

Prospero v Metro N. Commuter R.R.
2021 NY Slip Op 33326(U)
October 1, 2021
Supreme Court, Westchester County
Docket Number: Index No. 53624/2018
Judge: Alexandra D. Murphy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. ALEXANDRA D. MURPHY, J.S.C.**

----- x

ERICA PROSPERO,

Plaintiff,

Index No. 53624/2018

– against –

Motion Seq. # 2

METRO NORTH COMMUTER RAILROAD and
METROPOLITAN TRANSPORTATION AUTHORITY,
Defendants.

DECISION & ORDER

----- x

In an action to recover damages for personal injuries, the defendants move for summary judgment dismissing the complaint pursuant to CPLR 3212 and to dismiss the complaint pursuant to CPLR 3211(a)(7) as against the defendant Metropolitan Transportation Authority:

Papers Considered NYSCEF Doc No. 55-56; 59-100; 106-111; 116-120

1. Notice of Motion/Affirmation of Jonathan Goldsmith, Esq./Exhibits 1-41;
2. Affirmation of David Fischman, Esq. in Opposition/Expert Affidavit of Carl Berkowitz/Exhibits A-C;
3. Reply Affirmation of Jonathan Goldsmith, Esq./Exhibits 1-3.

Factual and Procedural Background

On June 8, 2017, at approximately 8:10 a.m., the plaintiff, Erica Prospero, allegedly fell into the gap when entering a New York City bound train on the Metro-North platform at the Croton-Harmon train station. The plaintiff commenced this action against the defendants, Metro-North Commuter Railroad (hereinafter Metro-North) and Metropolitan Transportation Authority (hereinafter MTA).

The defendants move for summary judgment dismissing the complaint. The defendants argue that the gap was open and obvious and not inherently dangerous and that the gap must be deemed reasonably safe as a matter of law. The defendants assert that the alleged negligence was not the proximate cause of the plaintiff's injuries and that the plaintiff was comparatively negligent as a matter of law. The defendants further argue that they are entitled to qualified immunity and that the negligent maintenance claims are

Prospero v. Metro North Commuter Railroad, Index No. 53624/2018

really allegations of negligent design, which are not properly pled. Finally, the defendants argue that there is no legally cognizable cause of action against the MTA.

In support of the motion, the defendants submit the deposition testimony of David Melillo, who is the chief engineer of the Maintenance-of-Way department for Metro-North. Melillo is a licensed professional engineer and a certified code enforcement official. Melillo explained that the gap is the opening between a train and a platform to allow clearance for different equipment to run adjacent to the platform. While periodic inspections of the gap are performed by his department, such inspections are not routine. Metro-North also takes additional measures, such as warning signs to watch the gap and announcements by the crew.

According to Melillo, there is a standard for horizontal and vertical dimensions of the gap. At the time of the plaintiff's accident, the standard in place for the horizontal gap between a platform and a train was no more than ten inches. As to the vertical gap, he testified that Metro-North "strives" to have no more than a seven-inch vertical height differential between a train and a platform. Melillo acknowledged that he never evaluated the gap on Track 2 at the Croton-Harmon station, where the plaintiff's accident occurred. Melillo identified the gap incident report for the plaintiff's accident. According to the report, the gap width was six-and-three-quarter inches.

Edward Rice was the train conductor at the time of the plaintiff's accident. During his deposition, Rice identified the Chief Rail Traffic Controller's Log for the date of the accident. The log reported that Track 2 at Croton Harmon was inspected after the plaintiff's accident, and no defects were observed. Rice testified that he never observed any defects on track 2 at the Croton-Harmon station.

The defendants also submit an April 2007 report from the New York State Public Transportation Safety Board (PTSB) regarding a study of gap risks on Metro-North and the Long Island Rail Road. The PTSB report expressly states that the focus of the report is on the management of and consequences of horizontal gaps. The report expressly attempts to "(1) provide insight into some of the fundamental engineering considerations that influence the size and variability of gaps and (2) outline both short and long term strategies to manage these gaps, including measures to increase passenger awareness of the gap" (NYSCEF Doc. 96 [ii]).

Metro-North reviewed the report and issued a press release in July 2007, which stated:

The MTA today issued its response to the Public Transportation Safety Board's (PTSB) report on "Best Practices on Managing the Gap". The MTA concurs with the PTSB's recommendations. The response outlines many of the recommended actions that are already being implemented by Long Island Rail Road and Metro-North Railroad, as well as additional gap mitigation measures that [sic] being planned or studied.

Prospero v. Metro North Commuter Railroad, Index No. 53624/2018

Specific actions taken by both railroads include aggressive public outreach, introduction of a uniform pictograph warning sign for customers, "Watch the Gap" messages installed on platforms, gap-related literature, [and] specifically targeted announcements on trains and at stations. Both railroads are reviewing crowd control strategies and improvements to data collection. Both railroads are working to make gaps as small as possible, through engineering and operating solutions, while ensuring that the space between the platform and the train allows for the safe passage of railcars.

The LIRR and Metro-North are open to and are exploring the use of special technologies (platform extenders, platform rubbing boards and retractable platforms) that, if feasible, can become part of a future design strategy.

In an effort to develop industry standards with regard to the gap, Metro-North and the LIRR are actively involved in the Federal Railroad Administration's Rail Safety Advisory Committee and the American Public Transportation Association's Gap Safety & Accessibility Management Working Group (NYSCEF Doc. 97).

The MTA issued a responsive report entitled "MTA Actions incorporating PTSB Best Practice Recommendations". The report included three courses of action: (1) develop a general public and passenger awareness protocol including signs, visual cues, pamphlets, announcements, customer participation; (2) strengthen inspection and accident investigation protocols to ensure continued focus on the hazards and delivery of promised strategies; and (3) develop an engineering and operation plan that minimizes platform gaps and their variability (NYSCEF Doc. 98).

In opposition to the motion, the plaintiff argues that the gap violated the industry standard, created a dangerous condition and is inherently dangerous. The plaintiff asserts that her comparative negligence is an issue for the jury, and there are issues of fact as to whether the defective condition was a proximate cause of her injuries. The plaintiff argues that there are no allegations of negligent design and that the claims against the defendants are for negligent maintenance. The plaintiff further argues that the defendants do not have a valid qualified immunity claim and that issues of fact exist as to whether the MTA is a proper party.

The plaintiff submits, inter alia, an expert affidavit of Carl Berkowitz, Ph.D, P.E. Berkowitz attests that based upon his analysis and review, Metro-North was negligent by failing to maintain safe platform conditions for passengers entering the train at Track 2 East at the Croton Harmon train station. According to Berkowitz, Metro-North maintained an unsafe distance between the platform and the train where the plaintiff attempted to board. Berkowitz was familiar with the PTSB study submitted by the defendants. He testified that the study did not establish standards for the gap, rather, it recommended

Prospero v. Metro North Commuter Railroad, Index No. 53624/2018

mitigation efforts in recognition of the danger of passengers falling into gaps. Berkowitz opines that the study did not apply scientific methods or engineering studies or review applicable studies on the issue. Thus, Berkowitz states that the gap standards are not reasonable and are contrary to industry standards and safety guidelines. Berkowitz opines that the measurements of the gap by Metro-North at the time of the accident were a horizontal gap of 6.5 inches and a vertical gap of 5 inches. According to Berkowitz, these gap measurements were in violation of industry standards set forth by the New York City Department of Transportation that gaps be less than 4 inches and by the American Public Transportation Association standard that horizontal gaps be less than 3.25 inches.

In reply, the defendants withdrew their argument regarding qualified immunity and reserved their right to make the argument at trial.

Discussion

The proponent of a motion for summary judgment 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 (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (*see Zuckerman v New York*, 49 NY2d at 562).

"The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see Dykeman v Heht*, 52 AD3d 767, 768 [2d Dept 2008]). Additionally, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant (*see Pearson v Dix McBride*, 63 AD3d 895 [2d Dep't 2009]; *Brown v Outback Steakhouse*, 39 AD3d 450, 451 [2d Dept 2007]).

Metro-North Commuter Railroad Company is a New York public benefit corporation which operates an interstate railroad system as a subsidiary of the MTA (*Ecco III Enters. v Metro-North Commuter R.R.*, 170 AD2d 204, 204 [1st Dept 1991]). The functions of the MTA with respect to public transportation are limited to financing and planning and do not include the operation, maintenance and control of any facility (*Cusick v Lutheran Med. Ctr.*, 105 AD2d 681, 681 [2d Dept 1984]). Moreover, Public Authorities Law 1266(5) provides that subsidiaries of the MTA are individually subject to suit (*see Noonan v Long Is. R.R.*, 158 AD2d 392, 393 [1st Dept 1990]). Based upon the foregoing,

Prospero v. Metro North Commuter Railroad, Index No. 53624/2018

the MTA is not a proper defendant in this action because the claims are against Metro-North, which is a subsidiary of the MTA subject to suit.

The defendants argue that the gap between the train and the platform at the Croton-Harmon Metro-North train station was open and obvious and not inherently dangerous as a matter of law. The plaintiff argues that the gap in question was inherently dangerous and that issues of fact exist. A landowner has a duty to maintain his or her premises in a reasonably safe manner (*see Basso v Miller*, 40 NY2d 233, 241 [1976]). However, a landowner has no duty to protect or warn against an open and obvious condition, which, as a matter of law, is not inherently dangerous (*see Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]; *Iwelu v NY City Tr. Auth.*, 90 AD3d 712, 713 [2d Dept 2011]).

Metro-North failed to demonstrate that the gap was open and obvious and not inherently dangerous as a matter of law. The plaintiff's testimony that her left foot went into the gap all the way up to her hip as well as the photographs of the gap identified at the plaintiff's deposition that show the width of the gap to be the size of the plaintiff's foot raise an issue of fact as to whether the gap was inherently dangerous (*see Sanchez v City of New York*, 85 AD3d 580 [1st Dept 2011]). Moreover, issues of fact exist as to whether Metro-North was negligent and whether such negligence was a proximate cause of the plaintiff's injuries. Metro-North's alleged compliance with its own standard as the maximum permissible gap is not conclusive on the issue of liability (*see Daniels v New York City Tr. Auth.*, 171 AD3d 601 [2d Dept 2019]), and in any event, the plaintiff, through the submission of her expert's affidavit, raised an issue of fact as to whether Metro-North was negligent.

The parties remaining contentions have been considered by the Court and are found to be without merit.

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is **GRANTED** solely to the extent that the complaint is **DISMISSED** insofar as asserted against the defendant Metropolitan Transportation Authority, and the motion is otherwise **DENIED**.

The parties are directed to appear in the **Settlement Conference Part** for further proceedings at a date and time to be provided.

Dated: White Plains, New York
October 1, 2021


HON. ALEXANDRA D. MURPHY, J.S.C.