

2013 WL 6779541 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
Part 21
New York County

BLECHMAN, Pamela,
v.
TRANSIT AUTHORITY.

No. 1092632008.
March 21, 2013.

Sequence Number: 001
Motion Date 1/17/13
Motion Seq. No. 001

Dismiss Defense

Michael D. Stallman, Judge.

*1 The following papers, numbered 1 to 16 were read on this motion for summary judgment

Notice of Motion - Affirmation - Exhibits A-K, L [Affidavit], M, N [Affidavit]	No(s). 1-5
- Affidavit of Service	
Affirmation in Opposition - Affirmation of Service	No(s).6-7
Reply Affirmation - Affidavit of Service	No(s).8-9
Amended Notice of Motion - Amended Affirmation - Exhibits A-N	No(s).10-12
- Affidavit of Service	
Affirmation in Opposition to Amended Notice of Motion	No(s).13-14
- Affirmation of Service	
Reply Affirmation - Affidavit of Service	No(s).15-16

Upon the foregoing papers, it is ordered that plaintiff's motion for summary judgment is granted, the third affirmative defense of governmental immunity is stricken, and defendant is not permitted to raise the defense of governmental immunity at trial.

In this action, plaintiff alleges that, on April 18, 2008, she fell in the gap between the train and the uptown platform of the number 4 and 5 trains at the 14th Street-Union Square subway station in Manhattan. In an amended verified answer dated April 2, 2012, defendant New York City Transit Authority asserted that "the New York City Transit Authority... performs a

governmental function. Accordingly, its decisions concerning acceptable gaps between subway cars and platforms are entitled to immunity.” (Director Amended Affirm., Ex J [Amended Verified Answer] ¶ 7.)

In June 2012, plaintiff moved for an order striking defendant's affirmative defense of qualified immunity. Following a court conference, the parties agreed in a so-ordered stipulation dated November 18, 2012 that plaintiff “will serve papers clarifying the section of the CPLR under which she is moving for relief.” By an amended notice of motion dated December 6, 2012, plaintiff seeks summary judgment dismissing the affirmative defense of qualified immunity.

The standards for summary judgment are well-settled.

“On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tendered] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers.”

*2 (*Vega v Restani Constr. Corp.*, 18 NY3d 499,503 [2012] [internal citations and quotation marks omitted].) “The moving party need not specifically disprove every remotely possible state of facts on which its opponent might win the case.” (*Ferluckaj v Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009].)

In support of her motion for summary judgment dismissing the defense of qualified immunity, plaintiff submits the documents upon which defendant has relied to invoke the defense of qualified immunity under *Weiss v Fote* (7 NY2d 579 [1960].) These documents were in response to plaintiff's demand for documents which showed the history and development of its policy of the maximum gap tolerance, from 1986 to present. (Director Amended Affirm., Ex F.)

Plaintiff contends that the defense of qualified immunity should be dismissed because the Appellate Division, First Department has ruled that these documents did not establish the defense of qualified immunity. (*Leon v New York City Tr. Auth.*, 96 AD3d 554,554 [1st Dept 2012]; *Sanchez v City of New York*, 85 AD3d 580, 926 NYS2d 52 [2011]; see *Tzilianos v New York City Tr.Auth.*, 91 AD3d 435, 936 NYS2d 159 [2012].) Specifically, the Appellate Division ruled,

“This Court, on two occasions, has already found that the 1987 memorandum does not constitute a study for purposes of the qualified immunity doctrine because it does not cite any basis for the six-inch standard, [citations omitted]. Indeed, the TA concedes that the 1987 memorandum ‘was not a study, did not purport to be a study, and contained no reference to any study’.... This is insufficient to demonstrate the TA's entitlement to qualified immunity.”

(*Leon v New York City Jr. Auth.*, 96 AD3d 554,554 [1st Dept 2012].) Plaintiff has met the prima facie burden of summary judgment dismissing the affirmative defense of qualified immunity because plaintiff has submitted the documents that defendant has relied upon to formulate its gap policy. At the core of the gap policy is the memorandum dated May 28, 1987 from David L. Gunn, colloquially referred to as the Gunn Memo.

In opposition, defendant argues that *Leon* only ruled that the documents produced in discovery in that case were insufficient to establish the defense of qualified immunity. Defendant contends that *Leon* should prevent defendant from presenting other evidence at trial that might establish the defense of qualified immunity.

However, once plaintiff met the prima facie burden for summary judgment, the burden then shifted to defendant to lay bare its proof to demonstrate the existence of a triable issue of fact. (See e.g. *Feliz v Beth Israel Med. Ctr.*, 38 AD3d 396, 397 [1st Dept 2007]; *Hoot Group, Inc. v Caplan*, 9 AD3d 448 [2d Dept 2004].) Defendant submits no documents or other evidence that

might establish that “a public planning body considered and passed upon the same question of risk’ that would go to a jury.”
{*Sanchez*, 85 AD3d at 580.)

*3 Therefore, plaintiffs motion for summary judgment is granted, and the third affirmative defense of governmental immunity is stricken. Defendant is not permitted to raise the defense of governmental immunity at trial.

Dated: 3/19/13

New York, New York

<<signature>>, J.S.C.

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.