

Matter of Metro-North R.R. Collision at Valhalla, N.Y. Feb. 3, 2015
2022 NY Slip Op 35193(U)
December 8, 2022
Supreme Court, Westchester County
Docket Number: Index No. 64924/2015
Judge: Lewis J. Lubell
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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.

P R E S E N T:

HON. LEWIS J. LUBELL
JUSTICE OF THE SUPREME COURT

IN RE METRO-NORTH RAILROAD
COLLISION AT VALHALLA, NEW YORK
FEBRUARY 3, 2015

DECISION & ORDER

Index No.: 64924/2015

Defendants Metropolitan Transportation Authority, Metro-North Commuter Railroad, Argent Ventures, LLC, Midtown TDR Ventures LLC, and Steven Smalls move (Motion #31) for summary judgment, dismissing certain state law claims.

The following papers were read:

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By way of background, on February 3, 2015, at approximately 6:30 p.m., locomotive engineer Steven Smalls was operating a train (Train) northbound on the Harlem Line of the Metro-North Railroad and collided (Accident) with a motor vehicle (SUV), which was operated by Ellen Brody, that was on the train tracks at their intersection with Commerce Street, Valhalla, New York (Commerce Street Crossing). Subsequently, the National Transportation Safety Board (NTSB) performed an investigation and issued various reports. After the Accident, various actions were commenced. One of these actions was commenced by Steven Smalls against Alan Brody, as Administrator of the Estate of Ellen G. Brody, and several others named Steven Smalls as a defendant. All of these actions were ultimately consolidated for joint discovery and joint trial on liability. Now, defendants Metropolitan Transportation Authority (MTA), Metro-North Commuter Railroad (Metro-North), Argent Ventures, LLC, Midtown TDR Ventures LLC, and Steven Smalls (Smalls) (collectively, defendants) move for summary judgment as to certain claims asserted by plaintiffs.

Defendants' Contentions

Initially, defendants proffer evidence that the speed limit for the Train in the subject area was 60 mph and that the Train, at all times relevant to this action, was traveling within the 60-mph speed limit. Defendants proffer evidence that the crossing before the Commerce Street Crossing was a crossing at the intersection with Lakeview Avenue (Lakeview Avenue Crossing) and that the distance between the two crossings was approximately 1,800 feet. Defendants note that Smalls testified that, at some point after passing the Lakeview Avenue Crossing, he observed a reflection on or near the tracks at the Commerce Street Crossing. Defendants note that Smalls testified that, when he realized that the reflection was a vehicle, Smalls put on the emergency brakes, which occurred about 230 feet before the collision with the SUV. Defendants proffer evidence that, after the Train struck the SUV, the Train and SUV continued to travel north along the tracks and came to a stop about 665 feet north of the Commerce Street Crossing. Defendants proffer evidence that, while the Train and the SUV continued to travel north after the collision, the third rail that was located on the west side of the track penetrated through the SUV and into several cars of the Train. Now, defendants contend that five of plaintiffs' claims are preempted by the Federal Railroad Safety Act (FRSA), 49 USC § 20101 *et seq.*

First, defendants assert that plaintiffs allege in the supplemental bill of particulars, dated July 15, 2021 (NYSCEF Doc. No. 584, p.2), that the Train should have braked and slowed down when an "unknown object" was first observed by Smalls as he approached the Crossing. Regarding this allegation, defendants assert that plaintiffs have not cited a federal safety regulation, order, or internal standard adopted pursuant to a federal safety regulation. Defendants note that the Train was traveling within the 60-mph speed limit and thus, defendants contend, any claim concerning excessive speed is preempted. Defendants acknowledge that there are two exceptions to this conclusion, the first being an "essentially local hazard" and the second being a "specific individual hazard." As to the "essentially local hazard," defendants contend that a car on the tracks does not qualify as such a hazard, as that phrase is used in the FRSA. As to the "specific individual hazard," defendants contend that this exception is limited to an imminent collision, such as with a car stuck on the tracks. However, defendants contend, the mere presence of a car on the tracks does not, by itself, constitute a threat of an imminent collision. Defendants contend that Smalls did not have any duty to initiate any emergency procedures until he realized that there was something on the tracks that either would not or could not move away from the tracks. Defendants assert that a locomotive engineer can assume that the operator, once alerted to an oncoming train, will take reasonable measures to remove the vehicle from the tracks. Defendants assert that a locomotive engineer is also obligated not to indiscriminately employ the emergency braking procedures. Defendants assert that Smalls complied with these obligations in that he maintained the Train within the 60-mph speed limit; he properly sounded the Train's horn as it approached the Lakeview Avenue Crossing and the Commerce Street Crossing; when he observed a reflection on the tracks at the Lakeview Avenue Crossing, there was time for the object (that he testified he could not identify) to

move from the tracks; and once Smalls realized that there was a vehicle on the tracks (approximately 230 feet from the Commerce Street Crossing), he initiated the emergency brakes.¹

Second, defendants assert that plaintiffs may allege that defendants' warning systems at the Crossing did not provide adequate warning of an oncoming train. Regarding this potential claim, defendants assert that plaintiffs have not cited a federal safety regulation or internal standard adopted pursuant to a federal safety regulation. Regardless, defendants contend that the evidence demonstrates that the crossing gates operated in compliance with federal regulation.

Third, defendants assert that plaintiffs may allege that Smalls negligently used the locomotive horn, that claim should be preempted. Regarding this allegation, defendants assert that plaintiffs have not cited a federal safety regulation, order, or internal standard adopted pursuant to a federal safety regulation. Regardless, defendants contend that the evidence demonstrates that Smalls complied with federal regulations regarding the use of the Train's horn.

Fourth, defendants assert that plaintiffs alleged in the supplemental bill of particulars, dated July 15, 2021 (NYSCEF Doc. No. 584, at pages 1-2), that "Smalls was inadequately trained and should have received specific training on how to respond to an unexpected presence on the tracks of a person, an animal, or a vehicle." Regarding this allegation, defendants assert that plaintiffs have not cited a federal safety regulation, order, or internal standard adopted pursuant to a federal safety regulation. Defendants assert that there are comprehensive federal regulations relating to the qualification and certification of locomotive engineers (*see, e.g.*, 49 CFR § 240.1 *et seq.*), which, defendants contend, substantially subsume any state law claim plaintiffs might wish to pursue.

Fifth, defendants assert that plaintiffs allege in the supplemental bill of particulars, dated April 26, 2021 (NYSCEF Doc. No. 653, at page 2), that the Train was not crashworthy because Metro-North failed to have protective devices and a design that would adequately protect the third rail from penetrating the front of and under the Train car as the result of a collision or derailment. Regarding this allegation, defendants assert that plaintiffs have not cited a federal safety regulation, order, or internal standard adopted pursuant to a federal safety regulation. Defendants assert that there are comprehensive federal regulations relating to the crashworthiness of the Train (*see, e.g.*, 49 CFR § 238.1 *et seq.*), which, defendants contend, substantially subsume any state law claim plaintiffs might wish to pursue.

¹ Defendants variously make reference to: putting the Train "into emergency," initiating/activating/pulling/applying the "emergency brake," taking "emergency action," and the "emergency application." Defendants do not explain whether there is any difference between these operations. As any potential difference does not alter the outcome of the motion, the Court overlooks it.

Finally, defendants contend all claims against Smalls individually should be dismissed. Defendants proffer evidence that Smalls operated the Train within the allowable speed limit and that he put the Train into emergency mode as soon as he identified the SUV. Thus, defendants contend, Smalls was not negligent and the collision was unavoidable under the circumstances.

Plaintiffs' Contentions

First, plaintiffs contend that the SUV was a specific individual hazard, which required Smalls to stop or, at a minimum, to slow the Train. Plaintiffs proffer, among other things, the affidavit of Jimmy Scott, an expert in the correct and safe operations of trains. Mr. Scott avers that he has reviewed the NTSB report on the Accident, Small's EBT, the Event Data Recorder (EDR), and the photographs of the scene of the Accident. Mr. Scott notes that the EDR indicates that the Train accelerated after the Lakeview Avenue Crossing. Mr. Scott opines that "proper safety procedure called for him to put the Train into full service braking as soon as he observed the object, which he knew could not have been an animal but only a vehicle" Plaintiffs also proffer the expert affidavit of Edward Frisch, a mechanical engineer. Mr. Frisch avers that he examined data downloaded from the Train and used those data to analyze the Train's approach to and passage through the Commerce Street Crossing and until the Train came to a stop after the Accident. Mr. Frisch also avers that he examined data from brake qualification tests of various multi-car configurations of the same model of Train, which comprised the Train and used those brake test data to assess the performance of the Train in the Accident and to predict its performance in alternate scenarios where the collision could have been avoided. Mr. Frisch opines that the Accident could have been avoided if Smalls had initiated braking² when he first observed the object on the tracks at the Commerce Street Crossing.

Second, plaintiffs concede that they will not pursue a claim for negligence based on the negligent operation of the warning gates and their timing. However, plaintiffs contend that their claims in the area are not so limited as they have alleged that defendants were negligent in the ownership, operation, control, and maintenance of the Commerce Street Crossing. Plaintiffs proffer, among other things, the expert affidavit of John Nawn, a civil engineer. Mr. Nawn avers that he reviewed, among other things, various documents relating to the layout and operation of the Commerce Street Crossing. Mr. Nawn opines, among other things, that, due to the configuration of the Commerce Street Crossing, a second railroad crossing sign was required and its absence was a substantial cause of the Accident.

² Plaintiffs variously make reference to: applying the brakes/service brakes/full-service brakes/emergency brakes and putting the train in "emergency mode." Plaintiffs do not explain whether there is any difference between these operations. Plaintiffs' expert, Mr. Scott, provides some explanation of the braking modes of the Train, which falls short of full clarification. As any potential difference between the various braking modes does not alter the outcome of the motion, the Court overlooks it.

Third, plaintiffs concede that they will not pursue a claim for the negligent use of the horn. However, plaintiffs contend that their claims in the area are not so limited.

Fourth, plaintiffs acknowledge that the training, supervision, and instruction of train operators is addressed and substantially subsumed by federal regulations. Nevertheless, plaintiffs contend that Metro-North was negligent in not having protocols, procedures, or standards for the situation when a train operator observed an obstruction on the tracks and that such a claim is not preempted, citing to *Dowe v Natl. R.R. Passenger Corp.* (2004 WL 887410 [ND Ill Apr. 26, 2004]).

Fifth, plaintiffs note that defendants admit that the relevant regulations do not include anything touching on the strength or penetrability of the exterior floor of the Train or the potential penetration of the exterior subfloor by the third rail. Plaintiffs also assert that defendants fail to address plaintiffs' allegation that Metro-North was negligent in failing to design, manufacture, and install a third rail that was frangible and would break away harmlessly when struck.

Finally, plaintiffs contend that defendants failed to make a *prima facie* showing as to the claims against Smalls. Regardless, plaintiffs again note, among other things, the expert opinions of Mr. Scott and Mr. Fritsch relating to Smalls' operation of the Train and their opinions that Smalls should and could have operated the Train to avoid the collision with the SUV.

Analysis

"Where a state statute conflicts with, or frustrates, federal law, the former must give way" (*CSX Transp., Inc. v Easterwood*, 507 US 658, 663 [1993]). Under the FRSA, Congress mandated that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable" (49 USC § 20106 [a]). To this end, the FRSA preempts state laws relating to railroad safety to the extent a federal regulation or order covers the same subject (*see* 49 USC § 20106 [a] [2]). The Supreme Court has explained that the specific test for determining federal preemption under the FRSA is whether there are federal regulations that "substantially subsume" the subject matter of the state law, which includes state common law (*see Easterwood*, 507 US at 664).

The Court addresses defendants' arguments in order. First, the allegation in the supplemental bill of particulars cited by defendants does not allege that the Train was traveling in excess of the federally imposed speed limit. Defendants note, in reply, that numerous complaints allege that the Train proceeded "at an excessive, unsafe speed under the circumstances." Again, the allegation is not that the Train was traveling in excess of the federally imposed speed limit. Thus, whether such an allegation would be preempted by the FRSA is not properly considered at this juncture (*see Matter of Kirkland v Annucci*, 150 AD3d 736, 738 [2d Dept 2017]). As defendants concede, there is an exception to the

preemptive effect of FRSA, which is judicially created and will preserve a claim from preemption, if the claim is that the Train failed to slow or stop to avoid a “specific, individual hazard” (*Easterwood*, 507 US at 675) of a non-permanent nature, such as “a car stalled on the tracks at a grade crossing” (*Macfarlane v Can. Pac. Ry. Co.*, 278 F3d 54, 59 [2d Cir 2002]). Thus, the issue is whether the reflection on the tracks, which Smalls observed while passing through the Lakeview Avenue Crossing, constituted a “specific, individual hazard.” Here, viewing the evidence in the light most favorable to the non-moving party (*see Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]), plaintiffs have proffered sufficient evidence to raise a genuine issue of material fact on this issue.

Defendants’ second and third arguments are that plaintiffs may have alleged certain claims for the negligent operation of the warning gates and their timing or the negligent use of the Train’s horn. In interpreting a federal statute pertaining to a subject traditionally governed by state law, the Court will be reluctant to find preemption (*see Easterwood*, 507 US at 64). Common law claims of negligence are traditionally governed by state law. In addition, defendants have failed to cite to any pleading in which plaintiffs allege that defendants negligently operated the warning gates or the timing thereof or that defendants negligently used the Train’s horn on the date of the Accident. As such, defendants’ application seeks nothing more than an advisory opinion, which is not a proper exercise of the judicial function (*see U.S. Bank N.A. v McCaffery*, 186 AD3d 897, 899 [2d Dept 2020]).

Fourth, defendants assert that plaintiffs alleged in the supplemental bill of particulars, dated July 15, 2021 (NYSCEF Doc. No. 584, at pages 1-2), that “Smalls was inadequately trained and should have received specific training on how to respond to an unexpected presence on the tracks of a person, an animal, or a vehicle.” As plaintiffs acknowledged, the training, supervision, and instruction of locomotive engineers is addressed and substantially subsumed by federal regulations (that is, 49 CFR Parts 217, 240, and 242). Plaintiffs have not presented any evidence that defendants violated any specific federal regulation governing the training of locomotive engineers and the suggestion that Smalls should have received different training is an allegation of negligence that is preempted (*see Union Pac. R. Co. v California Pub. Util. Com’n*, 346 F3d 851, 868 [9th Cir 2003]; *Natl. R.R. Passenger Corp. v Cimarron Crossing Feeders*, 16-1094-JTM, 2018 WL 5962876, at *39 [D Kan Nov. 14, 2018], *amended*, 16-1094-JTM, 2019 WL 1014727 [D Kan Mar. 4, 2019]; *contra Dowe v Natl. R.R. Passenger Corp.*, 01 C 5808, 2004 WL 887410, at *5 [ND Ill Apr. 26, 2004]). However, as defendants do not cite the specific language of plaintiffs’ claim(s), the Court must determine what claims are preempted. The supplemental bill of particulars specifically provides that defendants were negligent in:

“[1]³ Failing to properly train engineers and Smalls in particular, about safe operation of train; [2] failing to properly train engineers and Smalls in particular, about how to respond to a situation of seeing an obstacle ahead on a RR crossing; [3] failing to have proper training equipment for training of engineers and Smalls in particular especially in light of the dangerous crossing known to have safety issues as testified to by Smalls at his 50H and based upon the number of times gates have been broken by cars, [4] in failing to train on how to respond to situation of seeing an obstacle ahead on a RR crossing including the usage of the emergency braking system as required when an object is fouling the tracks; [5] failing to have proper simulators to train engineers and Smalls in particular, in how to respond to situation of seeing an obstacle ahead on a RR crossing including the application of emergency brakes and braking system; [6] failing to properly utilize simulators available to Metro North at the time it trained engineers and Smalls in particular, on how to respond to an obstacle ahead on a RR crossing. Said negligence was committed at the Metro-North Training facilities by their employees including Frank Mesa and Shelly Prettyman.”

Items 1, 2, and 4 clearly fall within the claim addressed by defendants’ motion, that is, that defendants failed to properly train Smalls. Items 3, 5, and 6, which allege that defendants failed to have proper equipment relating to training and/or failed to properly utilize equipment relating to training, do not fall within the claim addressed by defendants’ motion. Whether the preemption of the former necessitates the preemption of the latter is not an issue addressed by defendants and will not be addressed here.

Fifth, defendants assert that plaintiffs alleged in the supplemental bill of particulars, dated April 26, 2021 (NYSCEF Doc. No. 653, at page 2), that the Train “was not crashworthy because Metro-North failed to have protective devices and a design that would adequately protect the third rail from penetrating the front of and under the train car as the result of a collision or derailment.” Defendants contend that the federal regulations substantially subsume the subject matter of the crashworthiness of trains like the one involved in the Accident. Plaintiffs contend that what is not addressed is not preempted. The mere fact that a federal regulation does not address the specific situation does not, by itself, mean that the claim is not preempted (*see Burlington N. and Santa Fe Ry. Co. v Doyle*, 186 F3d 790, 796 [7th Cir 1999], citing *Easterwood*, 507 US at 674). Rather, the question is whether federal regulations “substantially subsume” the subject matter (*see Easterwood*, 507 US at 664). In this instance, a federal statute directed the Secretary of Transportation to “prescribe regulations establishing minimum standards for the safety of cars used by railroad carriers to transport passengers” (49 U.S.C. § 20133 [a]). Said regulations were then implemented (*see, e.g., 49 CFR § 238.1 et seq.*). Review of Part 238 reveals that, although the federal regulations do not specifically address the strength or

³ The Court has inserted the bracketed numbers for ease of reference.

penetrability of the exterior floor of the Train or the potential penetration of the exterior subfloor by the third rail, the federal regulations substantially subsume the subject matter of the crashworthiness of trains like the one involved in the Accident. Again, as defendants do not cite the specific language of plaintiffs' claim(s), the Court must determine what claims are preempted. Defendants assert that the claim is to be found on page 2 of the supplemental bill of particulars, which begins in the middle of an allegation; beginning with the first full allegation and ending with the last complete allegation, plaintiffs allege:

“[1]⁴ the third rail as designed, manufactured and installed at the Commerce Street crossing was not in proper condition or safe to operate in the service to which it was put, was unreasonably and unnecessarily dangerous, perilous, a trap, hazard, and nuisance and was not properly inspected and tested and its splice bars and bolts were too robust at the connecting points for each section of the third rail's connecting points and were not frangible or crashworthy; [2] the third rail splice plates were not manufactured according to specifications and were thus less frangible than designed; [3] the third rail design failed to provide a protective ramp that would allow an object, such as a motor vehicle, to ride up the rail and over the top of the elevated third rail thereby preventing it from being pried upward and into the object and the train; [4] in failing to have a frangible third rail with frangible splice plates and bolts and/or install third rail protective devices such as ramps, ballasts, and/or barriers and a design to make the train crashworthy that would prevent the third rail from penetrating the train causing death and serious injuries . . .”

Each of the items appears to fall within the claim addressed by defendants' motion, that is, that defendants failed to have protective devices and/or a design that would adequately prevent the third rail from penetrating the front the Train. Based hereon, these claims are preempted.

Finally, although defendants have proffered evidence that Smalls was not negligent in his operation of the Train in the time leading up to the Accident, plaintiffs have proffered evidence, including from expert witnesses, that Smalls was negligent in his operation of the Train in the time leading up to the Accident. It is well settled that where conflicting affidavits and other contradictory evidence is submitted, summary judgment is not appropriate (*see Webar, Inc. v Capra*, 212 AD2d 594, 596 [2d Dept 1995]). The reasoning is that it is not within the purview of the Court to resolve issues of credibility on a motion for summary judgment (*see Halkias v Otolaryngology-Facial Plastic Surgery Associates, P.C.*, 282 AD2d 650, 651 [2d Dept 2001] [“Resolution of issues of credibility of both expert and lay witnesses and the accuracy of their testimony are matters within the province of the jury.”]).

⁴ The Court has inserted the bracketed numbers for ease of reference.

To the extent not specifically addressed herein, the Court finds the remaining arguments of the parties to be without merit. Based on the foregoing, it is hereby

ORDERED that Motion #31 is GRANTED TO THE EXTENT that Items 1, 2, and 4, as defined above, of the supplemental bill of particulars, dated July 15, 2021 (NYSCEF Doc. No. 584, at pages 1-2) and Items 1-4, as defined above, of the supplemental bill of particulars, dated April 26, 2021 (NYSCEF Doc. No. 653, at page 2) are DISMISSED as being preempted by federal law and Motion #31 is otherwise DENIED.

Dated: December 8, 2022
White Plains, New York



HON. LEWIS J. LUBELL
Justice of the Supreme Court