Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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JORGE DE LOS SANTOS

Plaintiff, **Index No.: 24261/09**

-against- **Mot. Date: 8/16/13**

MTA LONG ISLAND RAIL ROAD and "JOHN DOE" whose full and true name is unknown, the person indicated being an employee of defendant MTA LONG ISLAND RAIL ROAD, **Mot. Cal. No. 68**

Mot. Seq. 1

Defendants.

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The following papers numbered 1 to 9 read on this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their and dismissing the plaintiff's complaint as against them.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition-Exhibits	5-6
Reply Affirmation	7-9

Upon the foregoing papers, it is ordered that the defendants' motion is granted and the plaintiff's complaint as against the defendants is dismissed.

The plaintiff brings this action seeking damages for personal injuries sustained when he apparently became inebriated and attempted to commit suicide by laying down on the tracks in the path of a Long Island Railroad (LIRR) commuter train. The defendants move for summary judgment dismissing the plaintiff's complaint on the ground that its train operator exercised reasonable care to avoid striking the plaintiff under the circumstances.

Tragic consequences result when individuals who consume alcoholic beverages come into contact with railroad tracks traveled by speeding commuter trains. Cases

dealing with this painful scenario focus on whether the reaction of the train operator was reasonable under the attendant circumstances. After a careful analysis of the facts of this case, and the governing case authority, this Court is constrained to find that the plaintiff has failed to raise an issue of fact that the train operator's judgment in this case was anything less than reasonable, thereby warranting a summary dismissal of the plaintiff's complaint as against the defendants.

The Court of Appeals has held that "a train operator may be found negligent if he or she sees a person on the tracks 'from such a distance and under such other circumstances as to permit him [or her], in the exercise of reasonable care, to stop before striking the person.'" (Soto v NYCTA, 6 NY3d 487, 493 [2006] quoting Coleman v New York City Tr. Auth., 37 NY2d 137, 140 [1975]).

In the Soto case, the court found that the plaintiff's credibly expert testified that the train could have stopped 51 feet before it reached the plaintiff. In addition, it was extremely significant that the train operator offered several inconsistent versions of his conduct at the time of the accident, one of which was that he did not see the plaintiff until he had already passed him. (Soto, supra at 490-91). Moreover, there was evidence that the train had stopped only after it made contact with the plaintiff. Thus, the court found that there was a reasonable view of the evidence in that case that the train operator failed to use reasonable care in failing to see the plaintiff from a distance from which he should have seen him, and failed to employ emergence braking measures (Id.).

After Soto, in Dibble v NYCTA, (76 AD3d 272 [1st Dept. 2010]), the issue was also whether the train operator, in the exercise of reasonable care, could have avoided hitting the plaintiff with the subway train. The First Department reversed a jury finding of liability against the New York City Transit Authority that was based upon an expert's speculative computation of an average reaction time of one second, which is also used for automobile drivers as the applicable standard of care for reaction time. The court found that the jury improperly equated negligence with possession of a motor skill that is essentially a reflex action, without any variability for identification, analysis, decision, or any adjustment for factors such as age, and vision, and other variables such as lighting or weather or time of day (Dibble, supra at 280) .

The case whose facts most closely mirror the case at bar is Mirjah v NYCTA (48 AD3d 764 [2d Dept. 2008]). The decedent in that case, whose blood-alcohol level

was .24, was first observed by the train operator as he was about to enter the station sitting in the middle of the train tracks facing the oncoming train in an apparent desire to commit suicide. The operator immediately took his hand off the throttle, activating the "dead man's feature" and the train's braking system, and simultaneously placed the emergency brake into "full service." The train nonetheless continued to move over the decedent, killing him. The same expert used in Dibble, who again utilized an "average stopping time of drivers" as a paradigm for operator reaction, testified that the train operator should have been able to stop the train in time to avoid striking the decedent. The court rejected the expert's testimony as speculative, and insufficient to raise an issue as to whether the failure to stop constituted a failure to use reasonable care (Mirjah, supra at 765). It reversed the trial court's denial of the defendant's summary judgment motion (see also Wadhwa v Long Is. RR., 13 AD3d 615 [2d Dept.2004]).

The defendants here met their initial burden, on their motion for summary judgment, of establishing that the train operator could not have avoided the accident, based upon the operator's testimony at her deposition that she immediately "put the train into emergency" upon seeing the plaintiff on the tracks, but could not stop the train in time to avoid the accident (see Deposition Transcript of Christine King at page 60, lines 24-25, page 61, lines 2-3; see also Stanley v New York City Tr. Auth., 45 AD3d 832 [2d Dept. 2007]).

There is no merit to the plaintiff's contention that the defendant's motion is premature because certain non-parties had not been deposed. As the Second Department recently held, "[a] party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence" (Rungoo v Leary, 2013 NY Slip Op 6556; 2013 NY Slip Op 6556 [2d Dept. Oct. 9, 2013] citing Cajas-Romero v Ward, 106 AD3d 850, 852 [2d Dept. 2013]; Anzel v Pistorino, 105 AD3d 784, 786 [2d Dept. 2013]; Cortes v Whelan, 83 AD3d 763 [2d Dept. 2011]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion'" (Cajas-Romero v Ward, supra at 852 quoting Lopez v WS Distrib., Inc., 34 AD3d 759, 760 [2d Dept. 2006]; see Anzel v Pistorino, supra at 786; Cortes v Whelan, supra at 763). The train operator testified at her deposition that she told the train crew what happened (see Deposition of Christine King, at p. 65, line 25- p. 66, lines 1-3). Hence, any of the train crew's testimony regarding the accident would be based upon what she told them. In

addition, plaintiff's counsel failed to identify what information he hoped to discover at the depositions of the non-parties that would demonstrate that the train-operator caused or contributed to the happening of accident (see Cajas-Romero v Ward, supra at 852). Thus, his prematurity argument is based on mere speculation (see Lopez v WS Distrib., Inc., supra at 760), which is insufficient to defeat the defendants' motion.

The record in this case indicates that the plaintiff has absolutely no recollection of the incident whatsoever, including why he was on the tracks at the station where the accident transpired:

Q. Am I correct in saying, sir, that you possess no further memory of that evening after such time that you purchased the ticket and were standing on the platform?

A. Yes.

(Deposition Transcript of plaintiff Jorge De Los Santos, at p. 28, lines 4-8)

Q. And you have no memory of physically being present on the railroad tracks that night?

A. No.

(Id. at page 29, lines 23-25).

"While . . . a deceased or unconscious plaintiff is held to a lesser standard of proof, that does not relieve the plaintiff of the obligation to provide some proof from which negligence could reasonably be inferred" (Bacic v. New York City Tr. Auth., 64 AD3d 526 [2d Dep't 2009] citing Byrd v New York City Tr. Auth., 228 AD2d 537 [2d Dept. 1996]; see generally Noseworthy v City of New York, 298 NY 76, 80 [1948]; Jose v. Richards, 307 AD2d 279 [2d Dept. 2003]; Horne v Metropolitan Tr. Auth., 82 AD2d 909, 910 [2d Dept. 1981]). Here, there was no evidence of any fault on the part of the train operator other than mere speculation, which does not constitute proof from which negligence could reasonably be inferred (see Mirjah supra at 765-766; Seong Sil Kim v New York City Tr. Auth., 27 AD3d 332, 334 [2d Dept. 2006). The Court rejects the efforts of plaintiff's counsel to argue inconsistencies or gaps in the testimony of the train operator; that polemic fails to add any direct evidence of negligence on the part of the defendants in opposition to their motion.

Finally, the Court must comment on the uncontroverted medical evidence submitted by the defendants as exhibits to its motion. The toxicology report of the

defendants' expert toxicologist indicates, based on blood drawn from the plaintiff at the hospital where he was taken following this accident, that his blood alcohol level was .198 and he had likely consumed over 8 drinks. As indicated in her report, ethanol is a central nervous system depressant. The hospital records also indicate that the plaintiff was intoxicated and depressed, and appeared to have attempted suicide by laying on his back between the railroad tracks of an oncoming train. While extremely sympathetic to the plaintiff's situation, the evidence in this case demonstrates that the plaintiff disregarded the obvious danger posed by the train, and placed himself in a position of extreme peril. Even assuming, arguendo, that there was some negligence on the part of the defendants, the reckless conduct of the injured plaintiff constituted a superseding cause of the accident which absolved the defendant of any liability (see Wadhwa v Long Island R.R., 13 AD3d 615 [2d Dept. 2004]; Zenteno v MTA Long Is. Rail Rd., 71 AD3d 673 [2d Dept. 2010]; Johnson v New York City Tr. Auth., 96 AD3d 906 [2d Dept. 2012]; Lassalle v New York City Tr. Auth., 11 AD3d 661 [2d Dept. 2004]). Accordingly, it is

ORDERED that the defendants motion for summary judgment is granted in all respects, and the plaintiff's complaint and any cross-claims or counterclaims are dismissed as against them. Any and all other applications not specifically addressed herein are denied.

This constitutes the opinion, decision and order of the Court.

Dated: October 21, 2013

TIMOTHY J. DUFFICY, J.S.C.