

<b>Obey v City of New York</b>
2014 NY Slip Op 33849(U)
May 15, 2014
Supreme Court, New York County
Docket Number: 106088/07
Judge: Geoffrey D. Wright
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 47

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ROBERT OBEY,

Plaintiff-Petitioner(s),

-against-

THE CITY OF NEW YORK and NEW YORK  
CITY TRANSIT AUTHORITY,  
Defendants.

Index #106088/07

Motion Cal. #

Motion Seq. #

DECISION/ORDER

Pursuant To Present:

Hon. Geoffrey Wright

Judge, Supreme Court

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: set aside verdict and dismiss the complaint

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PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1,2
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	3,4
Replying Affidavits & Exhibits Annexed	5,6
Other (Cross-motion) & Exhibits Annexed	
Supporting Affirmation	

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Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

On March 6, 2006, the Plaintiff entered the southbound station of the #6 IRT local train at 33<sup>rd</sup> Street and Park Avenue South. At some point, the Plaintiff lost his balance and fell to the tracks. At some point thereafter, some part of a #6 local train passed over the Plaintiff, severing his left foot. After a trial before a jury, the verdict returned found the Plaintiff 40% negligent, and awarding the Plaintiff a total of \$1,950,000.00. Both sides now move to set aside the verdict. The defense bases its motion on liability, the Plaintiff bases his motion on the damages awarded. Because there are no damages without liability, I will address the Transit Authority's motion first.

**FILED**

MAY 22 2014

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NEW YORK

I start the analysis with what we know of the incident, which is very little. The Plaintiff could not recall anything between the time he lost his balance and the time that he regained consciousness back on the platform. He does not remember falling. The train operator of the train that is alleged to have struck the Plaintiff, recalls seeing a pair of sneakers on the tracks, toward the south end of the platform, as the train was going no faster than 5 mph, and about to come to a stop. There was no prior warning of any passenger on the tracks (cf *MIRJAH v. NEW YORK CITY TRANSIT AUTHORITY*, 48 A.D.3d 764, 853 N.Y.S.2d 148, 2008 N.Y. Slip Op. 01722, where the train operator, while coasting into the station, saw someone on the tracks). In a review of cases with circumstances similar to this one, the courts have consistently found that train operators were not negligent as a matter of law. For instance, in the case of *DIBBLE v. NEW YORK CITY TRANSIT AUTHORITY*, 76 A.D.3d 272, 903 N.Y.S.2d 376, 2010 N.Y. Slip Op. 05494, the First Department dismissed, after a trial, a verdict in favor of a Plaintiff who was seen in the middle of the tracks as the train was entering the station. It was only when the Plaintiff, in a plastic bag, moved, that the train operator applied the brake. The motorman had testified that he saw a lump on the tracks that he took at first to be debris. In this case, train operator Lopez could not distinguish what he saw as anything in particular. Further, in the cases of *BACIC v. NEW YORK CITY TRANSIT AUTHORITY*, 64 A.D.3d 526, 883 N.Y.S.2d 258, 2009 N.Y. Slip Op. 05734, and *POSNER v. NEW YORK CITY TRANSIT AUTHORITY*, 27 A.D.3d 542, 813 N.Y.S.2d 106, 2006 N.Y. Slip Op. 01784 expert testimony of what a train operator should have seen was ruled to be speculative.

In the case of *SEONG SIL KIM v NEW YORK CITY TR. AUTH.*, 27 A.D.3d 332, 812 N.Y.S.2d 485, 2006 N.Y. Slip Op. 02274, another similar case, the Appellate Division, First Dep., dismissed a Plaintiff's verdict even though there was evidence that the train operator had received a warning to be on the lookout for a person on the tracks.


The Plaintiff's expert testimony as to reaction time must also be disregarded as speculative [*MIRJAH v. NEW YORK CITY TRANSIT AUTHORITY*, 48 A.D.3d 764, 853 N.Y.S.2d 148, 2008 N.Y. Slip Op. 01722; *DIBBLE v. NEW YORK CITY TRANSIT AUTHORITY*, 76 A.D.3d 272, 903 N.Y.S.2d 376, 2010 N.Y. Slip Op. 05494]. Therefore, the motion to set aside the verdict on the issue of liability is granted, and the complaint is dismissed.

In view of the foregoing, the Plaintiff's motion on the issue of damages is denied. I note here also, that the Plaintiff was unable to submit any case law on the issue of fault. This constitutes the decision and order of the court.

**FILED**

Dated: May 15, 2014

MAY 22 2014

  
GEOFFREY D. WEIST

AJSC

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