| **Santana v Bank of Am. Corp.** |
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| 2018 NY Slip Op 32278(U) |
| September 14, 2018 |
| Supreme Court, New York County |
| Docket Number: 159025/15 |
| Judge: Paul A. Goetz |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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VALDEMIR SANTANA and NIDIA SANTANA,

Plaintiffs,

-against-

Index No.
159025/15

BANK OF AMERICA CORPORATION and BANK OF AMERICA, N.A.,

Defendants.

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PAUL A. GOETZ, J. :

Defendant Bank of America, N.A., sued erroneously as Bank of America Corporation (hereinafter, Bank of America), moves for summary judgment dismissing the complaint.

This is an action for personal injury. Plaintiff Valdemir Santana alleges in the complaint that he was injured at a Bank of America banking center located at 5310 Sunrise Highway, Massapequa Park, New York on the afternoon of March 13, 2015. He conducted a transaction at the premises and on his way outside, he walked directly into a glass sidelight panel located next to an interior glass entrance door at the front entrance vestibule, suffering severe physical injuries.

Plaintiffs sued Bank of America Corporation and Bank of America, N.A., though Bank of America, N.A. claims that Bank of America Corporation is not a proper defendant. The complaint alleges that Bank of America was negligent in knowingly providing defective glass in its panel and in failing to warn others of the condition of the glass. Subsequently, a claim for loss of consortium brought by plaintiff Nidia Santana was discontinued by stipulation. Mr. Santana's negligence claim is the sole claim in this action. A verified Bill of Particulars served on him by Bank of America was answered, emphasizing that Bank of America violated 12 NYCRR 47.2

through 47.10 with respect to the glass sidelight at issue here. Plaintiff has filed a Note of Issue and Certificate of Readiness.

Bank of America moves for summary judgment on the ground that it was not negligent as a matter of law. Bank of America submits as evidence deposition testimony from Mr. Santana, photographs of the front part of the bank, a bank accident report, a surveillance video of the incident, an expert witness disclosure for Paul Angelides, P.E., and an affidavit from engineer Robert Fuchs. Bank of America sought to schedule a witness for deposition testimony but plaintiff's counsel waived the deposition.

Bank of America argues that Mr. Santana was the sole cause of the accident because he failed to pay attention while exiting the bank. He testified that he was injured while in the course of his employment. While in the process of delivering vehicles to Long Island from Connecticut, he entered the bank to make a personal deposit. He testified that he was alone and walked towards the first glass door at the front entrance to the bank, with no one walking in front of him. He stated that he could not recall if he observed the glass panel upon his entrance. Upon leaving, he said thank you to the associate who had assisted him with the transaction. Bank of America states that Mr. Santana made eye contact with this associate while exiting and also testified that he did not recall where he was looking in the second before the accident occurred. Mr. Santana claims that he did not walk into the glass doorway but the panel next to the doorway. Upon observing photographs of the entrance and the panel, he responded that as he was leaving, he was looking down at his deposit slip and not at the glass in front of him, and that he made no observations as to whether there were any markings upon the glass panel. Mr. Santana testified that he walked into the glass panel with his forehead, coming into contact with the hairline of his

forehead.

Mr. Santana was shown a copy of the bank accident report, which included a statement he made after the accident, and contained his signature. The bank accident report states that while he was walking out, he turned around to say good bye to the bank associate, and turned back and walked into the glass petition.

In addition to evidence allegedly indicating Mr. Santana's lack of attentiveness prior to the accident, an affidavit from expert witness Robert Fuchs is submitted in response to the claim that Bank of America was in violation of 12 NYCRR 47.2 to 47.10. This code section involves standards and specifications for building use of safety glass. In his affidavit, Fuchs asserts that in his review of the Building Department file covering Oyster Bay, of which Massapequa Park is included, he found that the bank was constructed in 1962. As of that date, the 1956 Building Code was in effect and applied to such construction. Fuchs states that since its initial construction in 1962, the bank has not undergone any work, renovations or reconstructions of its front entrance vestibule or sidelight panel. The applicable provisions for safety glass installations were first enacted in 1968 and were not designated retroactively. Had there been any such alterations or renovations by Bank of America since 1968, it would have been obligated to comply with these code provisions. Fuchs concludes that since Bank of America has not altered or renovated its front entrance and sidelight panel, it is not subject to the provisions of Part 47.

Bank of America argues that based on this evidence, it is entitled to summary judgment as a matter of law.

In opposition to the motion, Mr. Santana contends that the glass in the sidelight panel was

defective and that at the time of the accident, he was unable to see the markings on the sidelight. He argues that it was the lack of adequate markings, not his inattention, that was the cause of the accident. Plaintiff also submits the affidavit of his expert architect Douglas Peden, who asserts that the sidelight at issue is not in compliance with Part 47, specifically 47.9. Due to this lack of compliance, Peden concludes that Bank of America should have been aware that the glass was potentially dangerous and made an effort to properly mark or replace the glass with safer glass. Thus, he states that Bank of America violated the standard of care and created a defective condition that led to plaintiff's injuries. Peden notes that Bank of America performed an American with Disabilities Act upgrade alteration in 2011 where the glass components in the south vestibule of the bank at the rear entrance were replaced. Peden asserts that at that time, Bank of America should have replaced all the glass in its building pursuant to the code. Mr. Santana argues that as the opinions of the two experts conflict, as here, resolution of this conflict must be left to the trier of fact.

In reply, Bank of America argues that it was not obligated to upgrade all of the parts of the bank. Bank of America also argues that the alterations performed at the time were minor rather than substantial. Bank of America reaffirms the conclusions of its expert Fuchs. In addition, Bank of America contends that plaintiff fails to address the issue of proximate cause with respect to Mr. Santana's apparent inattention prior to the accident.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues" (*Birnbaum v Hyman,* 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and ' [o]nly disputes over facts that might affect the outcome of the suit under the

governing law will properly preclude the entry of summary judgment [internal quotation marks and citation omitted]'" (*People v Grasso,* 50 AD3d 535, 545 [1st Dept 2008]). "To prevail on a summary judgment motion, the moving party must provide evidentiary proof n admissible form sufficient to warrant the direction of summary judgment in his or her favor [citation omitted]" (*Kershaw v Hospital for Special Services,* 114 AD3d 75, 81 [1st Dept 2013]). "Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial [citation omitted]" (*id.* at 82).

To be entitled to summary judgment in a premises liability action, the property owner is required to establish that it maintained its premises in a reasonably safe manner, and that it did not create a dangerous condition which posed a foreseeable risk of injury to the individual expected to be present on the premises (*see Westbrook v WR Activities-Cabrera Mkts.,* 5 AD3d 69, 71 [1st Dept 2004]). A property owner has no duty to warn or protect others from a dangerous or defective condition unless it created or contributed to the condition (*see Clementoni v Consolidated Rail Corp.,* 8 NY3d 963, 965 [2007]).

In the complaint, Bank of America is alleged to have committed common law negligence, which is subject to a " reasonable man" standard of care. Plaintiff supplements the standard in the Bill of Particulars by alleging Bank of America's violation of Part 47 as a form of negligence. It is settled that when a statute designed to protect a particular class of persons against a particular type of harm is invoked by a member of the protected class, a court may, in furtherance of the statutory purpose, interpret the statute as creating an additional standard of care (*see Dance v Town of Southampton*, 95 AD2d 442, 445 [2d Dept 1983]). In this case, the rules raised by plaintiff are designed to protect the general public, not a specific class. Moreover, the rules are

not specific statutes but regulations administrative in nature. A violation of these regulations would constitute evidence of negligence rather than negligence per se, that is, negligence to be considered within the totality of the evidence. (*see Long v Forest-Fehlhaber,* 55 NY2d 154, 160 [1987]). Therefore, the violation of 12 NYCRR 47.2 et al. subjects a defendant to a lesser standard if liability is proven. In fact, Bank of America could be found liable of negligence in the absence of any code violation.

However, negligence alone is not enough to prove in this action. Plaintiff must establish that defendant's negligence was the proximate cause of the accident. The issue of whether a defendant's negligence was the proximate cause of an accident is separate and distinct from the negligence determination. A defendant may act negligently without that negligence constituting the proximate cause of the accident (*see Pavlou v City of New York,* 21 AD3d 74, 77 [1st Dept 2005], *affd* 8 NY3d 961 [2007]).

Bank of America seeks dismissal of the complaint because it contends that Mr. Santana was solely negligent in failing to look where he was going, walking directly into the glass panel without considering the nature of the glass. This alleged carelessness on his part, according to Bank of America, is the proximate cause of the accident. Mr. Santana, on the other hand, blames Bank of America for installing defective glass, with improper or indistinguishable markings and failing to use toughened or hardened glass which is shatter-resistant.

Plaintiff must show that the defendant's negligence was a substantive cause of the event which produced his injuries (*see Maniscalco v New York City Tr.,* 95 AD3d 510, 512 [1st Dept 2012]). "Evidence establishing that defendant's negligence was the proximate cause of the harm alleged is essential to proving liability; without it, a defendant cannot be held liable [citations

omitted]" (*Cosmos, Queens Ltd. v Matthias Saechang Im Agency,* 74 AD3d 682, 683-684 [1st Dept 2010]). "[T] he law draws a distinction between a condition that merely sets the occasion for and facilitated an accident and an act that is the proximate cause of the accident [citation omitted] (*D'Avilar v Folks Elec. Inc.*, 67 AD3d 472, 472 [1st Dept 2009]). While proximate cause is rarely ruled as a matter of law, there are certain instances in which only one conclusion may be drawn from the established facts, and the question of legal cause may be decided as a matter of law (*see Alexander v Eldred,* 63 NY2d 460, 468 [1984]).

Here, defendant has failed to meet its prima facie burden with respect to the motion for summary judgment. First, defendant has failed to show that plaintiff's conduct was the sole proximate cause of the accident. The surveillance video submitted by defendant is not authenticated and therefore may not be considered on this motion *(Torres v. Werner Bus Lines, Inc.*, 157 A.D.3d 624, 625 [1st Dep't 2018]). Although plaintiff's deposition testimony supports defendant's argument that plaintiff was not paying attention to where he was going when he was leaving the bank, this is insufficient to eliminate all questions of fact with respect to proximate cause. While it is likely that plaintiff was looking down at his deposit slip in the moments directly before he walked into the glass panel, particularly since he testified that he hit the panel with his forehead first, the admissible evidence does not show where plaintiff was looking prior to this moment as he exited the bank. It is possible that he was looking ahead and that if the glass panel had been marked differently, he would have noticed it and the accident would not have occurred. Second, defendant has failed to show that it did not breach the standard of care owed to plaintiff. Even if defendant was not required to comply with the marking requirements of Part 47, there remain questions of fact regarding whether defendant should still have provided additional

markings on this glass panel given its prominent location in the entryway of the premises and the potential danger that it posed to customers.

Accordingly, it is

ORDERED that defendant Bank of America's motion for summary judgment is denied.

Dated: 9/14/2018

ENTER:

Hon. Paul A. Goetz, JSC