metro North argues that plaintiff cannot support any claim of negligence because “the official vertical height differential measurements taken at the Hastings station in 2007 show a vertical gap of 1.5 inches at maximum, which is truly a *de minimus* defect and is in perfect compliance with the established FRA standard.” Metro North further argues that plaintiff has failed to demonstrate that a dangerous, defective, hazardous or trap like condition existed at the Hastings station under the current FRA standard.

In opposing the motion, plaintiff argues that the deposition testimony establishes the existence of issues of fact as to the size of the vertical height differential between the floor of the train and the station platform. Plaintiff objects that Metro North’s 2007 measurements were taken two years before the accident and that its witness, Richard Kirner, testified that the measurements were “theoretical” and not “actual.” Relying on his own testimony that the vertical height differential was 6 to 8 inches, plaintiff argues that Metro North violated its duty

by allowing the misleveling between the platform and the train; the vertical gap between the floor of the train and the top of the platform was unsafe; and it cannot be determined as a matter of law that the defect was trivial. Plaintiff also argues that his photographs establish a “clear issue of fact” by depicting a “significantly large gap” between the floor of the train and the top of the platform at the Hastings station. Plaintiff further argues that the vertical height differential between the train floor and the platform was the proximate cause of the accident, and that Metro North had actual and constructive notice of the unsafe condition.

In reply, Metro North asserts that plaintiff fails to raise a triable issue of fact, since he cites no regulation or statute to counter the FRA standard, and identifies no other regulation setting another standard for the same type of railroad as Metro North. Metro North addresses the photographs produced at plaintiff’s deposition, which were shown to Metro North’s witness Richard Kirner. Metro North points to Kirner’s testimony that he could identify the height differential as four inches, since the piece of wood shown in the photograph was 4 inches. Metro North argues that throughout discovery, plaintiff has not made any other measurements at the platform, either through his own expert or inspection, and that even if the court considered plaintiff’s photographs and assumed they were taken at the Hastings station, plaintiff cannot show a defect at the station, because the FRA standard under the ADA sets a height differential of 5.5 inches as acceptable.

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 issues of fact from the case.” Winegrad v. New York University Medical Center, 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 Hospital, 68 N.Y.2d 320, 324 (1986).

Defendant Metro North has failed to make a sufficient showing to be entitled to judgment as a matter of law. For the purposes of resolving this motion, the court assumes without deciding that the height differential standards set forth in the U.S. Department of Transportation's ADA regulations are relevant to determining the issue of Metro North's negligence. Metro North's reliance on 42 CFR §37.42(f) is misplaced, as the federal regulation merely sets a maximum standard for the vertical gap between the train floor and the station platform when the train floor is *above* the platform, and not, as here, when the train floor is *below* the platform. Specifically, section 37.42(f) provides that "the vertical height of the car floor is no more than 5.5 inches *above* the boarding platform."

In addition to the foregoing, Metro North neglects to cite the qualifying language in section 37.42(f), which provides that "[w]here the horizontal gap is more than 3 inches and/or the vertical gap is more than 5/8 inch, measured when the vehicle is at rest, the horizontal and vertical gaps between the car floor and the boarding platform must be mitigated by a bridge plate, ramp, or other appropriate device consistent with 49 CFR 38195(c) and 38.125(c)."

Metro-North likewise fails to meet its burden of establishing as a matter of law that the alleged defect was trivial and thus, non-actionable. Whether a defect is trivial is generally a question for a jury. See Dominguez v. OCG, IV, LLC, 82 AD3d 434 (1st Dept 2011). Nothing about the nature or appearance of the defect at issue, a 6 to 8 inch difference in the height between the train floor and the station platform, permits the court to determine as a matter of law

that the defect was too trivial to constitute a defective condition. To the contrary, plaintiff's "visual estimate" of the gap as between 6 to 8 inches is sufficient to raise issues of fact as to the size of the gap and whether it constituted an unsafe or dangerous condition. See Tzilianos v. New York City Transit Authority, 91 AD3d 435 (1st Dept 2012); Sanchez v. City of New York, 85 AD3d 580 (1st Dept 2011); Pemberton v. New York City Transit Authority, 304 AD2d 340 (1st Dept 2003). Here, just as in Sanchez v. City of New York, defendant Metro North's "measurements of the gap were taken remotely in time from the accident, and even contemporaneous measurements taken by defendant would raise a questions of fact by conflicting with plaintiff's estimate." Sanchez v. City of New York, *supra*.

Finally, defendant's reliance on Spivey v. New York City Transit Authority, 2009 WL 2844431 (Sup Ct, NY Co, 2009, J. Beeler) is not persuasive, in view of the Appellate Division First Department's decision in Tzilianos v. New York City Transit Authority, *supra*.

Accordingly, it is

ORDERED that defendant Metropolitan Transit Authority's motion for summary judgment is granted in the absence of opposition, and the complaint is severed and dismissed as against said defendant and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant Metro-North Railroad's motion for summary judgment is denied and the action shall continue as against said defendant; and it is further

ORDERED that the remaining parties shall proceed to mediation.

DATED: July 9, 2013

ENTER: **FILED**
 JUL 17 2013
 COUNTY CLERK'S OFFICE
 NEW YORK
 J.S.C.