

Yu Chen v Nitkewicz

2020 NY Slip Op 30714(U)

January 13, 2020

Supreme Court, Queens County

Docket Number: 711702/15

Judge: Robert I. Caloras

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. ROBERT I. CALORAS

PART 36

Justice

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YU CHEN,

Plaintiff,

-against-

**AVELINO NITKEWICZ, ANDREW P.
NITKEWICZ, LARRY STODDARD III
and AVELINO NITKEWICZ, LLP,
Defendants.**

**Index No. 711702/15
Motion Date: 11/7/19
Motion Cal. No. 4
Seq. No. 4**

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The following papers numbered E56-E79 read on this motion by defendants, Andrew P. Nitkewicz and Avelino Nitkewicz, LLP, for an order dismissing the Complaint pursuant to CPLR 3212.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affirmation-Exhibits-Memo of Law.....	E56-E72
Affirmation in Opposition-Exhibits.....	E73-E78
Memo of Law in Reply.....	E79

Upon the foregoing papers, it is ordered that defendants', Andrew P. Nitkewicz and Avelino Nitkewicz, LLP, (hereinafter "defendants") motion is granted as follows:

This is a legal malpractice action¹ that stems from an underlying action entitled *Yun Chen v New Jersey Transit Corporation*, Docket No.: MID-L-9013-11 (the, "Underlying Action"), which was filed in the Superior Court of New Jersey. In the underlying action, the plaintiff alleged that she was injured on December 30, 2009, when a metal object struck her right hand while she was standing on a train platform at the New Jersey Transit Edison Station. It is undisputed that, in a written order, filed on August 9, 2013, Judge Phillip Lewis Paley of Superior Court of New Jersey granted New Jersey Transit Corporation's (hereinafter "NJTC" or "NJT") motion for summary judgment and dismissed the underlying action. It is also undisputed that the plaintiff appealed this order, and that on June 20, 2014, the Superior Court of New Jersey, Appellate Division issued a decision affirming the Superior Court's order granting summary judgment to NJTC. The Appellate Division stated in its decision, in pertinent part, the following:

¹In a decision, dated August 10, 2016, Justice Diccia T. Pineda Kirwan dismissed the Complaint as to defendant Larry Stoddard III.

Fatal to plaintiff's proofs is that she does not know the source of the object that struck her hand, or how it struck her hand. The object could have come from a passing train, which is consistent with the statements of the witnesses who were walking behind her, or, as plaintiff theorizes, the object could have been "kicked up" from the tracks. But absent evidence that the object came from a NJT train, plaintiff cannot establish that NJT's property was in a dangerous condition or that NJT had notice of such dangerous condition. And even if the object had been "kicked up" from the tracks, plaintiff offered no evidence that an incident had occurred where an object had been "kicked up" from the tracks by a passing train, or that a similar object had been on or near the tracks long enough for NJT to have discovered it.

Stated differently, plaintiff presented no competent evidence from which a reasonable jury could have inferred that NJT had notice of a dangerous condition.

Defendants now move for summary judgment, dismissing the Complaint. Defendants have submitted, among other things, the following: Summons with Notice and Verified Complaint, along with Exhibit "1" which contained the decision issued on June 20, 2014 by the Superior Court of New Jersey, Appellate Division; Verified Answer; plaintiff's deposition transcript; affidavit from defendant Andrew P. Nitkewicz, Esq.; Retainer Agreement; plaintiff's deposition transcript in the underlying action; plaintiff's affidavit of merit in the underlying action; Judge Paley's order, dated August 9, 2013; correspondence, dated September 3, 2013; and a memorandum of law.

At her deposition, and in her affidavit of merit in the underlying action, the plaintiff stated that she did not see where the metal object came from. At her deposition in the this action, the plaintiff also testified that she did not know the identity of who was responsible for, or placed the metal object on the tracks. Plaintiff further testified that, since the time the defendants ceased representing her, she has not taken any steps to attempt to identify where the metal object came from, and she has not retained any investigators to attempt to learn the identity of the metal object.

Defendants argue that the allegations in the Complaint regarding the ability of an investigator to identify the owner of the metal object, along with the plaintiff's failure to identify any individual or entity from whom the plaintiff could have recovered from in the underlying action, are conclusory and speculative.

Defendants also argue that the Complaint should be dismissed because, even if an investigator could have identified the metal object which struck the plaintiff, she cannot establish that she would have succeeded on the merits of an action for negligence against that individual or entity. Defendants assert that since the plaintiff did not see the metal object before it struck her hand, and does not know the mechanics of how the metal object propelled through the air to hit her, the plaintiff cannot establish that an alleged tortfeasor had actual or constructive notice of the alleged dangerous condition.

In opposition, the plaintiff argues that in the underlying action, the defendants failed to name Amtrak as a defendant necessary party. Plaintiff has submitted the New Jersey police report for the subject incident, which includes the following statement:

W 1 and W 2 . . . stated: They were walking behind victim. They noticed a possible Amtrak Train traveling South in the center tack. As the train passed they noticed a metal object fall off the train and kicked or kicked up by the train, fly in the air and strike victim.

The plaintiff argues that the defendants' failure to investigate and name Amtrak as a defendant in the underlying action was gross negligence. The plaintiff also asserts that judicial notice could be taken that New Jersey train system was controlled and run by the NJT and Amtrak at the time of the accident. both NJT and Amtrak. The plaintiff argues that the defendants failure to add Amtrak as a defendant caused the following: Amtrak easily got out of the hook; shifted the burden of proving negligence from the defendant to the plaintiff in the underlying action; and the underlying action to be dismissed.

Plaintiff also argues that the defendants claims that the Complaint is speculative and based upon conjecture contradict the verified statements they made in the underlying action.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

To establish a cause of action to recover damages for legal malpractice, a plaintiff must establish the elements of proximate cause and damages, i.e. "a plaintiff must show that but for the attorney's negligence, he or she would have prevailed on the underlying claim" (Verdi v Jacoby & Meyers, LLP, 154 AD3d 901, 902 [2d Dept. 2017]). Only after a plaintiff

establishes that he or she would have recovered a favorable judgment in the underlying action, can he or she proceed with proof that the attorney was negligent in handling that action, and that the attorney's negligence was the proximate cause of the plaintiff's loss (Lindenman v Kreitzer, 7 AD3d 30, 34 [1st Dept. 2004]).

Here, the Court finds that the defendants established their *prima facie* entitlement to summary judgment. In New Jersey, a common law cause of action for negligence has four elements: (1) a duty of care owed to plaintiff by defendant, (2) a breach of that duty by defendant, (3) proximate cause, and (4) actual damages (Brunson v Affini Fed. Cred. Union, 199 NJ 381, 400, 972 A2d 1112 [2009]). Plaintiff must establish that the alleged tortfeasor had actual or constructive knowledge of the dangerous condition that caused her accident in order for Plaintiff to have recovered for her personal injuries (see Nisivoccia v Glass Gardens, Inc., 175 NJ 559, 563, 818 A2d 314, 314 [NJ 2003], citing Brown v Racauet Club of Bricktown, 95 NJ 280, 291, 471 A2d 25 [1984]). Here, even if an investigator could have determined the owner of the piece of metal that struck the plaintiff, she has repeatedly stated that she does not know how the metal object propelled through the air and struck her hand. Consequently, the plaintiff cannot establish that a potential tortfeasor had actual or constructive notice of the alleged dangerous condition, which is a required element for a cause of action for negligence in the State of New Jersey.

The Court also finds that the plaintiff has failed to raise a triable issue of fact. The plaintiff's claim that the outcome of the underlying action would have been different if the defendants had named Amtrak and/or other unspecified tortfeasors as parties is based upon mere speculation. The plaintiff is still unable to identify where the metal object came from, what caused it to propel through the air and what caused it to hit her hand. Moreover, there is nothing to indicate that any potential tortfeasor had any of this information, or actual and/or constructive knowledge of the metal object which struck her hand. In addition, the witnesses' statement in the uncertified police report the plaintiff submitted are hearsay and not admissible evidence (Coleman v Maclas, 61 AD3d 569 [1st Dept. 2009]). Moreover, the plaintiff failed to demonstrate how Amtrak may be liable for the dangerous condition which caused her injuries. Contrary to her implicit argument, an Amtrak train's mere presence in the train station at the time of plaintiff's injury is insufficient to establish liability on the part of Amtrak. Furthermore, the Court finds the plaintiff's remaining contentions to be without merit. Accordingly, the defendants' motion is granted, and the Complaint is dismissed.

Dated: January 13, 2020



ROBERT I. CALORAS, J.S.C.

