SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 31
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MARC SHARINN,

Plaintiff, **Index No. 161244/2013**

-against-

ICON PARKING SYSTEMS, LLC,
333 E. 46TH ST. PARKING, LLC, and **DECISION AND ORDER**
333 EAST 46TH ST. APARTMENT CORP.,

Defendants.
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Kelly O'Neill Levy, J.S.C.

In this action seeking recovery for personal injury, defendants move for summary judgment pursuant to CPLR § 3212, dismissing the complaint. Plaintiff opposes this motion. Defendant's motion is granted.

"The drastic remedy of summary judgment may only be granted where, viewing the facts in the light most favorable to the non-movant, 'the moving party has "tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact,"' and the non-moving party has subsequently 'fail[ed] "to establish the existence of material issues of fact which require a trial of the action."'" *Dormitory Authority v. Samson Constr. Co.*, 30 N.Y.3d 704, 717 (2018) (citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012)).

Background

Viewing the relevant facts in the light most favorable to the plaintiff, on July 8, 2011, at approximately 12:15 a.m., two of plaintiff's acquaintances drove plaintiff to the parking garage located at 333 East 46th Street, New York, New York to retrieve the car that plaintiff had parked there hours earlier. *See* Sharinn Dep. (p. 8, line 16-p. 9, line 6). The attendant at the booth inside

the parking garage informed plaintiff that it was too late – to which Plaintiff gestured to his car, which was only several feet away from where the discussion as taking place, and said "Are you serious? My car is right here." (p. 57, line 15-p. 58, line 4). The attendant indicated that the hour of plaintiff's arrival meant that the price would be approximately $50 more than plaintiff expected, to which plaintiff responded with words to the effect of, "Are you kidding me? Are you serious?" (p. 59, lines 15-22). After that, the attendant turned away from plaintiff. Plaintiff who had three glasses of wine at dinner, is 6'2" tall, and weighed approximately 215 pounds at the time, then attempted to get the attention of the attendant by knocking on the booth window with "medium force," and the glass of the window broke. (p. 8, lines 12-15; p. 9, lines 11-14); (p. 60, line 16-p. 61, line 2). Plaintiff sustained injuries to his hands and arms due to contact with the resulting sharp glass. (p. 70, line 24-p. 71, line 5).

Plaintiff alleges that the defendants were negligent, careless and reckless in the ownership, operation, design, maintenance, management, control, supervision, and installation of the glass window of the parking garage cashier booth.[1] Defendant 333 E. 46TH ST. PARKING, LLC d/b/a ICON operated the parking garage pursuant to a lease with defendant 333 EAST

[1] Plaintiff's Bill of Particulars also alleges that the window in question violates various city regulations, namely: NYC Building Code §§ 27-147 ("When permits required."), 27-645 and 27-646 and 27-647 and 27-648 (regulations relating to "use of glass in the exterior wall of a building."), and 27-651 (regulations relating to "Glass in prime and storm doors, interior doors, fixed glass panels that may be mistaken for means of egress or ingress, shower doors and tub enclosures, or in similar installations."), as well as Article 25-B of the General Business Law ("Use of Safety Glazing Materials"). These regulations do not apply to the window of the indoor cashier booth at issue – which is neither an exterior wall subject to winds, nor a panel that may be mistaken for a means of egress, nor a safety glazing material – and Plaintiff makes no legal argument that the regulations ought to apply, except to defer to an unsigned expert witness report stating that they do. The unsigned expert report, in turn, makes only conclusory statements to support its erroneous legal conclusion. *See, e.g., Colon v. Rent a Center*, 276 A.D.2d 58, 61 (1st Dep't 2000) ("Expert witnesses should not be called to offer opinion as to the legal obligations of the parties ... [e]xpert opinion as to a legal conclusion is impermissible. Likewise, the interpretation of a statute is purely a question of law, and is the responsibility of the court, not the trier of facts ... especially where legislative intent [would be] called into question.").

46TH ST. APARTMENT CORP. Defendant ICON PARKING SYSTEMS, LLC is a brand name with no day to day responsibilities over operation, maintenance or repair of the parking garage.

Analysis

"It is well established that owners and lessees have a duty to maintain their property in a reasonably safe condition under the existing circumstances." *Waiters v. Northern Trust Co. of New York*, 29 A.D.3d 325, 326 (1st Dept 2006); *see also, e.g., Basso v. Miller*, 40 N.Y.2d 233, 241 (1976). "If they do not, liability may be imposed for any foreseeable injuries arising from the unsafe or dangerous condition." *Vazquez v. City of New York*, 192 A.D.2d 522, 524 (2d Dep't 1993). However, it is well-settled[2] that a court may "conclude as a matter of law, upon the uncontroverted facts established by the submissions of the parties that the conduct of the

[2] *See, e.g., Somma v. New York*, 28 Misc.3d 1231(A) (New York Sup. Ct. 2010) ("In each of the following cases, a plaintiff was deemed the sole proximate cause of his or her injuries:
(1) swimmers, with prior experience in swimming and diving and familiarity with a particular pool or water source or who were warned about it, who nonetheless dove into the water and were injured (*Olsen v. Town of Richfield*, 81 N.Y.2d 1024, 1026 [1993]; *Boltax v. Joy Day Camp*, 67 N.Y.2d 617 [1986]; *Nolasco v. Splish Splash at Adventureland, Inc.*, 74 AD3d 1303 [2d Dept 2010]);
(2) a plaintiff who climbed onto a ballet stretching bar and fell (*Osorio*, 69 AD3d at 403);
(3) a tenant who re-entered her apartment to try to extinguish a fire after unsuccessfully trying to extinguish it twice before (*Holliman v. New York City Housing Auth.*, 68 AD3d 515 [1st Dept 2009]);
(4)those injured while working on vehicles while the engines were running (*Isselbacher v. Larry Lopez Truck Equip. Mfg. Co.*, 66 AD3d 840 [2d Dept 2009]; *Bruno v. Thermo King Corp.*, 66 AD3d 727 [2d Dept 2009]);
(5) an infant plaintiff who jumped up and swung from pipes supporting a basketball backboard (*Mastropolo v. Goshen Cent. School Dist.*, 40 AD3d 1053 [2d Dept 2007]);
(6) a boater who, despite his familiarity with the area, crashed into a mooring field while driving the boat intoxicated and at an excessive speed (*Barry v. Chelsea Yacht Club of Chelsea on Hudson*, 15 AD3d 323 [2d Dept 2005]);
(7) a person who, while a train was passing by her, walked near the middle of the track and squatted down (*Wadhwa v. Long Island Rail Road*, 13 AD3d 615 [2d Dept 2004]);
(8) plaintiffs who walked around a safety gate in the down position at a railroad junction and crossed tracks directly behind an eastbound train without checking to see if westbound train was approaching (*Mooney v. Long Island Rail Road*, 305 A.D.2d 560 [2d Dept 2003]);
(9) a motorcycle rider, familiar with the road, who turned his head away from the road to talk to the other rider right before a curve (*Parmeter v. Bedard*, 295 A.D.2d 779 [2d Dept 2002], *lv denied*, 98 N.Y.2d 614);
(10) a building occupant who attempted to open an inoperable window after previously trying to open it without success (*Turner v. City of New York*, 290 A.D.2d 336 [1st Dept 2002]);
(11) a camper who climbed a 30–foot water tower at night (*Gustin ex rel. Gustin v. Assoc. of Camps Farthest Out, Inc.*, 267 A.D.2d 1001 [4th Dept 1999]); and
(12) a runner, familiar with the area and the presence of a cliff, who fell while running at dark on the cliff's edge (*Plate v. City of Rochester*, 217 A.D.2d 984 [4th Dept 1995]).").

respective plaintiffs was the sole proximate cause of their injuries or was an unforeseeable superseding event, sufficient to break the causal chain and thus absolve the defendant of liability." *See Amatulli v. Delhi Constr. Corp.*, 77 N.Y.2d 525, 534 (1991).

In *Hain v. Jamison*, the Court of Appeals expanded at length on the relevant factors to consider in making such a determination:

> Although foreseeability and proximate cause are generally questions for the factfinder, there are instances in which proximate cause can be determined as a matter of law because "only one conclusion may be drawn from the established facts." ...The line between those intervening acts which sever the chain of causation and those which do not cannot be drawn with precision. Proximate cause is, at its core, a uniquely fact-specific determination, and "[d]epending upon the nature of the case, a variety of factors may be relevant in assessing legal cause". Such factors include, among other things: the foreseeability of the event resulting in injury; the passage of time between the originally negligent act and the intervening act; the spatial gap, if any, between the original act and the intervening act; whether the original act of negligence was a completed occurrence or was ongoing at the time of the intervening act; whether and, if so, what other forces combined to bring about the harm; as well as public policy considerations regarding the scope of liability. The relevance of each factor will vary depending upon the factual circumstances presented, but the most significant inquiry in the proximate cause analysis is often that of foreseeability.

See 28 N.Y.3d 524, 530 (2016) (citations omitted); *see also Osorio v. Thomas Balsley Assocs.*, 69 AD3d 402 (1st Dep't 2010). Plaintiff allegations of negligence relate to the garage booth window, which the parties agree was installed in 1994. Applying the factors specified in *Hain* to the facts presented, there is a gap of seventeen years between the allegedly negligent act of defendant and the injury to plaintiff, and there is no evidence presented that anyone managed to break the allegedly defective window in question, whether by knocking on it with medium force or otherwise, until plaintiff did in 2011. *See id.*

The court has surveyed the long history of premises liability and negligence cases in New York and there are very few cases involving knocking on windows which also involve an adult.[3] Even in the cases involving young children, courts have consistently found no negligence on the,

[3] *But see Gelernt v. 80 CPW Apartments Corp.*, 232 A.D.2d 325 (1st Dep't 1996) (court found no foreseeability as a matter of law when adult banged on window to "drive away a stranger"); *Turner v. City of New York*, 290 A.D.2d 336 (1st Dep't 2002) (plaintiff attempting to open a window whose inoperability was "readily observable" found to be sole proximate cause of own injury).

part of the defendants as a matter of law. *See, e.g.. Delorenzo v. Filipides*, 2003 N.Y. Slip Op. 51415(U) (Sup. Ct. Kings Cty. 2003) (court found no foreseeability as a matter of law when child broke window trying to open it to get water balloons); *see also Bennett v. Saeger Hotels. Inc.*, 229 A.D.2d 909 (4th Dep't 1996) (court found no foreseeability as a matter of law when child broke window by jumping through it to escape impressment into prostitution); *Thackeray v. Novak*, 124 A.D.2d 946 (3d Dep't 1986) (court found no foreseeability as a matter of law when child put his hand through a raised window while climbing a fence). The few cases where a question of fact as to negligence has been found relating to installation or maintenance of a window involve cases where the defective window was brought to the attention of the defendant well ahead of time. *See, e.g., Jean v. St. Paul A.M.E. Zion Church*, 271 A.D.2d 491 (2d Dep't 2000) (foreseeability of criminal pulling plaintiff through broken casement window and assaulting her deemed foreseeable where defendant was aware that plaintiff had been pulled through and assaulted at same broken window a few months earlier, noting "the similarity between the two assaults"); *Snyder v. Moore*, 72 A.D.2d 580 (2d Dep't 1979) (tenant complained of defective window three weeks before injuring self trying to open it).

To paraphrase the reasoning of the Second Department, the plaintiff's theory of liability turns on the acceptance of the assertion that the window in question presented a dangerous condition of which the defendants were or should have been aware, and that their failure to remedy this condition foreseeably resulted in the accident. However, because the purpose of a window is not to be knocked on with medium force, the window screen herein did not present a dangerous condition. Because the window did not represent a dangerous or unsafe condition per se, the accident at bar was not foreseeable and the defendants cannot be held liable therefor. *See Vazquez*, at 524 ("plaintiffs' theory of liability turns on the acceptance of their assertion that

the window screen in question presented a dangerous condition of which the defendants were aware, and that their failure to remedy this condition foreseeably resulted in the accident. However, because the purpose of a window screen is not to prevent people from falling out the window, the window screen herein did not present a dangerous condition regardless of whether the latches were properly attached or functioning as intended. Because the screen did not represent a dangerous or unsafe condition per se, the accident at bar was not foreseeable and the defendants cannot be held liable therefor."); *see also, e.g., Wozniak v. Filler*, 245 A.D.2d 444, 445 (2d Dep't 1997). Put simply, just because windows *can* be knocked on does not mean that windows are meant to be knocked on. *See, e.g., Osorio*, 69 A.D.3d at 403 ("the fact that it could be used for a purpose other than its intended use did not render its availability foreseeably dangerous."). Plaintiff's theory of liability strays too far from legal basics. The proximate cause of plaintiff's injuries was not the window, it was the force that plaintiff applied to that window. Defendant's motion for summary judgment is granted.

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is granted.

This constitutes the decision and order of the court.

7/1/2020
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
KELLY O'NEILL LEVY
JSC

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
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APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
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