

Baptiste v New York City Tr. Auth.

2023 NY Slip Op 34123(U)

November 20, 2023

Supreme Court, New York County

Docket Number: Index No. 151283/2019

Judge: Denise M. Dominguez

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

-----X

INDEX NO. 151283/2019

JAMALCO BAPTISTE

MOTION SEQ. NO. 002

Plaintiff

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY

**DECISION AND ORDER ON
MOTION**

Defendants

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for

JUDGMENT – SUMMARY

For the reasons that follow, the motion for summary judgment by Defendants, New York City Transit Authority and Metropolitan Transportation Authority (Transit) is granted.

Background

This personal injury action arises out of a slip and fall incident. Plaintiff, a New York City Police Officer while on duty, alleges that on November 15, 2018, at about 4:30 p.m. at the West 59th Street- Columbus Circle subway station in Manhattan, he was seriously injured. Plaintiff specifically alleges slipping and falling on a staircase step due to snow and ice as he was chasing a criminal suspect up the staircase. On February 6, 2019, Plaintiff commenced a negligence action against Transit alleging Transit had failed to properly maintain the staircase and remove the snow and ice. Transit now moves for summary judgment pursuant to CPLR 3212 and for dismissal for failure to state a cause of action pursuant to CPLR 3211 on the basis that the storm in progress doctrine applies. Plaintiff opposes the motion.

Since motions pursuant to CPLR 3211 are generally addressing pleading defects rather than seeking a finding of entitlement to judgment and Transit moves post-completion of discovery and Plaintiff opposes the motion on summary judgment grounds, this Court will treat the motion as one seeking only summary judgment (*see Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]; CPLR 3211[c]; *Nonnon v City of New York*, 9 NY3d 825 [2007]; *Wiesen v. New York Univ.*, 304 AD2d 459 [1st Dept 2003]).

Discussion

Defendants in moving for summary judgment have the high burden of establishing entitlement to judgment as a matter of law by dispelling any material questions of fact for a trial with proof that show[s] that there is no defense to the cause of action or that the cause of action or defense has no merit (CPLR 3212 [b]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Only upon Defendant meeting this burden, will the opposing papers be considered (*see Alvarez*, 68 NY2d 320).

In relation to the storm in progress defense, property owners, including Transit as a leaseholder of the subways, are not liable for slip and fall accidents that happen during winter storms in progress or a reasonable time thereafter (*see Valentine v. City of New York*, 86 AD2d 381 [1st Dept 1982] *aff'd*, 57 NY2d 932 [1982]; *see also Solazzo v. New York City Transit Auth.*, 21 AD3d 735 [1st Dept 2005], *aff'd*, 6 NY3d 734 [2005]; *Kinberg v. New York City Transit Auth.*, 99 AD3d 583 [1st Dept 2012]). The law reasons that property owners have no duty and thus not required to remove precipitation during a storm in progress or for a reasonable time after the storm has ended (*see Valentine*, 86 AD2d 381).

Further in relation to Transit, the storm in progress defense applies to both exterior and interior walkways, including wet and slippery station platforms, subway station floors and subway station stairways (*see Abraham v. Port Auth. of New York & New Jersey*, 29 AD3d 345 [1st Dept 2006], *see also Solazzo*, 21 AD3d 735; *Kinberg*, 99 AD3d 583). As it would be unreasonable to require Transit to keep its floors dry during ongoing storms with continuous wet commuters (*see Hussein v. New York City Transit Auth.*, 266 AD2d 146 [1st Dept 1999]).

Here, in support of this motion, Transit primarily relies on a copy of a weather report for November 2018 from the National Oceanic & Atmospheric Administration (NOAA) to argue that there was a snowstorm taking place at the time of Plaintiff's accident and thus no duty to remove any wet snow, ice or slush. Based on the NOAA weather report, on November 15, 2018, on the date of Plaintiff's accident, approximately 6.4 inches of snow fell and the temperature ranged from 40°F to 28°F, freezing levels. The report further shows, that prior to November 15th, from November 1st to November 14th there was no prior snow fall and the temperature did not fall below freezing levels of 32 degrees that would create accumulation of ice.

Transit also submits the sworn testimony and statements of Plaintiff. Based on the statutory hearing, Plaintiff testified that it was cold and it had been snowing on the day of his accident. He also testified that he did not know what caused him to fall. However, he later submitted an errata sheet, changing that testimony to reflect that he slipped due to "snow on the ground/stair." At his deposition, Plaintiff testified that his right foot slipped due to snow and ice on the steps. Plaintiff again later clarified in an errata sheet that he was caused to slip and fall on the stairs due to snow and ice.

Upon review, Transit with the NOAA report and Plaintiff's admission, has met its prima facia burden by establishing that the storm in progress doctrine applies (*see Alvarez*, 68 NY2d 320;

Solazzo, 21 AD3d 735). Transit has shown that on the day of the accident, over half a foot of snow fell and Plaintiff acknowledges that it was cold, and snow was falling the day of his accident. Furthermore, the report eliminates questions of fact as to whether Plaintiff slipped on accumulated ice from days prior to Plaintiff's accident.

In opposition, Plaintiff alleges Transit motion should be denied because it is untimely, the weather report was not certified, and a question of fact was created by Transit's employee. As to untimeliness, Plaintiff argues that Transit's motion was filed over 120 days from the day the Note of Issue was filed. However, Transit's original summary judgment motion was timely filed and denied not on the merits but for a procedural defect. The motion was denied without prejudice and with leave to re-file with a proper statement of material facts (see decision and order for Motion Seq. 1).

As to the uncertified weather report, a better practice would have been for Transit to submit a certified copy. However, in establishing weather conditions, this copy of a NOAA weather report from the US Dept. of Commerce, often accepted to establish the storm in progress defense, coupled with Plaintiff's own sworn statements admitting on multiple occasions to the weather conditions on the day of his accident is sufficient (see e.g. *Solazzo*, 21 AD3d 735).

In addition, the Court reviewed Plaintiff's own uncertified weather report for November 2018. While it does not allege any snow fall on November 15, 2018, it does not allege that snow fell before November 15th or that the temperatures dropped below the freezing point the days before Plaintiff's accident. Nor does Plaintiff submit admissible evidence questioning the validity of this report. Thus, Plaintiff does not raise a material question of fact that would require a trial as to whether Plaintiff slipped on ice that had previously accumulated as opposed to slipping on falling snow, or snow that had just frozen, or slush from the foot traffic.

Plaintiff also argues that a question of fact exists as to whether there was a snowstorm in progress based on Transit’s cleaner’s testimony. Ms. Johnson, a Transit worker was disposed on November 19, 2021, nearly three years after the Plaintiff’s accident and did not recall if on November 15, 2018, it was snowing. This fact under these circumstances is insufficient to raise a material question of fact regarding how Plaintiff’s accident occurred or disprove the weather conditions on the day of Plaintiff’s accident.

Accordingly, in opposition Plaintiff has not raised any material questions of fact and Transit’s motion is granted.

It is hereby

ORDERED that Defendants’ motion for summary judgment is granted; it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Defendants shall serve within 30 days a notice of entry of this order.

11/20/2023
DATE

CHECK ONE:

CASE DISPOSED

GRANTED DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN


HON. DENISE M. DOMINGUEZ
J.S.C.

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT REFERENCE