Takhalova v Apple Bancorp., Inc.
2017 NY Slip Op 33405(U)
August 15, 2018
Supreme Court, Kings County
Docket Number: Index No. 500001/2013
Judge: Carl J. Landicino
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15th day of August, 2018.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

----------------------------------X

RAYA TAKHALOVA,

Plaintiff,

- against -

APPLE BANCORP., INC., doing business under the firm name and style of APPLE BANK FOR SAVINGS,

Defendant.

----------------------------------X

Index No.: 500001/2013

DECISION AND ORDER

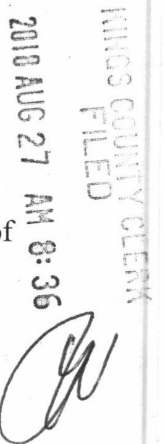
Motions Sequence #3

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed..	1/2,
Opposing Affidavits (Affirmations)...	3
Reply Affidavits (Affirmations)..	4

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The instant action results from an alleged (attempted) bank robbery that occurred on August 30, 2010. On that day the Plaintiff Raya Takhalova (hereinafter "the Plaintiff") allegedly suffered personal injuries and mental anguish as a result of a bank robbery while a customer at a bank operated by Defendant Apple Bancorp., Inc. (hereinafter "the Defendant"). The Plaintiff's complaint alleges that the Defendant was negligent "in failing to utilize proper and adequate security devices, and the defendant, its agents, servant and/or employees were otherwise guilty of carelessness and negligence, both active and passive."



Defendant now moves (motion sequence #3) for an order pursuant to CPLR §3212 granting summary judgment and dismissing the complaint. The Defendant contends that it should be awarded summary judgment given that the bank robbery was not foreseeable and as a result the Defendant was not negligent as a matter of law. Also, the Defendant argues that any alleged injuries suffered by the Plaintiff were not proximately caused by the lack of adequate security. The Plaintiff opposes the motion and argues that it should be denied in that the Defendant failed to meet its *prima facie* burden. The Plaintiff contends that the Defendant did not adequately establish that it was in compliance with industry guidelines and customary protocols in relation to the security of the bank.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168

[2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

"The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 [1928]. "Third-party criminal conduct is considered foreseeable as a matter of law where it is 'reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location.'" *Beato v. Cosmopolitan Assocs., LLC*, 69 A.D.3d 774, 776, 893 N.Y.S.2d 578, 580 [2nd Dept, 2010], *quoting Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 694 N.Y.S.2d 445 [2nd Dept, 1999]. As a result, a Defendant must show a lack of notice of criminal activity in order to establish that a risk of robbery was not foreseeable and that there was no duty of care on the part of the Defendant to the Plaintiff. *See Vaughan v. Bank of New York*, 230 A.D.2d 731, 731, 646 N.Y.S.2d 49, 49–50 [2nd Dept, 1996]. "Without evidentiary proof of notice of prior criminal activity, the owner's duty reasonably to protect those using the premises from such activity never arises." *Coronel v. Chase Manhattan Bank*, 19 A.D.3d 310, 311, 798 N.Y.S.2d 41, 42 (2005), aff'd, 8 N.Y.3d 838, 862 N.E.2d 782 [1st Dept, 2007], *quoting Williams v. Citibank, N.A.*, 247 A.D.2d 49, 677 N.Y.S.2d 318 [1st Dept, 1998]; *see also Valente v. Dave & Buster's of New York, Inc.*, 158 A.D.3d 731, 732, 68 N.Y.S.3d 744, 745 [2nd Dept, 2018]; *Golub v. Louris*, 153 A.D.3d 903, 904, 60 N.Y.S.3d 415, 416 [2nd Dept, 2017].

Turning to the merits of the Defendant's motion, the Court finds that the Defendant has met its *prima facie* burden by showing that the event at issue was not foreseeable. In support of its motion, the Defendant relies primarily on the affidavit of James G. Matera, the Defendant's Executive Vice President for Consumer Banking. In his affidavit, Mr. Matera states that "[i]n the ten years prior to August 30, 2010, the APPLE BANK FOR SAVINGS branch located at 4519 13th

Avenue, Brooklyn, New York, did not experience any attempted armed robberies." What is more, Mr. Matera states that the Defendant "complied with the requirements of 12 C.F.R. 326.3, which contains the Minimum Security Procedures required under the Minimum Security Devices and Procedures and Bank Secrecy Act." In opposition, the Plaintiff has failed to raise a material issue of fact that would show that such an attempted robbery had occurred in the past or was otherwise reasonably foreseeable. *See Coronel v. Chase Manhattan Bank*, 19 A.D.3d 310, 310, 798 N.Y.S.2d 41, 42 [1st Dept, 2005], *aff'd*, 8 N.Y.3d 838, 862 N.E.2d 782 [2007].

Based on the foregoing, it is hereby ORDERED as follows:

The motion (motion sequence #3) by Defendant Apple Bancorp Inc. is granted and the clerk is directed to enter judgment accordingly dismissing the complaint against the Defendant Apple Bancorp Inc.

This constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.

2018 AUG 27 AM 8:37
KINGS COUNTY CLERK
FILED