SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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ROBERT GALEANO,

Plaintiff,

-against-

BIG LOTS STORES, INC.,

Defendant.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF001130-2020
Motion Date: January 14, 2021

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The following papers numbered 1 to 5 were read on Plaintiff's motion for partial summary judgment on liability:

Notice of Motion - Affirmation / Exhibits - Affidavit 1-3

Affirmation in Opposition 4

Reply Affirmation 5

Upon the foregoing papers, it is ORDERED that the motion is disposed of as follows:

A. Factual Background

This is an action to recover for personal injury. On August 24, 2019, Plaintiff Robert Galeano was shopping at Defendant's "Big Lots" store in Buffalo, New York, for a bed and other items. The bed was contained in a box about 6 ½ feet long, 4 2/3 feet wide, and 14 inches deep. It weighed about 160 pounds. The incident wherein Plaintiff sustained injury was captured in its entirety on the store's surveillance camera. Defendant's employee was transporting the box

upright on a hand truck, pulling it behind him down an otherwise empty passageway. Plaintiff was standing several feet away, to the employee's left, behind a couch. As the employee approached the cashier's area, Plaintiff approached him obliquely, from the left. The employee stopped and allowed the hand truck to stand upright, whereupon the box tipped over. Plaintiff, from what appears to have been a distance of about three feet, lurched forward and reached out with his right hand in an effort to arrest the downward descent of the box. In consequence, he sustained injury to his right arm.

B. The Parties' Contentions

Plaintiff, invoking the doctrine of *res ipsa loquitur*, moves for partial summary judgment on the issue of Defendant's liability. Defendant does not seriously contest Plaintiff's contention that its employee was negligent in handling the box, but asserts that there are triable issues of fact regarding (1) Plaintiff's comparative negligence in affirmatively placing himself in harm's way, and (2) the proximate cause of Plaintiff's injury. On reply, Plaintiff observes that per *Rodriguez v. City of New York*, 31 NY3d 312 (2018), he need not establish the absence of fault on his own part to secure partial summary judgment on Defendant's liability. He further asserts that Defendant's negligence was as a matter of law a proximate cause of injury.

Both parties have neglected to address the analytically prior element of Defendant's duty to Plaintiff.

C. Legal Analysis

In this case, Plaintiff affirmatively placed himself in harm's way in what might be characterized as an effort to "rescue" the bed inside the falling box. He was not within the trajectory of the falling box, and neither he (nor anyone else) would have sustained injury had

he not moved forward and reached out to arrest the box's fall. Accordingly, the Court analyzes the issues presented under the rubric of "danger invites rescue." What, in these circumstances, is the scope of Defendant's duty to Plaintiff?

1. Duty

The concept of "duty" is admirably elucidated in the commentary to the New York Pattern Jury Instructions.

"The proper formula for analyzing the element of duty has long been a subject of debate, *Ohlhausen v. New York*, 73 NY3d 89...(1st Dept. 2010). The general outlines of the debate are derived from the majority and dissenting opinions in *Palsgraf v. Long Island R. Co.*, 248 NY 339...(1928). The majority opinion in *Palsgraf*, which was authored by Judge Cardozo, stated that '[t]he risk reasonably to be perceived defines the duty to be obeyed' and, further, that 'duty' is to be assessed not in the abstract but 'in relation to the plaintiff,' *id.* The dissenting opinion in *Palsgraf*, which was written by Judge Andrews, argued that '[e]very one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others' and the duty extends to all those who are 'in fact injured, even if [the injured] be outside what would generally be thought the danger zone,' *id.* (Andrews, J.). Additionally, Judge Andrews opined that where a duty 'owe[d] to the world' has been breached, the breacher should be liable if the breach was a 'substantial factor' in producing the result, *id.* Thus, the Andrews position was that the scope of foreseeable harm is not the proper touchstone for determining the limits of 'duty' and that, instead, the element of foreseeability is a factor in resolving the 'problem of proximate cause,' *id.*"[1]

[1]Plaintiff's position here is essentially that of the dissenting opinion in *Palsgraf*.

"The debate regarding the proper analytical role of foreseeability is also evident in modern case law, *see Pink v. Rome Youth Hockey Ass'n, Inc.*, 28 NY3d 994...(2016) ('Foreseeability merely determines the scope of the duty once the duty is determined to exist'); *Matter of New York City Asbestos Litigation (Dummitt)*, 27 NY3d 765...(2016) ('the court cannot recognize a duty based entirely on the foreseeability of the harm at issue, though foreseeability defines the scope of a duty once it has been recognized'); *532 Madison Ave. Gourmet Foods, Inc. v.; Finlandia Center, Inc.*, 96 NY2d 280...(2001) ('foreseeability of harm does not define duty'); *Lauer v. New York*, 95 NY2d 95...(2000) ('[w]ithout a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm'); *Eiseman v. State*, 70 NY2d 175...(1987) ('[f]oreseeability of injury does not determine the existence of duty'); *Bonomonte v. New York*, 79 AD3d 515...(1st Dept. 2010), *aff'd* 17 NY3d 866...(2011), and *Sheila C. v. Povich*, 11 AD3d 120 (1st Dept. 2004) (foreseeability 'does not determine the existence of duty, but rather, the scope of that duty once it is determined to exist'); *On v. BKO Exp. LLC*, 148 AD3d 50...(1st Dept. 2017) (where defendant owes some duty and question is breadth of duty, foreseeability of injury to plaintiff is relevant); *Gonzalez v. New York*, 133 AD3d 65...(1st Dept. 2015) ('In determining duty, a court must determine whether the injured party was a foreseeable plaintiff...')...." 1A NY PJI3d 2:10 at 246-247 (2021).

Pursuant to the doctrine of "danger invites rescue," New York courts have recognized the existence of a duty of care running from a tortfeasor not only to an "imperiled victim" (person or property), but also to the victim's "rescuer" *provided* that injury to the rescuer was foreseeable in that the wrongdoer should have known that his actions created a risk of injury, *and* the attempted rescue constituted a reasonable response to that risk under the circumstances.

2. The Doctrine of "Danger Invites Rescue"

In *Calderon v. Cruzate,* 175 AD3d 644 (2d Dept. 2019), the Second Department wrote:

> In 1921, the Court of Appeals, in an opinion by Judge Benjamin Cardozo, established that, with regard to the principle of foreseeability, "[d]anger invites rescue....The wrong that imperils life is a wrong to the imperiled victim; it is also a wrong to his rescuer" (*Wagner v. International Ry. Co.*, 232 NY [176] at 180...[cit.om.]). This principle applies where "the actions of the injured person were reasonable in view of the emergency situation," that is, where the rescuer "acted as a reasonably prudent person would act in the same situation, even if it later appears that the rescuer did not make the safest choice or exercise the best judgment" (PJI 2:13; *see Wagner v. International Ry. Co.*, 232 NY at 182...).

Calderon, supra, 175 AD3d at 647-648.

"Danger invites rescue" applies not only to imperiled life, but also to imperiled property. *See, Wardrop v. Santi Moving & Express Co.,* 233 NY 227, 229 (1922); PJI 2:13. In *Wardrop,* the Court of Appeals wrote:

> [W]e cannot say that [the rescuer] was guilty of negligence as a matter of law. That is not always the rule when an effort is made to protect life or property from injury. Each case must depend upon its own peculiar facts. Was the act resulting in the injury reasonable under all the circumstances? Was the end to be gained fairly commensurate with the risks incurred? Undoubtedly more risks may be taken to protect life than to protect property without involving the imputation of negligence, but the rule is that a reasonable effort may be made even in the latter case.

Wardrop, supra.

Accordingly, PJI 2:13 (Common Law Standard of Care – Foreseeability – Duty to Third Party Rescuer) instructs in pertinent part as follows:

> There is a principle of law that danger invites rescue. That means that someone who commits an act that a reasonably prudent person should know creates as risk of injury to (himself, herself, another person, property) may be liable for injuries sustained by another person who acted in an emergency to avoid or prevent that injury, provided that the actions of the injured person were reasonable in view of the emergency situation. A person acts reasonably in view of an emergency situation if he acted as a reasonably prudent person would act in the same

> situation, even if it later appears that the rescuer did not make the safest choice or exercise the best judgment.
> ....
> If you find that a reasonably prudent person in [Defendant's] position should have known that his actions would create a risk of injury to EF, that [Plaintiff] was injured because he acted [to prevent injury or damage to EF] and that [Plaintiff] acted reasonably in view of the circumstances, you will find [Defendant] liable for [Plaintiff's] injuries. On the other hand, if you find that a reasonably prudent person in [Defendant's] position would not have known that his actions would create a risk of injury to EF or that [Plaintiff's] actions in [acting to prevent injury or damage to EF] were not reasonable under the circumstances, you will find that [Defendant] is not liable for [Plaintiff's] injuries.

As the foregoing authority makes clear, the Defendant owes a duty of care to Plaintiff, as would-be rescuer of the falling box, only if injury to the rescuer was foreseeable in that Defendant's employee should have known that his actions created a risk of the box's falling with resultant damage to the bed, and further, that Plaintiff's attempt to prevent the box from falling constituted a reasonable response to that risk under the circumstances.

3. Conclusion

As Defendant has tacitly recognized, it is difficult to avoid the conclusion that its employee was negligent in handling the box and hand truck, and should have realized that without taking measures to stabilize the large box while tilting the hand truck back into a fully upright position, there was a significant risk that this action would cause the box to fall. However, as Justice Cardozo observed in *Palsgraf*, "[p]roof of negligence in the air, so to speak, will not do." *Id.*, 248 NY at 341 (quoting Pollock, Torts [11th ed.], at 455). "Negligence, like risk, is...a term of relation" (*id.*, at 345), and Defendant's negligence is actionable only if it was "a wrong in its relation to the plaintiff." *Id.*, at 341. Under New York law, as crystallized in PJI 2:13, Defendant's negligence was wrong in relation to Plaintiff only if Plaintiff's attempt to

prevent the box from falling was reasonable in view of the circumstances. *See, Wagner v. International Ry. Co.*, *supra*; *Calderon v. Cruzate*, *supra*; PJI 2:13.

As the Court of Appeals observed in *Wardrop v. Santi Moving & Express Co.*, *supra,* protecting life is one thing, protecting property is another. While reasonable measures may be undertaken to protect property from loss or damage, a risk of harm that would be deemed reasonable if incurred to preserve life may well not be reasonable if incurred solely to preserve property. The question is, "[w]as the end to be gained fairly commensurate with the risks incurred?" *Id.*, 233 NY at 229. Here, the bed in question was not even Plaintiff's property – they had yet to make it to the cashier – and his lurching forward to place one hand under the near side of a heavy box falling swiftly toward the floor would appear on its face to have been a highly risky maneuver with almost no chance of success. Whether or not in view of such circumstances Plaintiff's attempt to "rescue" the box was reasonable is a triable issue of fact. Consequently, Plaintiff's motion for partial summary judgment on Defendant's liability must be denied.

It is therefore

ORDERED, that Plaintiff's motion for partial summary judgment on the issue of Defendant's liability is denied.

The foregoing constitutes the decision and order of the Court.

Dated: January 27, 2021 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE

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