SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

SCAN

Present:
HON. **BERNARD F. McCAFFREY**
Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

PATRICK ROCHFORD,

Plaintiff,

-against-

INDEX NO. 1074/98

MOTION SUBMISSION
DATE: 8/25/00

MOTION NO. 2

LONG ISLAND RAILROAD COMPANY and
METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

Defendants' application, pursuant to CPLR 3212, for an award of summary judgment dismissing plaintiff's complaint is determined as hereinafter provided.

On 6/20/97 at approximately 2:55 pm plaintiff was standing on the south side of the platform at defendants' Baldwin passenger station when he was struck by an approaching eastbound train. He subsequently filed this negligence action on 11/14/98. Issue was joined on or about 2/18/98. Upon the completion of disclosure, the case was certified for trial on 10/18/99 and a 2/10/00 note of issue was filed. Defendants' application is therefore timely (CPLR 3212[a]).

Plaintiff was deposed on 8/26/98 but had no memory of the accident (p. 22, l. 5).

The train's engineer, John Bove, testified on 9/24/98. He recalled, inter alia, that 6/20/97 was a "sunny and dry" day (p. 44, l. 4). The train allegedly entered the station at approximately 40-45 miles per hour (p. 59, ls. 3-11) which is the "rule of thumb" engineers utilize (p. 104, l. 10). He first saw plaintiff when approximately two to three cars of the ten car train had entered the station (p. 67, l. 5). He was approximately a car length from the front of the train (p. 67, l. 20) and about six to eight lengths from the eastern end of the platform (p. 68, l. 15). Plaintiff reportedly walked continuously towards the edge of the platform at a "steady pace" (p. 69, l. 18). During the entire period he allegedly looked east or down at his feet but never west towards the approaching train (p. 75, l. 24 - p. 76, l. 11). Mr. Bove's view was not obstructed (p. 70, l. 5) and he never lost sight of plaintiff (p. 70, l. 8).

After initially observing plaintiff, he continued to slow the train for a routine stop (p. 78, l. 7). Plaintiff took two to four steps until he reached the yellow line of paint along the platform edge at which time he "put the train in emergency" (p. 80, l.4). At that point the train was approximately twenty to thirty feet from plaintiff (p. 80, l. 12). He allegedly sounded the horn (p. 81, l. 2) and observed plaintiff's upper torso extend over the edge of the platform "[j]ust as I hit him" (p. 76, l. 19 - p. 77, l. 10). The northern portion of the front of the train struck plaintiff knocking him down on the platform (p. 82, l. 20).

The conductor, Larry Zitzman, and assistant conductor, Victor F. Anes, were also deposed. Mr. Zitzman was in the car immediately behind Mr. Bove at the time of accident (p. 18, l. 7) sitting down (p. 29, l. 11) and facing west (p. 28, l. 20) while announcing the station (p. 21, l. 20). He was unable to recall whether he heard the horn sound in connection with the accident (p. 21, l. 7) and did not observe plaintiff beforehand (p. 24, l. 6). He learned of the accident over the radio when Mr. Bove instructed him not to open the doors because the train had not fully "platformed" since he believed he had struck a person on the platform (p. 24, ls. 16-22; p. 35, l. 12). The train stopped abruptly (p. 25, l. 6) and he perceived an emergency application (p. 26, l. 5) when he heard the brakes in full application dumping air (p. 26, l. 8).

Mr. Anes, the assistant conductor (p. 6, l. 11), was in the last car (p. 23, l. 14) in the rear of the train (p. 23, l. 10). He learned of the accident when the train "dumped" (p. 42, l. 9) or was put into emergency mode before it platformed and Mr. Bove told Mr. Zitzman to switch the radio to channel four (p. 42, ls. - 21). He perceived that the train was placed into emergency when he heard the release of air from the brakes (p. 42, l. 24). He also was unable to whether the horn sounded (p. 57, l. 25).

Finally, a non-party witness, Jonathan Turbin, was deposed on 12/2/98. He first observed plaintiff standing outside the east end of the waiting room (p. 30, l. 4; p. 36, l. 12).

He heard the train approach (p. 42, l. 20) i.e., its wheels and horn or whistle (p. 54, l. 25 - p. 55, l. 5; p. 87, l. 2) as it slowed down (p. 83, l. 4). He turned his head towards the train (p. 45, l. 23) and saw the plaintiff (p. 46, l. 14). His feet were "about or near" the yellow line of paint adjacent to the edge of the platform (p. 85, ls. 12-18).

Plaintiff "seemed to be looking west" (p. 48, l. 3) or in the direction of the advancing train (p. 48, l. 3, p. 51, l. 19). He then reportedly "leaned over the platform" (p. 48, l. 10; p. 92, l. 12) so that his head was extending over the tracks (p. 48, l. 14). "[A]s the train was blowing its whistle, it looked like he kind of leaned back, then leaned forward again" (p. 59, l. 21). He didn't seem to either trip or lose his balance (p. 49, ls. 21-25). A few seconds later (p. 86, l. 21), he saw the front of the train glance off plaintiff's head spinning him fully around before he landed on his back (p. 59, l. 7).

Plaintiff was allegedly over the edge of the platform before Mr. Turbin heard the horn sound (p. 87, l. 17). Afterwards, he witnessed plaintiff "kind of straighten up a little bit" before seeming to "lean back" (p. 87, l. 21). He reportedly realized there was going to be an accident only after he believes the train's horn sounded (p. 95, l. 16). In an earlier (7/18/97) statement he stated, inter alia, "I don't remember hearing the whistle of the train blow. However, I heard a train approaching" (plaintiff's exhibit I). A train engineer is only statutorily required to sound the horn or whistle when the train approaches a crossing (Railroad Law § 53-b; Phillips vs. New York Central & H.R.R. Co., 32 NYS 299).

The 4/10/00 affidavit of plaintiff's expert, Carl M. Berkowitz, Phd., attributes the accident to negligent design (e.g. fading yellow paint at the time of his 3/14/00 inspection) and signage which he asserts can result in passengers becoming disoriented and confused as to the direction of oncoming trains. That theory ignores, inter alia, the fact that plaintiff, a longtime resident of the area before his 1/18/98 relocation to Long Branch, New Jersey (p. 17, l. 11), was familiar with the station.

As a common carrier, a railroad owes its passengers a duty to exercise reasonable care in the movement of its trains and provide a reasonably safe place to enter or depart its trains (PJI 2:166 and 2:176).

"It is the established rule in New York and the rest of the nation that when a train engineer sees a person on or near the track, he is not bound to stop his train immediately, but has the right to assume that in broad daylight, the person will see and hear the train, heed the danger, and leave the track" (Alba vs. Long Island RailRoad, 204 AD2d 143, 611 NYS2d 196 [1st Dept., 1994]; Guller vs. Consolidated Rail Corporation, 242 AD2d 283, 661 NYS2d 42 [2d Dept., 1997]).

"In such a situation, the engineer has no duty to make an emergency stop until he determines that the person cannot or will not remove himself from harm's way" (Alba, supra. at 197; Del Costello vs. Hudson Railway Co., Inc., __AD2d__, 711 NYS2d 77 [3rd Dept., 2000]).

Although plaintiff is entitled to a lesser burden of proof (i.e., a Noseworthy charge) because he incurred retrograde amnesia as the result of this tragic accident (PJI 1:62), unless there is some admissible evidence upon which a jury could find defendants negligent the complaint must be dismissed (Smith vs. Stark, 67 NY2d 693, 499 NYS2d 922, 490 NE2d 841 [1986]; Serfaty vs. New York City Transit Authority, 254 AD2d 476, 679 NYS2d 629 [2d Dept., 1998]). "In the present case, [defendants] should not be held liable for the plaintiff's failure to take heed of the oncoming...train, which was readily observable by the normal use of one's senses" (Guller, supra. at 43).

Accordingly, in the absence of any admissible evidence sufficient to create a genuine issue of fact as to defendants' negligence, their application for an award of summary judgment (CPLR 3212) dismissing plaintiff's action is granted.

Dated OCT 05 2000

J.S.C.
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