

Bonet v Metropolitan Tr. Auth.
2016 NY Slip Op 30724(U)
April 13, 2016
Supreme Court, New York County
Docket Number: 451510/14
Judge: Michael D. Stallman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X
FRANCIS BONET,

Plaintiff,

Index No. 451510/14

- against -

Motion Seq. No. 001

METROPOLITAN TRANSIT AUTHORITY, NEW
YORK CITY TRANSIT AUTHORITY and BOSTON
PROPERTIES, INC.,

Decision and Order

Defendants.

-----X

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action, plaintiff alleges that she slipped on an escalator leading down to a subway platform. Defendants Metropolitan Transportation Authority and New York City Transit Authority (collectively, Transit Defendants) move for summary judgment dismissing the complaint based on the storm in progress doctrine.

BACKGROUND

Plaintiff alleges that on the morning of Wednesday, February 5, 2011, she was using the subway to get from her company's Manhattan office to her company's Queens office. (Feinstein Moving Affirm. Ex. G [Bonet statutory hearing tr.] at 6:09-14, 8:18-9:07; Ex. H [Bonet EBT] at 12:19-

13:10.) Plaintiff alleges that this interoffice commute required her to transfer from the 6 train to the E train at the Lexington Avenue station at East 53rd Street. (Bonet statutory hearing tr. at 9:11-10:03; Bonet EBT at 16:09-17:03, 19:14-21.) In making this transfer, plaintiff alleges that she had to walk through an underground passageway and then use a descending escalator to get down to the E train platform. (Bonet statutory hearing tr. at 9:24-10:19; Bonet EBT at 19:17-20:09.) Plaintiff alleges that around 9:30 a.m. that morning, she was walking down this escalator to the E train platform when her foot slipped on wet escalator stairs, causing her injury. (Feinstein Moving Affirm. Ex. C [Notice of Claim] ¶ 3; Ex. F [Bill of Particulars] ¶ 2-4, 6-7; Ex. F [Bonet statutory hearing tr.] at 6:07-14, 11:08-12:25; Ex. H [Bonet EBT] at 12:17-24, 13:05-07, 20:08-23:01.) Plaintiff alleges that she was assisted by two female customers who summoned NYCTA personnel to the scene, and she was eventually transported to the hospital. (Bonet statutory hearing tr. at 12:23-13:15; Bonet EBT at 24:09-25:18, 26:19-25.)

In response to plaintiff's accident, Transit Electro Maintenance Mechanic Aleksandr Krayniy and his partner Elya Ziskind were called to inspect the subject escalator. (Feinstein Moving Affirm. Ex. J [Krayniy EBT] at 28:06-30:11.) Krayniy states that when they arrived on scene at 10:01

a.m. they put the subject escalator, named Escalator 269, out of service so that they could perform an inspection. (Krayniy EBT at 30:04-31:06; 47:17-48:11.) Krayniy stated that he and Ziskind then began performing a visual inspection by walking up and down the non-moving escalator and checking the steps “if it’s broken or not; if it’s wet or dry.” (Krayniy EBT at 31:23-32:12.) Krayniy stated that, after inspecting the first half of the steps, he and Ziskind turned the escalator back on so that they could measure the bottom half of the steps. (Krayniy EBT at 33:11-22.) Krayniy stated that he found that the flooring around the entrance of Escalator 269 was dry, and that the escalator steps were also dry. (Krayniy EBT at 31:07-15, 32:13-23, 87:22-24.)

Thereafter, Transit defendants memorialized plaintiff’s accident and the subsequent escalator inspection in several reports, and Transit defendants submit these collected reports as Exhibit K. A Customer Incident Report stated that the accident occurred at 9:35 a.m. on “Esc. #269”, and that the “place of incident” was “wet.” (Feinstein Moving Affirm. Ex. K at Customer Incident Report.) An Elevator/Escalator Unusual Occurrence Report noted “steps wet because of snowy conditions.” (*Id.* at Elevator/Escalator Unusual Occurrence Report.)

A CTA Cleaner Report stated that the weather conditions were rainy, but that there was no “snow or ice” or “defects or obstructions” at the place of the incident. (*Id.* at CTA Cleaner Report.) The Escalator Inspection/Interruption Report stated that the inspectors “found steps dry and no defect with machine.” (*Id.* at Escalator Inspection/Interruption Report.)

In support of their motion, Transit Defendants submit National Oceanic and Atmospheric Administration (NOAA) records (from the Central Park location). (See Feinstein Moving Affirm. Ex. L [NOAA Records].) These NOAA records establish that 1.43 inches of water equivalent fell on the date of plaintiff’s accident, including 4.0 inches of snowfall. (NOAA Records at 1.) The precipitation began that day between 1 and 2 a.m., and it fell at its heaviest rate—0.30 inches water equivalent—between 7 and 8 a.m. (*Id.* at 2.) However, between 8 and 9 a.m. the precipitation had slowed to 0.08 inches water equivalent, and between 9 and 10 a.m. there was only trace precipitation recorded. (*Id.*)

DISCUSSION

“Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party’s meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action.”

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations, emendation, and quotation marks omitted].) Furthermore, on a motion for summary judgment, “facts must be viewed in the light most favorable to the non-moving party.” (*Id.* [internal quotation marks omitted].)

Transit Defendants argue that the Court should summarily dismiss this case because plaintiff slipped on a condition created by a storm in progress. Plaintiff argues that there was no storm in progress because there was only trace precipitation falling at the time of plaintiff’s accident.

Under the storm in progress doctrine, a property owner “cannot be held liable for a fall caused by a winter storm while the storm is in progress, or for a reasonable time thereafter.” (*Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 735 [1st Dept 2005], *affd* 6 NY3d 734 [2005].) The doctrine “is designed to relieve the worker(s) of any obligation” to mitigate hazards created by the storm when the storm conditions will likely render those mitigation efforts “fruitless.” (*Powell v MLG Hillside Assoc., L.P.*, 290 AD2d 345 [1st Dept 2002].) The storm in progress doctrine “is also applicable where one falls inside a facility because of a slippery condition brought about as a direct consequence of ongoing inclement weather.” (PJI 2:90; *see also Hussein v New York City Tr. Auth.*, 266 AD2d 146, 146-47 [1st Dept 1999] “[J]ust as it is unreasonable to require the Transit Authority to

keep the floors of subway cars clean and dry during ongoing storms, when the subway cars are continuously filled with wet commuters, similarly, a station floor cannot be effectively kept dry in such circumstances.” [internal citation omitted].)

Here, the NOAA records submitted by the Transit Defendants clearly establish that 1.43 inches of water equivalent fell on the date of plaintiff’s accident, including 4.0 inches of snowfall. (NOAA Records at 1.) The vast majority of that precipitation fell between 1 and 9 a.m.—1.39 inches of water equivalent. (*Id.* at 2.) Even if this Court were to accept plaintiff’s argument that trace precipitation does not constitute a storm in progress, this Court would still be required to find that Transit Defendants could not be expected to mitigate all storm related hazards within roughly 30 minutes of the storm’s cessation. Given the amount of precipitation that fell, it is unreasonable to expect Transit Defendants to remedy the effects of customers tracking moisture into the station within 30 minutes of the storm’s supposed cessation. (See *e.g. McKenzie v County of Westchester*, 38 AD3d 855, 856 [2d Dept 2007] [finding that defendants did not have a duty to prevent customers from tracking “snow, slush, and water” onto the bus, that was remaining from a snowstorm “several days earlier”].)

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants Metropolitan Transportation Authority and New York City Transit Authority's motion for summary judgment, dismissing the complaint, is GRANTED and the complaint is dismissed with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 13, 2016
New York, New York

ENTER:



J.S.C.

MICHAEL D. STALLMAN
J.S.C.