SHORT FORM ORDER

# ORIGINAL

INDEX No. 15-605004
CAL. No. 18-00076OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

***PRESENT:***

Hon. THOMAS F. WHELAN
Justice Supreme Court

MOTION DATE 5-24-18 (006)
MOTION DATE 7-30-18 (007)
ADJ. DATE 8-27-18
Mot. Seq. # 006 - MD
Mot. Seq. # 007 - XMG

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ANDREW W. BERGMAN,

Plaintiff,

- against -

LONG ISLAND RAIL ROAD, d/b/a MTA LONG ISLAND RAILROAD and METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

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Upon the following e-filed papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendants dated April 23, 2018 ; Notice of Cross Motion and supporting papers by plaintiff dated July 13, 2018 ; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers by defendants dated August 20, 2018 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion (#006) of the defendants for summary judgment dismissing the complaint is denied; and it is further

***ORDERED*** that the cross motion (#007) of the plaintiff for an order granting leave to amend his bill of particulars is granted.

Plaintiff commenced this action to recover damages for injuries that he allegedly sustained as a result of a slip-and-fall accident that occurred April 12, 2014, at approximately 3:00 a.m., on the platform of track 3 at the Babylon Long Island Railroad station. Plaintiff alleged that defendants Long

Island Railroad and Metropolitan Transportation Authority were negligent, *inter alia*, in maintaining the platform at the station, in allowing a significant gap to exist between the train and the platform, and in failing to warn that a dangerous condition existed on the platform.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff was the sole proximate cause of his injuries, and that plaintiff cannot prove that a dangerous condition existed on the platform at the time of his accident. Plaintiff cross-moves for leave to amend his bill of particulars to reflect the accurate date of the accident, and he opposes defendants' motion for summary judgment on the ground that they failed to meet their burden.

Plaintiff's testimony at a hearing pursuant to General Municipal Law section 50-h and at his later deposition was similar. According to plaintiff, on April 11, 2014, after he left work in New York City he went to have a meal and drinks with a friend. He could not recall his friend's name, and he was not sure how much alcohol he consumed that night, but he was not drunk. During the early morning hours of April 12, he planned to travel via the Long Island Railroad's Babylon line from Penn Station to Seaford to get home, but he had to wait for the train for a few hours because he missed the last train. While waiting, he drank a beer and ate "a couple slices" of pizza. When the train arrived, plaintiff sat in the second car from the rear and decided to sleep, and as a result he missed the Seaford stop. He awoke when the train arrived at the Babylon station, and he attempted to "get [his] bearings" to exit the train. When he stepped out of the train, plaintiff's foot "got stuck in between the platform and the train and [he] fell to [his] left knee and it broke." Plaintiff testified that he slipped on the part of the platform that was made up of concrete, had a "yellow skid pad," and was broken with "jagged stones." Plaintiff did not observe the ground where he slipped immediately after the accident; however, he returned some time later to photograph the area where he fell. The platform was lit, and he was walking at a regular pace when he exited the train. Plaintiff could not recall the exact size of the gap between the platform and the train, but he wore size 11 in shoes and his foot fit inside of the gap. Plaintiff had frequently traveled on the train for a two-year period before the accident, and he recalled hearing announcements to watch the gap between the train and the platform during those trips. He testified that he was looking for signs on the "horizon" to determine where he was when the accident occurred. Plaintiff was transported to Good Samaritan Hospital via ambulance and treated for his injuries. He could not recall whether a blood test was conducted while he was there.

In an affidavit, Elizabeth Spratt averred that she was the director of toxicology at Westchester Department of Laboratories and Research. She stated that she reviewed plaintiff's medical records, which indicated that at 5:35 a.m. on the morning of his accident, plaintiff's blood alcohol level was at 0.213 percent. According to Spratt, based upon a reasonable degree of certainty in the field of forensic toxicology, plaintiff's blood alcohol level at the time of the accident would have been approximately 0.241 percent, which is over 3 times the legal driving limit. Spratt concluded that plaintiff was highly intoxicated at the time of his accident, and, based upon his blood alcohol level, his coordination would have been adversely affected with respect to his balance and equilibrium.

Devica Das-Collado testified that she was employed by the Long Island Railroad as a staff engineer at the time of plaintiff's accident. The Long Island Railroad owned the Babylon train station where plaintiff's accident occurred. Das-Collado's primary responsibility was to manage projects and

gather information for the claims department. The Long Island Railroad had guidelines concerning the structure of its train platforms, but those guidelines did not pertain to the gap between the platform and the train. In her capacity as an engineer, Das-Collado had not measured the gaps, and she was not aware of any other employee who was responsible for taking those measurements. She testified that the Long Island Railroad used a measuring car that measured the distance from the "center line of the track to the edge of the platform." The station platforms were made out of concrete, and a tactile strip, which is a warning strip that is used to alert customers with disabilities that they are approaching the edge of the platform, was installed near the edge of the platform. The platform was inspected on an annual basis, and Das-Collado was not aware of any complaints concerning the gaps at the Babylon Sation prior to April 2014. She was not aware of a gap size that would be deemed unsafe according to Long Island Railroad guidelines.

Terrance Joseph testified that he was an assistant engineer for the Long Island Railroad, and one of his duties was to make sure that the tracks were tested. He conducted center line measurements with the measuring car at various platforms, and went to the Babylon station to take track measurements on more than one occasion. According to Joseph, in April 2104, the Long Island Railroad's standard track centerline measurement was 67 inches from the center of the track to the edge of the platform. The measuring car can record different measurements for the same location depending upon the suspension and movement of the car, and if the track center line measurement exceeded the Long Island Railroad's standard, mitigation procedures would be implemented. There was no standard measurement for the gap between the platform and the train. In an affidavit, Joseph averred that he conducted a review of the results of the track center line measurements as it related to the gap between the platform and the train on track 3 at the Babylon station at the time of plaintiff's accident. According to Joseph, based upon his review, the width of the gap at that station was 4.63 inches.

It is well established that 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 issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion, which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, *supra*; ***O'Neill v Town of Fishkill***, *supra*).

"Ordinarily, a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" (***Davidoff v First Dev. Corp.***, 148 AD3d 773, 774, 48 NYS3d 755 [2d Dept 2017]; *see* ***Devlin v Selimaj***, 116 AD3d 730, 986 NYS2d 149 [2d Dept 2014]; ***Dhu v New York City Hous. Auth.***, 119 AD3d 728, 989 NYS2d 342 [2d Dept 2014]; ***Morreale v Esposito***, 109 AD3d 800, 801, 971 NYS2d 209 [2d Dept 2013]; ***Gushin v Whispering Hills Condominium I***, 96 AD3d 721, 946 NYS2d 202 [2d Dept 2012]).

To meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*see* ***Dhu v New York City Hous. Auth.***, *supra*; ***Oliveri v Vassar Bros. Hosp.***, 95 AD3d 973, 943 NYS2d 604 [2d Dept 2012]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 869 NYS2d 222 [2d Dept 2008]). A defendant may also establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall (***Davidoff v First Dev. Corp.***, 148 AD3d 773, 774, 48 NYS3d 755 [2d Dept 2017]).

Defendants herein have failed to conclusively establish that plaintiff was the sole proximate cause of his injuries or that plaintiff could not identify the location where he fell (*see* ***Zorin v City of New York***, 137 AD3d 1116, 1117, 28 NYS3d 116 [2d Dept 2016]) . Plaintiff testified that he was seated in the second to last car of the train, and exited the train from that car. Additionally, plaintiff alleged that upon exiting the train, the broken platform on track 3 caused him to slip and his foot went into a significant gap between the platform and the train. Defendants failed to put forth any evidence to demonstrate that the subject platform was not in disrepair at the time of plaintiff's accident, and the testimony of their employees indicated that the platform was inspected only on an annual basis. Defendants insist that plaintiff was aware of the gap between the platform and the train, and that he was intoxicated at the time of his accident. Accepting plaintiff's version of events as true, the record demonstrates that plaintiff slipped because he stepped onto the deteriorated platform, which caused his foot to go into the gap. Even considering the statements of defendants' toxicology expert concerning plaintiff's blood alcohol level, there was no conclusive proof submitted to establish that no dangerous condition existed on the platform at the time of plaintiff's accident. "There can be more than one proximate cause of an accident . . ., and generally, it is for the trier of fact to determine the issue of proximate cause" (***Davidoff v First Dev. Corp.***, 148 AD3d 773, 774, 48 NYS3d 755 [2d Dept 2017]). Inasmuch as defendants failed to meet their prima facie burden, the court need not consider whether plaintiff raised a triable issue in opposition (*see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316).

In his cross motion, plaintiff seeks leave to amend his bill of particulars to reflect that the accident occurred on April 12, 2014, and defendants do not oppose the motion. In his bill of particulars, plaintiff stated that the accident occurred on April 2, 2014, and according to plaintiff's counsel, that date was typed in error. Pursuant to CPLR 3025, "[l]eave to amend the pleadings shall be freely given absent prejudice or surprise resulting directly from the delay" (***Fahey v Ontario County***, 44 NY2d 934, 935, 408 NYS2d 314 [1978] [internal quotation marks omitted]). In his complaint, plaintiff stated that the accident occurred on April 12, 2014, and he testified on more than one occasion that the accident occurred on that date. Accordingly, plaintiff's motion to amend his bill of particulars to reflect the correct date of the accident is granted.

Dated: 2/6/19

THOMAS F. WHELAN, J.S.C.

**____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION**