Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Noel Campbell,

Plaintiff,

-against-

Door Automation Corp.,
Besam Automated Entrance Systems, Inc.,
NABCO Entrances, Inc. and
ASSA ABLOY Entrance Systems US Inc.,

Defendant.

Motion Sequence No.: 003; MD
Motion Date: 10/31/18
Submitted: 11/28/18

Index No.: 602459/2017E

Attorneys [See Rider Annexed]

Upon the **E-file document list** numbered 24 to 43 read on this application by defendant Door Automation Corp. for an order granting it summary judgment pursuant to CPLR 3212 dismissing the complaint; it is

ORDERED that the motion by defendant Door Automation Corp. for an order granting it summary judgment pursuant to CPLR 3212 is denied.

This is an action seeking damages for personal injuries alleged to have occurred on August 29, 2016 when a metal portion of the automatic door mechanism at the BJ's Wholesale Club store located at 1900 The Arches Circle, Deer Park, New York ("BJs") struck the plaintiff in the right knee. Plaintiff commenced this action against defendant Door Automation Corp. ("DAC") by the filing of a summons and complaint on February 7, 2017. Issue was joined by defendant DAC on March 31, 2017. Plaintiff served a bill of particulars dated August 7, 2017. A preliminary conference order was issued on October 11, 2017. To date, no depositions have been held. Defendant DAC now moves for summary judgment pursuant to CPLR 3212 dismissing the complaint. In support of its motion, defendant DAC submits an affirmation of counsel, a memorandum of law, an affidavit of Joshua Gatoff ("Gatoff"), President and CEO of defendant DAC, the pleadings, plaintiff's verified bill of particulars, the complaint in the consolidated matter,

the motion to consolidate, photographs, an incident report, service logs, service invoice, and plaintiff's employment application. Plaintiff opposes the motion through the submissions of an attorney affirmation and defendant replies by attorney affirmation. Subsequent to the return date of the within motion, this matter was consolidated with an action commenced by plaintiff against Besam Automated Entrance Systems, Inc. ("Besam"), Nabco Entrances, Inc. ("Nabco"), and Assa Abloy Entrance Systems US Inc.("Assa"), under index number 607116/2018. In that consolidated action, plaintiff alleges that Besam, Nabco, and Assa repaired and maintained the automatic door that is the subject of this action.

It is alleged herein in the verified bill of particulars that plaintiff worked in the shipping department of BJ's at the time of the incident. It is further alleged that defendant DAC was hired to install and maintain the automatic doors located at BJ's. While defendant DAC admits that the actual service contract it entered into with Record USA to provide maintenance services for the subject automatic door was destroyed by Hurricane Sandy, certain records have been located for the automatic doors at the subject BJs. The Gatoff affidavit avers that the business records of defendant DAC indicate that the last date of service for the subject automatic door was on January 11 [sic], 2015,[1] which was a date more than a year prior to the alleged incident. The Gatoff affidavit further avers that defendant DAC never received any further service calls from BJ's for the service and/or repair of their automatic doors after January of 2015. Further, according to its service log records, the last time that defendant DAC was on the subject premises was on January 11, 2015. Gatoff avers that DAC was not providing any services for BJ's automatic doors at the time of plaintiff's alleged accident. Mr. Gatoff further avers that defendants Besam, Nabco and Assa were responsible for the maintenance and repairs of the subject automated doors at BJ's at the time of the alleged accident. Defendant asserts that it owed no duty to plaintiff, as it did not repair or service and had no responsibility to repair or service the subject automatic doors in 2016. Defendant DAC further alleges that even if it had been servicing and maintaining the subject automatic doors at the time of the accident, that plaintiff's own actions in attempting to repair the automatic door were the proximate cause of the plaintiff's injuries. Defendant asserts that according to the BJ's incident report, plaintiff admitted that he was attempting to fix the automatic door when a "top piece of the door hit him on the right leg" and further, according to the incident report, plaintiff was cited by BJ's for "failure to follow procedures or best practices" inasmuch as plaintiff "lacked knowledge or skill for the task."

It is well settled that the proponent of a summary judgment motion bears the initial burden of establishing his or her entitlement to judgment, as a matter of law, in his or her favor by offering admissible evidence sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the

[1]The court notes that the affidavit of Gatoff indicates the last service date as January 15, 2015. However, the invoice and the service log show a last service date of January 11, 2015.

sufficiency of any opposition thereto (***Winegrad v. New York Univ. Med. Ctr.***, *supra*). Once the movant has made the requisite showing, the burden then shifts to the opposing party, requiring him or her to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; ***Alvarez v. Prospect Hosp.***, *supra*; ***Zuckerman v. City of New York***, *supra*). On such a motion, the Court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the nonmoving party; the Court is not responsible for resolving issues of fact or determining matters of credibility (*see* ***Chimbo v. Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v. Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v. Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v. Bolivar***, *supra*; ***Benetatos v. Comerford***, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v. Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Rodriguez v. 5432-50 Myrtle Ave., LLC***, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; ***Russo v. Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v. Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]).

"Although a jury determines whether and to what extent a particular duty was breached, it is for the court to first determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society generally" (***Cupo v. Karfunkel***, *supra*, quoting ***Tagle v. Jakob***, 97 NY2d 165, 168, 737 NYS2d 331 [2001]). "In the absence of duty, there is no breach, and without a breach there is no liability. Negligence in the air, so to speak, will not do. The question of duty...is best expressed as whether the plaintiff's interests are entitled to legal protection against the defendant's conduct" (***Pulka v. Edelman,*** 40 NY2d 781, 390 NYS2d 393 [1976]. In that regard, it has been held that owners and occupants of stores, office buildings, and other places onto which members of the general public are invited have a non-delegable duty to provide the public with reasonably safe premises (***Blatt v. L'Pogee, Inc.***, 112 AD3d 869, 978 NYS2d 291 [2d Dept 2013]; ***Podlaski v. Long Is. Paneling Ctr. of Centereach, Inc.***, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]), and have a non-delegable duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries (*see* ***Nallan v. Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v. Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). This non-delegable duty includes the duty to provide the public with a safe means of ingress and egress (*see* ***Podlaski v. Long Is. Paneling Ctr. of Centereach, Inc.***, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]). Furthermore, an owner of property may be held vicariously liable for the negligence of its independent contractor if such negligence violated the owner's non-delegable duty to maintain the premises in a safe condition (*see* ***Pesante v. Vertical Indus. Development Corp.***, 29 NY3d 983, 53 NYS3d 249 [2017]; *affg* 142 AD3d 656, 36 NYS3d 716 [2d Dept 2016]; ***Olivieri v. GM Realty Co., LLC***, 37 AD3d 569, 830 NYS2d 284 [2d Dept 2007]; ***Backiel v. Citibank, N.A.***, 299 AD2d 504, 507 751 NYS2d 492 [2d Dept. 2002](non-delegable duty applies to employees).

Generally, a third-party contractor is not liable in tort to an injured plaintiff, as it owes no duty of care to one who is not a party to the contract (*see* ***Espinal Melville Snow Contrs.***, 98 NY2d 136, 141-142, 746 NYS2d 120 [2002]; ***Nachamie v. County of Nassau***, 147 AD3d 770, 47 NYS3d 58 [2d Dept 2017]; ***Kawka v. 135-55 35th Realty, LLC,*** 139 AD3d 677, 31 NYS3d 173 [2d Dept. 2016]); ***Matos v. Shelter Rock Homes, Inc.,*** 130 AD3d 883, 14 NYS3d 120 [2d Dept. 2015]; ***Foster v. Herbert Slepoy Corp.,*** 76 AD3d 210, 905 NYS2d 226 [2d Dept. 2010]; ***Brodbeck v. Albany Int'l Corp.,*** 297 AD2d 693, 747 NYS2d 533 [2d Dept. 2002]). However, the Court of Appeals has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. Liability may be imposed on a contractor under the following circumstances: (1) "where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launched a force or instrument of harm'" (***Espinal v. Melville Snow Contrs.***, 98 NY2d 136, 141-142, 746 NYS2d 120 [2002] *quoting* ***H.R. Moch Co. v. Rensselaer Water Co.***, 247 NY 160, 168, 159 NE 896 [1928]), thereby creating an unreasonable risk of harm to others or increasing the existing risk; (2) where a plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party's obligations (*see* ***Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.***, 76 NY2d 220, 226, 557 NYS2d 286 [1990]); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property (*see* ***Palka v. Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]; *see generally* ***Roberts ex rel. Gillespie v. Chaim Yanko, LLC,*** 39 Misc. 3d 1207(A), 971 N.Y.S.2d 74 [Kings Cty. 2013](contractor owed no duty of care to plaintiff as contract to provide emergency repairs was not comprehensive and exclusive, plaintiff did not rely on contractor's performance, and contractor did not launch a force or instrument of harm). Moreover, "in the absence of a contract for routine or systematic maintenance, an independent repairer/contractor has no duty to...inspect or warn of any purported defects...[and] absent such a duty, or proof of negligence with regard to the performance of the repairs...the independent repairer/contractor cannot be held liable for damages caused by the malfunction of the mechanism it had been hired to repair" (*see* ***Merchant Mut. Ins. Co. v. Quality Signs of Middletown,*** 110 AD3d 1042, 1043, 973 NYS2d 787 [2d Dept. 2013]; *see also* ***Lagman v. Overhead Door Corp.,*** 128 AD3d 778, 9 NYS3d 147 [2d Dept. 2015]). Conversely, where the defendant has contracted to maintain the equipment in a safe operating condition, it could be subject to liability for "failure to use reasonable care to discover and correct a condition which it ought to have found" (***Oxenfeldt v. 22 North Forest Avenue Corp.,*** 30 AD3d 391, 816 NYS2d 563 [2d Dept. 2006]).

Defendant cites ***D'Anna v. Inc. Village of Hempstead,*** 2010 WL 4530216, 2010 N.Y. Slip. Op. 33116 [Nassau Cty. 2010] for the proposition that it owed no duty of care to plaintiff. However, in that case, the lower court found that, in the absence of discovery, the subcontractor who installed the new sidewalk failed to make a prima facie showing that it was not responsible for the maintenance of the sidewalk and thus, its summary judgment motion was denied. Defendant further cites ***Giordano v. Seeyle, Stevenson & Knight,*** 216 AD2d 439, 628 NYS2d 373 [2d Dept. 1995], however, that case involves a supervisory engineer at a construction site, which the court finds is not applicable here, nor is ***Grgas v. Lehrer McGovern Bovis,*** 307 AD2d 982, 763 NYS2d 500 [2d Dept. 2003], another construction site case. As well, ***Petito v. Verrazano Constr. Co.,*** 283 AD2d 472, 724

NYS2d 463 [2d Dept. 2001], a case involving ongoing renovations and the liability of a general contractor, does not offer the court guidance on this issue.[2]

In this case, without the ability to review the contract between DAC and Record USA, the court cannot determine if DAC undertook a comprehensive and exclusive maintenance obligation of the automatic doors at BJs such that DAC was obligated to provide routine and systematic inspections and maintenance of the subject automatic door or if the maintenance and repair services were provided on an as-needed basis, which then could indicate no duty of care was owed to the plaintiff. As such, in the absence of the contract, the court cannot conclude as a matter of law that defendant owed no duty of care to plaintiff (*see, e.g.,* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]; ***Lagman v. Overhead Door Corp.,*** 128 AD3d 778, 9 NYS3d 147 [2d Dept. 2015]; ***Merchant Mut. Ins. Co. v. Quality Signs of Middletown,*** 110 AD3d 1042, 1043, 973 NYS2d 787 [2d Dept. 2013]). Further, the court notes that the Gatoff affidavit indicates Besam, Nabco and Assa, started handling the servicing of the subject automatic door starting in March or April of 2015. However, no evidence was submitted in support of this contention. In light of the foregoing, defendant DAC has not established a prima facie entitlement to summary judgment.

Notwithstanding the above, defendant DAC argues that even if a duty was owed to plaintiff, that it is not liable for any alleged negligence because plaintiff created the dangerous condition by attempting to repair the subject automatic door, a function that he was not hired by his employer to perform. The cases cited by defendants are inapposite, in that they concern dangerous conditions readily observable or apparent to the plaintiff. Nevertheless, the general principle that a "defendant is not required to protect a plaintiff from his own folly" (***Haynie v. New York City Hous. Auth.,*** 95 AD3d 594, 944 NYS2d 104 [1st Dept. 2012]) is instructive. While proximate cause is generally an issue for the trier of fact, it "may be decided as a matter of law where only one conclusion may be drawn from the established facts" (***Howard v. Poseidon Pools, Inc.,*** 72 NY2d 972, 534 NYS2d 360 [2d Dept. 1988]). For example, summary judgment is warranted when the sole proximate cause of the accident was the plaintiff's own conduct (*see* ***Yedynak v. Citnalta Constr. Corp.,*** 22 AD3d 840, 803 NYS2d 705 [2d Dept. 2005]; *see also* ***Conte v. Orion Bus Indus., Inc.,*** 162 AD3d 638, 78 NYS3d 236 [2d Dept. 2018]). Thus, a defendant will be relieved of liability where a superseding cause interrupts the causal chain of connection between the injuries and the defendant's negligence, including the plaintiff's own conduct (***Mesick v. State of New York,*** 118 AD2d 214, 504 NYS2d 279 [3d Dept. 1986]). An intervening act may be a superceding cause which "breaks the causal connection if it is extraordinary, not foreseeable in the normal course of events, or far removed from the defendant's conduct...[however,] an intervening act which is a normal consequence of the situation created by the defendant cannot constitute a superseding cause absolving the defendant from liability" (***Jackson v. New York City Hous. Auth.,*** 214 AD2d 605, 606, 624 NYS2d 720 [2d Dept. 1995]; ***Soomaroo v. Mainco Elevator & Elec. Corp.,*** 41 AD3d 465, 838 NYS2d 119 [2d Dept. 2007]). "Whether a plaintiff's act is a superceding cause or whether it is a normal

[2]Defendant further cites cases involving municipalities, which the court likewise finds do not apply herein.

consequence of the situation created by the defendant are generally questions for the trier of fact to determine" (***Soomaroo v. Mainco El. & Elec. Corp.,*** *supra,* 41 AD3d at 465).

Based upon the admissible evidence presented to the court, it cannot be said as a matter of law that plaintiff's actions were so extraordinary and unforeseeable as to sever any causal connection between defendant's alleged negligence and plaintiff's alleged injuries (*see* ***Jackson v. New York City Hous. Auth.***, *supra*; ***Soomaroo v. Mainco El. & Elec. Corp.,*** *supra*; *see also* ***Ventricelli v. Kinney System Rent A Car, Inc.,*** 45 NY2d 950, 411 NYS2d 555 [1978]; ***Senior v. Elevator Refurbishing Corp.,*** 59 Misc.3d 1225, 2018 N.Y. Slip Op. 50689 [Westchester Cty. 2018]).

Inasmuch as defendant has not demonstrated its prima facie entitlement to summary judgment, denial of its motion is required, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v. New York Univ. Med. Ctr.,*** 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***LaRosa v. Town of Hempstead,*** 237 AD2d 579, 655 NYS2d 620 [2d Dept. 1997]), and the absence of an affidavit from plaintiff.

Accordingly, defendant's motion for an order granting it summary judgment dismissing the complaint is denied (CPLR 3212).

Dated: 2/21/2019

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

RIDER

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