SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **IAS MOTION 22**

Justice

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INDEX NO. 160232/2014

BRIAN ASHTON, RAELLEN WATT,

MOTION DATE 01/23/2019

Plaintiff,

MOTION SEQ. NO. 007

- v -

NORFOLK SOUTHERN RAILWAY COMPANY, LIVONIA, AVON & LAKEVILLE RAILROAD CORPORATION, WESTERN NEW YORK & PENNSYLVANIA RAILROAD, LLC

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 270, 271, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 314, 316, 317, 318, 319, 320, 321, 322, 323

were read on this motion to/for JUDGMENT - SUMMARY.

Before the Court is defendants' motion for summary judgment for an order to dismiss plaintiff Brian Ashton and Plaintiff Raellen Watt's complaint against defendants Norfolk South Railway Company, Livonia, Avon & Lakeville Railroad and Western New York & Pennsylvania Railroad (collectively "Defendants").

Background

This matter stems from an accident which occurred on June 5, 2014, on Ruckles Road in Allegany County near Friendship, New York, when a train crashed into a FedEx vehicle operated by plaintiff Brian Ashton. Plaintiffs commenced this action on October 20, 2014 and allege that Ashton was seriously injured as a result of the accident which occurred when he was travelling over a passive public railroad grade crossing (the "Ruckles Road Crossing") and was struck by a train owned and operated by defendant Western New York & Pennsylvania Railroad ("WNYP"). At the time of the accident, the crossing was owned by non-party Southern Tier Extension Rail

Authority and leased to defendant Norfolk Southern Railway Company ("NS") who then subleased the track to WNYP.

Plaintiff Brian Ashton, a FedEx driver claims to have not been familiar with the crossing, having driven over it approximately three or four times in a five-year period (Pl.'s Ex. 2 at 51, ¶3-25). The Ruckles Road Crossing is a passive railroad crossing that had crossbucks and yield signs but no active warning devices such as gates or lights (*id.* at 53, ¶6-19). Plaintiff avers that as he approached the crossing he was traveling ten miles per hour, looked to his left and right, did not see the train, and proceeded to cross over when he was struck (*id.* at 147, ¶5-17). Plaintiff further alleges that Defendants failed to maintain vegetation at the crossing which obstructed his visibility.

Summary Judgment

Here, Defendants claim that plaintiff Brian Ashton is liable for the underlying accident and seek the Court's relief to dismiss plaintiffs' Complaint in its entirety. Further, defendants claim that the derivative clam of co-plaintiff, Raellen Watt must be dismissed as she was not involved in the accident and allege that she has never been married to plaintiff Brian Ashton.

"The proponent of a summary judgment motion 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, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

Preliminarily, the Court addresses the branch of defendants' motion seeking to dismiss Raellen Watt's consortium claim. Defendants allege that plaintiff Watt has never been married to plaintiff Ashton and aver that her consortium claim thus fails as a matter of law. The First Department Appellate Division has found that damages for loss of consortium are not recoverable when the alleged wrongful conduct precedes the marriage of a couple (*Mehtani v New York Life Ins. Co.*, 145 AD2d 90, 95 [1st Dep't 1989]). Defendants attach the deposition of Brian Ashton dated March 1, 2018 in support of their motion (Exh T, at 10, 170, & 171). Plaintiff testified that while he has been with plaintiff Watt for many years, that they are not married but plan to get married in the future (*id.*). Thus, defendants have made a prima facie showing that plaintiff Watt and plaintiff Ashton were not married at the time of the alleged wrongful conduct and that the consortium claim fails as a matter of law. Plaintiffs' opposition fails to address the consortium claim, thus the branch of defendants' motion to dismiss plaintiff Watt's consortium claim is granted.

As to plaintiff Ashton's remaining claims, defendants state that plaintiff's allegations can be threshed out into three categories: allegations as to signage and absence of gates/lights at the crossing; allegations of improper track maintenance at the crossing; and allegations of improper train handling/equipment. Defendants note that the Ruckles Road Crossing does not have a gate or light but rather a yield and cross buck signs. As to the allegations of improper track maintenance at the crossing, Defendants claim that aside from the lights and gates, the maintenance of the Ruckles Road Crossing, such as clearing vegetation was not within the purview of NS but rather of the operating railroad WNYP. Defendants claim that railroad operations are governed by a comprehensive scheme of federal statutes including the Safety Appliance Act, the Locomotive Inspection Act, and the Federal Railroad Safety Act ("FRSA").

The issue before the Court is the extent to which the FRSA preempts plaintiff's claim that defendants failed to install lights or gates at the crossing. The party advocating preemption bears the burden of proof (Fifth Third Bank ex rel. Trust Officer v. CSX Corp., 415 F3d 741 [7th Cir 2005]). In this case, defendants must demonstrate whether FRSA expressly preempts New York law.

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" (U.S.C.A. Const. Art. VI cl. 2). The Court interpreting federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption, unless it is a clear and manifest purpose of Congress (*CSX Transp., Inc. v Eastwood*, 507 US 658 [1993]). "Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue" (*id.* at 664). "If the statute contains an express-preemption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause" (*id.*).

"The issue before this Court is whether the Secretary of Transportation has issued regulations covering the same subject matter as [New York] negligence law pertaining to the maintenance of, and the operation of trains at grade crossings" (*id.*). Enacted in 1970, the purpose of FRSA "is to promote safety in every area of railroad operations and reduce the railroad-related accident and incidents (49 U.S.C. § 20101). "[T]he Act specifically directs the Secretary of Transportation to study and develop solutions to safety problems posed by grade crossings . . . the Secretary is given broad powers to 'prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety'" (*CSX Transp., Inc.*, at 661 [1993] [citing 45 U.S.C. § 421). In order to demonstrate that Federal regulations have a pre-

emptive effect, the movant must establish that the regulations do more than just "touch upon" or "relate to" the subject matter (*id.* citing *Morales v Trans World Airlines, Inc.*, 504 YS 374, 383-384 [1992]).

Through its crossing program, the Federal Highway Administration has used federal funds to install safety features at railroad crossings, including those at Ruckles Road Crossing. Regarding warning devices, States are required to follow standards set out in Federal Highway Administration ("FHWA") Manual on Uniform traffic Control Devices for Streets and Highways (the "Manual") (23 CFR §§ 646.214(b)(1)). The Manual provides that "the type of warning device to be installed, whether the determination is made by a State . . . agency, and/or the railroad, is subject to the approval of the FHWA" (*id.* (b)(4)).

The plain language demonstrates that the Manual establishes a "bargain between the Federal and State Governments . . . [and] has little to say about the subject matter of negligence law" (*CSX Transp., Inc.*, at 667-668 [1993][the opinion of the Supreme Court delivered by the late Supreme Court Associate Justice Byron White stated that "[i]n light of the relatively stringent standard set by the language [of the act] . . . and the presumption against pre-emption, and given that the regulations provide no affirmative indication of their effect on negligence law, we are not prepared to find pre-emption solely on the strength of general mandates"]). In fact, the FHA Traffic Control Devices Handbook states that "[j]urisdiction over railroad-highway crossings resides almost exclusively in the States" (U.S. Dept of Transportation, Federal Highway Administration, Traffic Control Devices Handbook [1983]). 23 CFR §§ 646.214(b)(3) and (4), provide requirements as to how railroads are to participate in the improvement of crossings. "For projects in which federal funds participate in the installation of warning devices,

the Secretary [of Transportation] has determined the devices to be installed and the means by which railroads are to participate in their selection" (*id.*).

The Secretary's regulations do seem to cover the subject matter of state law; however, Congress amended the FRSA preemption Clause in the 2007 Preemption Clarification Amendment 49 U.S.C. §20106 in order to prevent FRSA from shielding railroads from liability for harm resulting from violations of FRSA standards (Pub. L. No. 110-52, § 1528). The Amendment clarifies that "even when a regulation covers the subject matter of a claim, the claim can avoid preemption if the railroad violated a federal standard of care or its internal rule" (*Zimmerman v Norfolk Southern Corp.*, 706 F.3d 170, 178 [3rd Cir 2013] citing 49 U.S.C. §20106(b)(1)(A-B) [finding that "the amendment explicitly preserves the right to seek damages for violating state law, as long as the law is compatible with subsection (a)(2)" citing to 49 U.S.C. § 20106(a)(2)].

Upon examination of New York State law, the Court finds that the state law is compatible with that of the relevant federal regulations at issue. Defendants note that plaintiff's improper maintenance claim relies on *Albahae v Catskill Mountain Railroad Company Inc.*, 278 AD2d 639 [3d Dep't]. In *Albahae* the Court cited to NY Railroad Law § 21 which states that as to the maintenance of a railroad crossing "the corporation owning or operating such railroad shall construct and maintain a roadway." Defendant NS mistakenly construes NY Railroad Law § 21 to mean that the operating railroad and not the lessor of the railroad has a nondelegable duty to maintain the crossing. Defendant NS states that WNYP sub-leased the railroad line and crossing from NS and thus was operating trains over the crossing within the meaning of Railroad Law §21 and never abrogated its responsibilities in any way. The Court notes that NY Railroad Law § 21 "imposes a duty of maintenance which required the operating railroad to maintain grade

crossings in a reasonable, safe condition, and that such duty is continuous, nondelegable, and is not abrogated when its interest in the railroad is acquired by lease"; however, "by its terms the statute does not preclude another entity such as defendant from assuming a coextensive responsibility for maintaining the cross in a reasonably safe manner" (*Webster v Town of Saugerties*, 25 AD3d 861, 863 [2006] [citing *Albahae* 278 AD2d 639 [2009]).

NS, like WNYP, should not be relieved from its responsibility to maintain the railroad or crossing in a reasonably safe manner. Where a party does not own, maintain or control the railway but was in fact involved in maintaining a crossing, that party is not precluded from assuming a duty of its own (*id.* at 862 [finding that even if a railroad had a nondelegable duty to maintain the crossing, this did not preclude an adjoining landowner who maintained the crossing from assuming a duty of its own]). Plaintiffs allege that NS maintained the property and made repairs to it. In support of their argument that NS maintained the property at issue, plaintiffs submit the deposition of Carl Belke, an employee of WNYP who testified that NS have the ability to inspect the track and have made such inspections (Aff in Op, Exh 10 at 18, ¶ 10-23). Further, plaintiffs attach the deposition of Frank Meador, the director of strategic planning at NS who testified that NS maintains rights to come and repair the track (*id.* at 28, ¶ 1-8). Under New York State law both NS and WNYP owe a duty to properly maintain the crossing.

As to vegetation, the Secretary of Transportation promulgated 49 CFR § 213.37 in order to regulate vegetation, [and] Congress explicitly has preempted all state regulation in this area." The United States Court of Appeals for the Eleventh Circuit has found a railroad is responsible for the vegetation near its tracks regardless of whose property the trees are on (*Easterwood v CSX Transp., Inc.*, 933 F2d 1548, 1556-1157 [11th Cir 1991] [finding that "the trees contributed to the dangerousness of the intersection and therefore increased the need for better signals.

Therefore, even if the trees are out of the railroad's control, their very presence increases the need for the railroad to take other steps to improve the safety of the intersection"]). Further, under New York Railroad Law § 53 a railroad company has the "duty of maintaining the highway wherever practicable to maintain its property at or near such grade crossing free of obstruction to vision." Thus, the Court finds that pursuant to state and federal law, both NS and WNYP owe a duty to properly maintain signage, gates, lights and vegetation at the crossing.

As to the speed of the train, the Court finds that neither defendants can be found liable for operating the train at issue at an excessive speed. A railroad has a duty to operate its trains at a safe speed and will be found liable for a collision caused by excessive speed (*Massoth v Delaware & H. Canal Co.*, 64 NY 524 [1876]). Pursuant to 49 C.F.R. § 213.9 a train operating on a Class 2 track shall not exceed twenty-five miles per hour. Here, defendants claim that they are not in violation of the federal standard of care. At the time of the incident, the train was recorded as traveling on a Class 2 track at a speed of twenty-six miles per hour in a twenty-five miles per hour speed zone.

Defendants allege that it was plaintiff Brian Ashton's negligence and that the speed of the train and maintenance of the crossing was not the proximate cause for the accident. However, the Appellate Division has found that whether a plaintiff "may have been negligent, or reckless, does not insulate defendant from liability, for her intervening conduct 'may not serve as a superseding cause, and relieve [defendant] of responsibility, where the risk of the intervening act occurring is the very same risk which renders [defendant] negligent'" *Miller v Town of Fenton*, 247 AD2d 740, 742 [3d Dept 1998] [finding that defendant was not entitled to summary judgment where plaintiff's view of a train was obscured from plaintiffs view at the time of the accident and there was an absence of warning signs]).

Here, the Court finds that an issue of fact exists as to plaintiff Brian Ashton's ability to see the train and warning signage due to the alleged vegetation present at the crossing. New York State law is not in conflict with federal regulations and thus plaintiff's claims are deemed to not be preempted. Defendants motion to dismiss plaintiff's complaint is denied.

Accordingly, it is ORDERED that the branch of defendants' motion to dismiss the claims of plaintiff Raellen Watt is granted and the consortium causes of action of the Complaint are dismissed; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption read as follows:

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BRIAN ASHTON
Plaintiff,
-against- Index No. 160232/2014

NORFOLK SOUTHERN RAILWAY COMPANY,
LIVONIA, AVON & LAKEVILLE RAILROAD CORP.
and WESTERN NEW YORK &
PENNSLYVANIA RAILROAD, LLC
Defendants
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and it is further;

ORDERED that the branch of defendants' motion to dismiss the Complaint of plaintiff Brian Ashton is denied; and it is further

ORDERED that within 30 days of entry, counsel for plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

4/9/19
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE