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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHARLES A. LaTORRELLA, JR. IA Part 4  
Justice

SEAN MOLEY, etc., et al.	x	Index
	:	Number <u>11495</u> 1999
	:	
- against -	:	Motion
	:	Date <u>August 14,</u> 2001
	:	
THE LONG ISLAND RAIL ROAD	:	Motion
	:	Cal. Number <u>41</u>
	x	

The following papers numbered 1 to 8 read on this motion by defendant for summary judgment in its favor dismissing plaintiff's claims against it.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1-3
Answering Affidavits - Exhibits .....	4-6
Reply Affidavits .....	7-8

Upon the foregoing papers it is ordered that the motion is granted.

Plaintiff seeks to recover for injuries suffered when he was struck by a Long Island Railroad (LIRR) train on January 24, 1997. It is undisputed that the infant plaintiff, aged 13 years, was walking along the LIRR tracks in the vicinity of the Lawrence Road crossing and the Kings Park railroad station. While plaintiff testified in his deposition testimony that he had no memory of the incident, plaintiff had previously been able to tell detectives that he left a friend's home and entered upon the tracks for a shortcut to his own home. Plaintiff stated to the detectives that, while walking on the tracks, he heard the train coming behind him and started to walk off the tracks when "something" struck him on the right side.

Defendant maintains that, despite plaintiff's allegations of having been hit by the train, plaintiff was a trespasser on the tracks in violation of Railroad Law § 83 and that plaintiff can point to no negligence on the part of defendant LIRR. The engineer operating the train in question testified that he sounded the horn at the two grade crossings near the Kings Park station, including the one at Lawrence Road. The engineer testified that while he did

see a small dog on the tracks, that he did not see anything else on the tracks and did not see any people walking along the tracks. The engineer testified that although that portion of the track was unlighted, the headlights of the train were on and that the brakes were operational.

It has long been conclusively established that persons not affiliated with the railroad who walk upon railroad tracks are trespassers and are negligent per se. (Capitula v New York Cent. R.R. Co., 213 App Div 526.) An engineer does not have a duty to watch for trespassers on the track "save to do no intentional, reckless or wanton injury." (Capitula v New York Cent. R.R. Co., 213 App Div, at 527, supra.) In this case, it is significant that the engineer never saw plaintiff on the tracks, and testified that he did not learn of the incident until approached by detectives some days later. Accordingly, the issue of what, if any, duty the engineer might have had to attempt an emergency stop is not implicated. (Cf., Alba v Long Island R.R., 204 AD2d 143.)

Plaintiff nevertheless maintains that questions of fact exist as to negligence on behalf of the defendant. However, plaintiff's only evidence thereof is the deposition of the engineer. Plaintiff relies on that portion of the engineer's testimony wherein the engineer stated that he recalled hitting a log west of the Kings Park station. It is uncontroverted, however, that plaintiff was struck east of the Kings Park station and west of the Lawrence Road crossing. The engineer stated that while he recalled seeing the small dog on the tracks, and believed that he in fact did hit the dog, that the animal was some 75 feet west of the Lawrence Road crossing. The investigative reports all indicate that plaintiff was hit some 900 to 1000 feet west of the Lawrence Road crossing. Nothing in the evidence relied upon supports the allegation that the engineer was negligent, and nowhere does plaintiff refute that he was a trespasser on the tracks. (Pytel v New Jersey Trans. Auth., 267 AD2d 155.) Furthermore, despite plaintiff's alleged loss of memory of the accident, the reduced standard of proof of the Noteworthy Doctrine is not applicable here, as the burden first rests upon the amnesiac plaintiff to present prima facie evidence of defendant's negligence. (Smith v Stark, 67 NY2d 693.) Plaintiff has made no such showing.

Finally, courts have repeatedly held in cases of this nature that an act on the part of a plaintiff may be so reckless as to break any causal connection to alleged negligence on the part of the defendant. (Prysock v Metropolitan Transp. Auth., 251 AD2d 309; Wright v New York City Trans. Auth., 221 AD2d 431.) Here, plaintiff was walking along active tracks after dark and failed to get off the tracks even as he was admittedly aware that the train was approaching. (Feng v Metropolitan Transp. Auth., \_\_\_\_ AD2d \_\_\_\_, 727 NYS2d 470; Prysock v Metropolitan Trans. Auth., supra; Guller v Consolidated Rail Corp., 242 AD2d 283.) Courts have recognized that even with infant teenage plaintiffs, the recklessness of one's activity, in light of the clear risk of danger, may be so obvious

as a matter of common sense to be sufficient to break the causal connection and relieve the defendant of liability. (Pena v New York City Trans. Auth., 236 AD2d 209; and see, Gustin v Association of Camps Farther Out, 267 AD2d 1001.)

In consideration of the foregoing, the court finds that defendant has met its burden of demonstrating that no triable issues of fact exist and the motion for summary judgment in its favor is granted.

Dated: October 9, 2001

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J.S.C.