

<b>Stallings-Wiggins v New York City Tr. Auth.</b>
2014 NY Slip Op 33680(U)
December 1, 2014
Supreme Court, Kings County
Docket Number: 21256/10
Judge: Johnny Lee Baynes
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS**

**IAS TERM, PART 22**

-----X  
**NOREEN STALLINGS-WIGGINS,**

**Index No. 21256/10**

**Plaintiff,**

**Motion Sequence No. 7**

**- against -**

**Decision/Order**

**NEW YORK CITY TRANSIT AUTHORITY  
and METROPOLITAN TRANSIT AUTHORITY,**

**Present:  
Hon. Johnny Lee Baynes  
Justice, Supreme Court**

**Defendants.**  
-----X

**Numbered**

Notice of Motion and Supporting Affirmations (Affidavits)  
Answering Affirmations (Affidavits)  
Reply Affirmations (Affidavits)

1-3  
4-5  
6

Plaintiff Noreen Stallings-Wiggins (hereafter, plaintiff) moves in Seq. No. 7 for leave, pursuant to CPLR 2221 (e), to renew the branch of her motion in Seq. No. 2 which was to strike the affirmative defense of governmental immunity asserted by defendants New York City Transit Authority and Metropolitan Transportation Authority, sued herein as Metropolitan Transit Authority (hereafter, collectively, defendant), and to preclude defendant from raising such defense at trial; and, upon renewal, granting her prior motion.

***Background***

This lawsuit arises from an incident alleged to have occurred on November 23, 2009, at about 9:15 A.M. on the northbound Prospect Park Train Station in Brooklyn, New York. Plaintiff alleges that as she was exiting the fourth (last) door in the eighth (last) car of a northbound B Train, she tripped and fell because of the gap between the station platform and train door. A pre-accident space measurement survey of the station platform found that the

area where plaintiff fell was curved at a radius of 1,000 feet, and that the fourth door of the eighth car had an 8" horizontal gap and a 1.5" vertical gap from the station platform.

On August 26, 2010, plaintiff commenced this action, alleging that the gap between the station platform and train door constituted a dangerous condition. Defendant joined issue on October 7, 2010, by serving an answer which, at that time, did not assert the governmental immunity defense. On August 18, 2011, defendant provided plaintiff with the internal "NYCTA & MTA's Gap Rules" that were prepared between 1986 and 2009. On December 28, 2012, plaintiff served the prior motion seeking, among other things, to strike the potential defense of governmental immunity or, in the alternative, to compel defendant to provide discovery regarding this defense. The Court, by order, dated May 17, 2013 (hereafter, the prior order), resolved the prior motion by directing that defendant (1) serve the last two pre-accident geometry car measurements for the Prospect Park station, and (2) amend its answer to include the governmental immunity defense by date certain or, otherwise, be barred from asserting it. On June 18, 2013, defendant served a notice of expert witness disclosure indicating that its expert engineer would be relying on certain additional documents. On June 21, 2013, defendant timely served its amended answer now including the governmental immunity defense. On October 22, 2013, plaintiff filed a note of issue and certificate of readiness.

On December 11, 2013, plaintiff moved for an order striking the affirmative defense of governmental immunity and precluding defendant from raising it at trial. In opposition, defendant submitted an affidavit of its previously disclosed expert, together with copies of

certain additional documents supporting its platform gap policies. Plaintiff replied with an affidavit of her own expert responding to the arguments advanced by defense expert. At oral argument, plaintiff withdrew her motion because her reply papers, through the submission of an expert affidavit, raised issues that she should have addressed in her opening papers.

On April 28, 2014, plaintiff refiled her motion, which was referred to the City Transit Part. There, according to plaintiff, she was advised that her motion appeared deficient because it was not denominated as one for leave to renew and was not made returnable before this Court. Plaintiff then served the instant motion for leave to renew and made it returnable before this Court.

#### *Discussion*

A motion for leave to renew must “be based upon new facts not offered on the prior motion that would change the prior determination.” CPLR 2221 [e] [2]. The Court, in its prior order of May 17, 2013, merely permitted defendant to amend its answer to plead governmental immunity as an affirmative defense so as to provide plaintiff with a procedural pathway for moving to strike this defense. The merits of the governmental immunity defense were first presented to the Court nine months later on December 11, 2013, when plaintiff moved to strike it. Plaintiff later withdrew her motion because, as the Court indicated, she improperly raised new issues in her reply papers. Now that plaintiff has corrected this deficiency and included an expert affidavit in her opening papers, the merits of her motion to strike are ripe for determination. Accordingly, the branch of plaintiff’s motion for leave to renew her prior motion is denied as moot.

The remaining branch of plaintiff's motion is, in effect, one for summary judgment dismissing the governmental immunity defense. "[A] governmental entity may be held liable for injuries arising out of the execution of a duly-executed plan only if the plan . . . was evolved without adequate study or lacked reasonable basis." *Chase v New York City Tr. Auth.*, 288 AD2d 422, 423 [2d Dept 2001] [internal quotation marks and citations omitted], *lv denied* 98 NY2d 611 [2002]. "A mere informal review or internal policy will not suffice" to establish the governmental immunity defense. *Leon v New York City Tr. Auth.*, 96 AD3d 554, 555 [1<sup>st</sup> Dept 2012]. Rather, the "defendant must demonstrate that a study, inquiry or investigation into that question was conducted and reached the determination now relied upon." *Id.* [internal quotation marks omitted].

Here, defendant's claim to governmental immunity is based on two sets of documents it produced in pretrial discovery. Defendant's initially produced documents are derived from an internal memorandum of former president of New York City Transit Authority, dated May 28, 1987, known as the "Gunn memorandum," which defendant followed in its internal memoranda in 2001 and 2002. In *Leon*, the First Department held that these self-generated memoranda were insufficient to establish the governmental immunity defense. *Leon*, 96 AD3d at 555.

Defendant's additional documents are likewise insufficient to support its governmental immunity defense. The first of these documents – a 2012 internal memorandum on the New York City subway-platform clearances – is irrelevant because it was prepared three years after

the accident at issue. The other additional documents – a 2004 study commissioned by the UK Department of Transport of the British subway system and a 2009 passenger-behavior study of the New Jersey train stations prepared for the New Jersey Department of Transportation and the Federal Highway Administration – do not “establish that this type of study, inquiry or investigation was made by any group or board or committee on behalf of defendant[ ].” *Jackson v New York City Tr. Auth.*, 30 AD3d 289, 290 [1<sup>st</sup> Dept 2006].

Even if the Court were to assume that the UK study and the NJ study were reflective of an industry standard or a generally accepted safety practice, they would not be conclusive on the issue of liability. “A jury must be satisfied with the reasonableness of the common practice, as well as the reasonableness of the behavior that adhered to the practice.” *Tzilianos v New York City Tr. Auth.*, 91 AD3d 435, 436 [1<sup>st</sup> Dept 2012].

Accordingly, the Court holds that defendant is not entitled to governmental immunity. The remaining branch of plaintiff’s motion which is for an order striking this affirmative defense from defendant’s amended answer is granted. The affirmative defense of governmental immunity is hereby stricken. Defendant is not permitted to raise the defense of governmental immunity at trial.

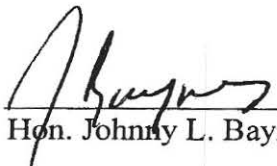
The parties are reminded of their next scheduled appearance in the City Trial Readiness Part – Transit on January 8, 2015.

This constitutes the decision and order of the Court.

ENTER,

**FILED**  
DEC 09 2014  
KINGS COUNTY CLERK'S OFFICE

Dated: December 1, 2014  
Brooklyn, New York

  
Hon. Johnny L. Baynes, J.S.C.