

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

DELORES VELASQUEZ, Individually
and as Next Friend of Kaleema Allen,

Plaintiff,

v.

UNITED CORPORATION,

Defendant,

UNITED CORPORATION,

Third Party Plaintiff,

v.

ABED ALDALIE,

Third Party Defendant.

SX-16-CV-043

ACTION FOR DAMAGES

JURY TRIAL DEMANDED

MEMORANDUM OPINION and ORDER DENYING SUMMARY JUDGMENT

THIS MATTER is before the Court on Defendant's Motion for Summary Judgment, filed September 14, 2018; and Plaintiff's Opposition thereto (Opposition), filed September 19, 2018. Because the Court cannot conclude as a matter of law that the type of injury suffered by Plaintiff was unforeseeable to Defendant, and that therefore Defendant owed no duty to Plaintiff, Defendant's Motion will be denied.

BACKGROUND

Plaintiff filed her Complaint on February 2, 2016 alleging that "while working alongside co-workers gathering food to benefit the Salvation Army, a vehicle operated by an older gentleman," drove "from the parking lot area onto the sidewalk and apron area customers use to enter and exit the store." As a result, "she and her 5 year old daughter were pinned by the car to the wall of the building" causing significant injuries. Complaint ¶¶ 8-9. Plaintiff further alleges that "at the time of the incident... the Premises did not have barriers, appropriate curbing or bumpers, or any other suitable traffic control devices, restraints, or safety measures so as to enable pedestrians to safely stand in, and to traverse the...sidewalk area." *Id.* ¶ 21. Plaintiff's Complaint alleges that Defendant is liable on four counts: Negligence, Premises Liability, and two counts of Negligent Infliction of Emotional Distress. Counts one and two (Negligence and Premises Liability) are in fact identical claims both alleging that Plaintiff's injuries were proximately caused

by Defendant's failure to install some form of traffic control barrier to guard pedestrians against the foreseeable risk of injury from being struck by a vehicle in the sidewalk area in front of the premises.¹ *Id.* ¶¶ 26-39. Count three alleges that as a result of Defendant's negligence as described in counts one and two, Plaintiff suffered "severe emotional distress as a result of watching her child suffer harm at the Premises and her subsequent emergency medical treatment at the scene." *Id.* ¶¶ 40-47. Count four alleges that Plaintiff's daughter similarly suffered severe emotional distress as a result of observing the injury and suffering of her mother. *Id.* ¶¶ 48-55.

In its Motion, Defendant argues that Plaintiff has failed to establish, as a matter of law, that Defendant owed any duty to implement traffic control barriers in the sidewalk area in front of the store, and that Plaintiff has failed to establish United had actual or constructive notice that vehicles in its parking lot presented a dangerous condition. Motion, at 3. In opposition, Plaintiff argues that injuries such as those sustained by Plaintiff and her daughter were reasonably foreseeable under the circumstances, and that Defendant's Motion should be denied because the Court cannot conclude as a matter of law that Defendant owed no duty to Plaintiff. Opposition, at 2.

LEGAL STANDARD

In evaluating a motion for summary judgment, the Court must determine whether there exists a genuine dispute of material fact; one that would impact the outcome of the case under applicable law. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379-80 (V.I. 2014) (quoting *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008)). Such a dispute is genuine if a reasonable trier of fact could find that factual issue material to the claim presented in favor of the non-moving party. *Id.* at 391-92. "Summary judgment is a drastic remedy [and] should be granted only when the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact," and judgment is appropriate as a matter of law. *Id.* at 379-80.

¹ Plaintiff sets forth "negligence" and "premises liability" as separate counts of the Complaint. However, premises liability is itself a species of negligence and does not constitute a separate claim for relief. *See Antilles School, Inc. v. Lembach*, 64 V.I. 400, 413 (V.I. 2016). Rather, "premises liability" refers generally to "a landowner's or landholder's tort liability for conditions or activities on the premises," most commonly based upon a claim of negligence. *See Black's Law Dictionary* 1300 (9th ed. 2009). The distinguishing feature of cases based upon "premises liability" is that the duty allegedly breached arises from the defendant's status as a landholder rather than from a general duty imposed upon any ordinary citizen. However, the underlying claim in these cases is still a claim for negligence. *See Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 380 (V.I. 2014) (discussing the elements of a negligence claim in the context of premises liability).

Reviewing United's Motion, the Court does not weigh the credibility of the evidence offered – instead, all inferences from the evidence are drawn in favor of the nonmoving party, and any conflicting allegations, if properly supported by the record, are resolved in favor of the nonmovant. *See Perez v. Ritz-Carlton (V.I.), Inc.*, 59 V.I. 522, 527 (V.I. 2013) (citing *Williams*, 50 V.I. at 194-95). The moving party bears the burden of demonstrating the absence of any genuine issue of material fact. *Martin v. Martin*, 54 V.I. 379, 389 (V.I. 2010). Only if the moving party discharges this initial obligation does the burden shift to the non-moving party to introduce some evidence showing the existence of a genuine issue of material fact. *See Perez*, 59 V.I. at 527-28. At this point, “the nonmoving party may not rest on its allegations alone, but must present actual evidence, amounting to more than a scintilla, showing a genuine issue for trial.” *Id.* at 527.

To succeed on a claim of negligence, a plaintiff must establish the following elements: 1) defendant owed plaintiff a legal duty of care; 2) defendant breached that duty; 3) and defendant's breach constituted the proximate cause of 4) damages to plaintiff. *Machado*, 61 V.I. at 380. In *Machado*, the Supreme Court eschewed the traditional premises liability framework in which the scope of a landowner's duty to individuals injured on its property was determined by the individual's classification as either an invitee, licensee, or trespasser upon the premises. *Id.* at 385-86. Instead, *Machado* definitively established that “the foreseeability of harm ‘is the touchstone of the existence of [a land possessor's] duty of reasonable or ordinary care.’” *Id.* (citing *Perez*, 59 V.I. at 533.

DISCUSSION

United argues that summary judgment is proper because it owed no legal duty to Plaintiff. *See Motion*, at 12. In performing a *Banks* analysis,² United urges that “the majority view is the soundest rule for the Virgin Islands,” referring to cases from four states decided between 1961 and 1994 that determined that occurrences of vehicles driving onto a sidewalk and causing injury in front of a store “fall within the category of unusual or extraordinary, and are therefore

² *See Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 979 (V.I. 2011). In cases where the common law of the Virgin Islands remains unclear in the absence of binding precedent, the trial court must: 1) evaluate the approach taken by other courts in the Virgin Islands, 2) evaluate the approach taken by courts in other jurisdictions and, most importantly, 3) determine which approach represents the soundest rule for the Virgin Islands.

unforeseeable in contemplation of the law.” *Id.* at 8 (quoting *Schatz v. 7-Eleven, Inc.*, 128 So.2d 901, 904 (Fla. Ct. App. 1961)).

United asserts that the accident giving rise to this litigation was not foreseeable as a matter of law, thus entitling it to summary judgment. United argues that the incident was unforeseeable because “there is no evidence of a storefront vehicle incursion accident occurring anywhere in the Virgin Islands, much less at United’s Plaza East store, prior to the instant accident. And, United was not aware of any such incident at its store.” *Id.* at 13. Plaintiff responds correctly that the mere fact that an incident has never occurred in the past does not make it *per se* unforeseeable. Opposition, at 2 (citing *Machado*, 61 V.I. 373 and *Lembach*, 64 V.I. 400).

In her Opposition, Plaintiff presents more recent and more expansive case law showing a split of authority among other jurisdictions as to whether the issue of foreseeability should be decided summarily as a matter of law by the trial court, or rather left as a question of fact for jury determination. Plaintiff relies upon liability expert, Robert Reiter, to demonstrate the foreseeability of this type of harm. Reiter reports: “The Storefront Safety Council has accumulated data on more than 10,000 accidents into commercial and public buildings over the years [in the United States], and we have observed that vehicle-into-building crashes occur as many as 60 times per day, which means that there are more than 20,000 such crashes annually.” Motion, ex. 4 ¶ 26. Plaintiff further provides an excerpt from the 2014 edition of safety standards adopted by the American Society for Testing and Materials relating to vehicle impact protective devices to protect pedestrian traffic on sidewalks adjacent to storefronts, noting that local governments “are beginning to adopt legislation intended to reduce the increasing number of vehicle-into-building impacts.” See Motion, ex. 11. United insists that its storefront sidewalk is not dangerous and that protective bollards would serve no purpose. United acknowledges its familiarity with bumpers or bollards in use in the Virgin Islands, and its Plaza East premises employs bollards to protect two separate fire hydrants and a side access door, each of which is adjacent to parking areas. Opposition, ex. 10.

The facts underlying a certain incident may be so unusual or extraordinary as to be unforeseeable as a matter of law. However, the Supreme Court has held that “this Court’s jurisprudence has consistently favored—wherever possible—the adjudication of negligence cases by a jury, a preference codified by the Legislature in 5 V.I.C. § 1451(a), instead of by a single judge at summary judgment.” *Rymer v. Kmart Corp.*, 2018 WL 461388, at *2 (V.I. 2018) (quoting

Machado, 61 V.I. at 399). In light of this jurisdiction's clear preference for adjudication of negligence cases by a trial jury, and properly drawing all inferences in favor of the nonmovant Plaintiff, the Court is unable to conclude that the incident in question was unforeseeable as a matter of law.

United further argues that even if the Court declines to hold that "accidental vehicle incursions are not foreseeable as a matter of law, in order to survive summary judgment Plaintiffs would still be required to submit evidence supporting its contention that United had actual or constructive notice of a dangerous condition." Motion, at 13 (citing *Perez*, 59 V.I. 529-30). As United has presented evidence of the lack of prior accidents on its premises and within the Virgin Islands, which it urges establishes as a matter of law lack of actual or constructive notice to United of a dangerous condition, the burden shifts to Plaintiff to introduce some evidence showing the existence of a genuine issue of material fact as to notice to United. *See Perez*, 59 V.I. at 527-28. Plaintiff as "the nonmoving party may not rest on its allegations alone, but must present actual evidence, amounting to more than a scintilla, showing a genuine issue for trial." *Id.* at 527.

United alleges that "Plaintiffs have not put forward any evidence from which a jury could conclude that United had actual or constructive notice that vehicles in its parking lot presented a danger of driving onto the pedestrian sidewalk at the front of the store." Motion, at 13-14. At the summary judgment stage, the Court does not weigh the evidence, but rather draws all inferences in favor of the nonmoving party, resolving conflicting allegations within the record in favor of the nonmovant. *Perez*, 59 V.I. at 527. The record reflects that the handicap parking sign adjacent to the sidewalk area in the front of the Plaza East store had been moved back toward the store because it been repeatedly struck by vehicles. Opposition, ex. 3; ex. 4, at 14-15. United's representative also testified about an incident involving a drunk driver who lost control of his vehicle or swerved trying to avoid a speed bump in front of the store, colliding into a parked car and losing a bumper in the parking area halfway between the street and the entrance door. *Id.* ex. 5. These incidents resulting in property damage from vehicle collisions in the parking area adjacent to the store front permit a reasonable inference that United should have known of the potential danger from vehicular traffic to pedestrians in the same area.

In addition to the noted specific incidents, United's argument is further undercut by its placement of bollards to protect fire hydrants and its side door, which permits the reasonable

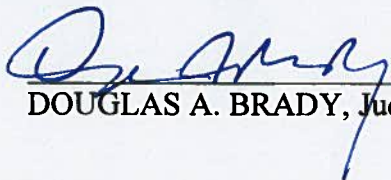
inference that United had constructive knowledge that the hydrants and door were at risk of being struck by vehicles without the protective bollards. Further, Plaintiff's experts Stephen Melia and Rosie Mackay both opine that United should have been aware of the risk of this type of accident. *See* Opposition, "Melia Report," ex. 12, at 4 ("it is my professional opinion that the risk of a vehicle coming onto the unprotected pedestrian walkway was foreseeable and therefore, steps could have been taken which would have prevented the injury to Ms. Velasquez."); "Mackay Report," ex. 13, at 11 ("United Corporation... Failed to have a competent or qualified person or persons perform any risk assessment or hazard analysis identifying existing and predictable hazards in the surroundings").

Viewing Plaintiff's evidence in response to United's Motion in the light most favorable to Plaintiff, there exists a genuine issue of material fact, both as to whether the harm to Plaintiff was foreseeable and whether United had actual or constructive notice of the existence of a dangerous condition on its premises. As such, this matter is inappropriate for summary judgment.

Accordingly, it is hereby

ORDERED that United's Motion for Summary Judgment is DENIED.

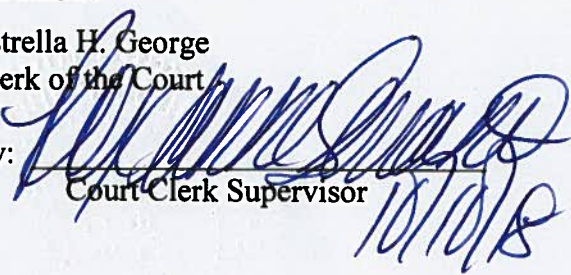
October 10, 2018.


DOUGLAS A. BRADY, Judge

ATTEST:

Estrella H. George
Clerk of the Court

By:


Court Clerk Supervisor