

Musso v New York City Tr. Auth.

2013 NY Slip Op 34046(U)

November 13, 2013

Supreme Court, New York County

Docket Number: 105079/10

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

ROBERT MUSSO, AS TRUSTEE OF THE ESTATE OF
JAYNE GASTALDO,

INDEX NO. 105079/10

MOTION DATE 10/17/13

Plaintiff,

- v -

MOTION SEQ. NO. 002

NEW YORK CITY TRANSIT AUTHORITY, 1251
AMERICAS ASSOCIATES II, L.P. AND MITSUI
FIDOSAN AMERICA, INC.,

FILED

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Defendants.

COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 7 were read on this motion for summary judgment

- Notice of Motion – Affidavit of Service; Affirmation in Support – Exhibits A-K | No(s). 1-3
- Affirmation in Opposition – Exhibit A – Affidavit of Service | No(s). 4-5
- Affirmation in Reply – Affidavit of Service | No(s). 6-7

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

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that this action is referred to the Trial Support Office for reassignment to a general IAS part.

In this action, plaintiff, trustee of the bankruptcy estate of Jayne Gastaldo, alleges that, on January 20, 2009, Jayne Gastaldo fell while walking along the underground concourse at Rockefeller Center, near a stairway leading up to the corner of 50th Street and Avenue of the Americas. Defendant New York City Transit Authority (NYCTA) moves for summary

(Continued)

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

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judgment dismissing the action as against it on the grounds that it does not own or control the area of the alleged incident and plaintiff does not know what caused the fall.

At her statutory hearing, Gastaldo testified:

"As I was walking in the Concourse looking straight ahead just saying do I update my metro card or do I go to the bank, I'll go get my metro card, and just walking on the downward incline I went flying.

Q: Now, this the Concourse, part of what they call Rock Center.

A: All underground for Rock Center, yes.

* * *

Q: Now you said you went on a downward incline?

A: There is a little bit of a hill. That's prior to the location where I fell, so I was walking downward. As I came to a still, a slight slant, I would say, is where I fell, very slight. I think it would be level. I would think it's level at that point. I'm not certain.

Q: Where this was do you know who owns that area?

A: No, I don't."

* * *

Q: What does that lead to where you fell, where you were going?
Where does it lead to?

A: A number of locations.

Q: To different buildings?

A: It can go to another building, it could go to 1251. You can go to the subway where I was headed, and there are stores. It's the promenade. It would lead to the promenade.

Q: Do you know why you fell?

A: No.

Q: And when you fell did you fall to the ground?

A: I fell to the ground and while I was on the ground I noticed that my leg was wet and then I looked down because I wasn't looking down and I saw that it was slick.

(Coffey Affirm., Ex F [Gastaldo Hearing], at 16-18.)

"Although a plaintiff bears no burden to identify precisely what caused [her] . . . fall, mere speculation about causation is inadequate to sustain the cause of action." (*Acunia v New York City Dept. of Educ.*, 68 AD3d 631, 632 [1st Dept 2009].) Gastaldo testified that after she fell, she saw the ground "was slick." (Gastaldo Hearing at 18.) She also testified that, "I

(Continued)

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believe that the pavement was wet because after I had fallen I was in shock that my pants were wet" and "[the substance] must have been muddy or dirty because there was [] white on my black trousers." (Levine Affirm. [Gastaldo EBT], at 29, 32.) The reasonable inference from this testimony, which must be drawn in plaintiff's favor, is that Gastaldo may have allegedly slipped on something wet on the ground. (See *Signorelli v Great Atl. & Pac. Tea Co., Inc.*, 70 AD3d 439 [1st Dept 2010].)

NYCTA has provided sufficient evidence demonstrating that it did not own, maintain or control the area in dispute. In support of its motion, NYCTA submits the deposition testimony of Carmelite Cadet, a NYCTA engineer. (Coffey Affirm., Ex H. [Cadet EBT].) Cadet testified that she went to the 50th Street and 6th Avenue passageway adjacent to the stairs numbered O15 and O16, and noted that the NYCTA does not own or maintain the entrance/staircase or the area in front of it. (*Id.* at 10, 12-15). Defendant also notes that it does not have maintenance and cleaning schedules because the NYCTA does not control the subject area. (Coffey Affirm., ¶ 13). Moreover, the plaintiff has "not presented any evidence to counter the proof submitted by [NYCTA] that it did not own, operate, or control the [alleged] accident area." (*Walker v City of New York*, 251 AD2d 653 [2d Dept 1998].) Thus NYCTA has demonstrated prima facie entitlement to summary judgment as a matter of law.

The issue of whether the NYCTA had actual or constructive notice of the alleged defective condition need not be reached because NYCTA does not own or maintain the area of the alleged incident.

Plaintiff contends that if the Court accepts NYCTA's evidence, the Court should find that the location of the alleged incident was necessarily under the control of the nonmoving defendants. However, such relief against the nonmoving defendants should have been brought by motion. In any event, that the subject location was not owned, controlled or maintained by the NYCTA does not necessarily lead to the conclusion that the subject location was owned, controlled or maintained by the nonmoving defendants. Plaintiff could have affirmatively taken steps to determine which entity owned the subject area and moved for summary judgment as to ownership, which plaintiff has not done. (See *Grullon v City of New York*, 297 A.D.2d 261, 264 [1st Dept 2002].)

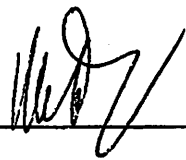
Contrary to plaintiff's arguments, the NYCTA "is entitled to costs in the action . . . unless the court determines to allow costs would not be

(Continued . . .)

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equitable, under all of the circumstances." (CPLR 8101.) "Good faith by itself does not require [the] court to deny costs, since all parties to [the] action have an obligation to act in good faith." (Dejesus v Starr Technical Risks Agency, Inc. 2005 WL 957389, *2, 2005 US Dist LEXIS 7152, *5-6 [SD NY, April 25, 2005, No. 03 Civ. 1298 (RJH)].) Furthermore, "although a [] court may deny costs based on financial hardship, indigency per se does not preclude an award of costs against [the] unsuccessful [party]." (Id.) Here, the plaintiff has filed for bankruptcy, but this is not sufficient to preclude an award for costs. (Id.) Therefore, the motion is granted and the action is dismissed against the NYCTA with costs to this defendant.

Dated: 11/13/13
New York, New York


_____, J.S.C.

- 1. Check one:
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
<input type="checkbox"/> DO NOT POST	<input type="checkbox"/> SUBMIT ORDER
<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> OTHER
<input type="checkbox"/> REFERENCE	

HON. MICHAEL D. STALLMAN

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