Davis v Commack Hotel, LLC
2016 NY Slip Op 30298(U)
February 22, 2016
Supreme Court, Suffolk County
Docket Number: 11-12197
Judge: Peter H. Mayer

[* 1]

SHORT FORM ORDER

INDEX No. 11-12197

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4-17-15 (#005)
MOTION DATE 6-3-15 (#006)
MOTION DATE 7-16-15 (#007)
MOTION DATE 7-15-15 (#008)
MOTION DATE 9-8-15 (#009)
MOTION DATE 11-25-15 (#010)
ADJ. DATE 1-16-15
Mot. Seq. # 005 - MD # 008 - MD
006 - MotD # 009 - MG
007 - MD # 010 - MD

STANLEY DAVIS, as Administrator of the Goods, Chattels and Credits which were of STANLEY EARL DAVIS, JR., deceased,

Plaintiff,

-against-

COMMACK HOTEL, LLC d/b/a HOWARD JOHNSON and CARLOS J. RODRIGUEZ,

Defendants.

STANLEY DAVIS, ProSe
43 Argyle Drive
Shirley, New York 11967

GOLDBERG SEGALLA LLP
Attorney for Defendant Commack Hotel
200 Garden City Plaza, Suite 520
Garden City, New York 11530

CARLOS J. RODRIGUEZ
c/o Riverhead Correctional Facility
100 Center Drive
Riverhead, New York 11901
NYSID: 1708672P

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated April 17, 2015 (005); July 6, 2015 (007); July 8, 2015 (008); Amended September 14, 2015 (008); and October 27, 2015 (010), and supporting papers (including Memorandum of Law dated ___); (2) Notice of Cross Motion by the defendant, Howard Johnson, dated April 22, 2015 (006), and August 21, 2015 (009) , and supporting papers; by plaintiff, dated May 15, 2015 ; Amended June 16, 2015; (3) Affirmation in Opposition by the plaintiff, dated June 24, 2015 (006); and September 15, 2015 (009); by Johanna Hilgado, dated November 17, 2015 (010), and supporting papers; by defendant, Howard Johnson, dated June 29, 2015;(4) Reply Affirmation by the defendant, dated June 2, 2015 (006); by plaintiff, dated August 24, 2015 (005), and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motions (005), (006), (007), (008), (009), and (010) are consolidated and decided herein; and it is further

ORDERED that the motion (008) by plaintiff to amend the summons and complaint to add defendants Community Association PG, Inc., McGowan Purchasing Groups, HMB Management, LLC, Dinesh Patel, all partners, owner's and associates of the LLC, and Howard Johnson International, Inc. is denied; and it is further

ORDERED that the motion (010) by plaintiff to amend the complaint to add Johanna Hilgado Cruz is denied; and it is further

ORDERED that the amended unnumbered motion by plaintiff "to add parties to the complaint" is denied; and it is further

ORDERED that the motion (005) by plaintiff for discovery is denied, with leave to renew upon a showing of what, if any, discovery remains outstanding; and it is further

ORDERED that the motion (007) by plaintiff to compel certain discovery is denied, with leave to renew upon a showing of what, if any, discovery remains outstanding; and it is further

ORDERED that the motion (009) by defendant, Commack Hotel, LLC d/b/a Howard Johnson for a stay of discovery pursuant to CPLR § 3214 (b) or in the alternative a protective order is granted, to the extent indicated; and it is further

ORDERED that the motion (006) by defendant, Commack Hotel, LLC d/b/a Howard Johnson for summary judgment in its favor dismiss the complaint is denied; and it is further

ORDERED that the unnumbered cross motion and unnumbered amended cross motion by plaintiff for partial summary judgment on the issue of liability is granted.

Plaintiff, Stanley Davis, Sr., commenced this action as administrator of the estate of his son, Stanley Davis, Jr., who was stabbed to death by Carlos J. Rodriguez on November 13, 2010, while both attended a birthday party at the Howard Johnson's hotel in Commack, New York. Plaintiff alleges that the hotel was negligent in the ownership, operation, maintenance, management, supervision and control of the premises. He contends that the failure to maintain an orderly establishment, to monitor the number of persons entering and remaining at the hotel, and to provide adequate security caused the death of Stanley Davis, Jr. Plaintiff asserts a second cause of action against Carlos J. Rodriguez, the admitted killer of his son. Plaintiff also interposes a cause of action against Howard Johnson for conscious pain and suffering.

Plaintiff moves (008) to amend the complaint to add "other insurance companies" to his complaint because "they have policies." His pro se motion includes "Community Association PG, Inc. c/o McGowan purchasing Groups (umbrella) and HMB Management, LLC, Dinesh Patel, and all partners, ower's (sic) and ass (sic) of the LLC Howard Johnson corporate office headquarters." In support of the motion, plaintiff submits, among other things, his own affidavit, the summons and complaint, correspondence from Great American E & S Insurance Company and AIG, and the deposition transcript of Dinesh Patel. Plaintiff moves pursuant to "[F]ed. R. Civ. Proc. 15 (a) (2) and Fed. R. Civ. Proc. 20" to amend the summons and complaint to add parties. In opposition, Howard Johnson's, HMB Management, Howard Johnson

International, Inc., and Dinesh Patel, submit an affirmation of counsel, and a response to the demand for production of documents.

The documents submitted also contain an "amended notice of motion" which seeks to " add parties to the plaintiff's complaint." No affidavit of service has been supplied and the attached papers appear to oppose the motion (009) by defendant for a protective order.

Plaintiff also moves (010) to amend the complaint to add Johanna Hilgado Cruz to the complaint. In support of the motion, plaintiff submits, among other things, an affidavit of Crystal Vivas, "check-in" records for Howard Johnson room 142, the summons and complaint, the deposition transcripts of Crystal Vivas and Dinesh Patel. In opposition, Johanna Hilgado aka Johanna Cruz submits an affirmation of counsel.

Generally, applications for leave to amend pleadings under CPLR 3025 (b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit (*see* ***Maldonado v Newport Gardens, Inc.***, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed (*see* ***Gitlin v Chirinkin***, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]; ***Ingrami v Rovner***, 45 AD3d 806, 847 NYS2d 132 [2d Dept 2007]).

Here, putting aside the procedural deficiencies of the motion, the proposed amendments are palpably insufficient or patently devoid of merit on their face (*see* ***Giunta's Meat Farms, Inc. v Pina Constr. Corp.***, 80 AD3d 558, 914 NYS2d 641 [2d Dept 2011]; *see also* ***Chenango County Indus. Dev. Agency v Lockwood Greene Engineers, Inc.***, 111 AD2d 508, 488 NYS2d 890 [3d Dept 1985]). First, with regard to the proposed amendment as against the excess or umbrella carriers, in New York, an injured person possesses no cause of action against the insurer of the tort-feaser (***Jackson v Citizen Cas. Co.***, 277 NY 385, 14 NE 2d 446 ([1938]). A direct lawsuit against an insurer is not permitted, prior to judgment, as there is no privity between plaintiff and the insurance carrier(s) (***Thrasher v United States Liab. Ins. Co.***, 19 NY2d 159, 278 NYS2d 793 [1967]). Plaintiff's remedy, should he be successful in obtaining a judgment against the insured, is to serve the insurance carrier with that judgment, and await payment for 30 days, only then may he bring a direct action (*see* New York State Insurance Law § 3420).

Moreover, with regard to all of the proposed defendants, the applicable statute of limitations for a negligence claim is three years (*see* CPLR § 214, ***Kent v 534 E. 11th Street***, 80 AD3d 106, 912 NYS2d 2 [1st Dept 2010]). The statute of limitations for wrongful death claims is one year from the date the administrator of the decedent's estate is appointed and two years from the date of death (EPTL § 5- 4.1). The statute of limitations for a cause of action alleging conscious pain and suffering is three years (CPLR § 214). It is undisputed that the stabbing took place on November 13, 2010, and plaintiff did not file the motion to add parties until August 20, 2015, and the proposed amended complaint is therefore barred by the statute of limitations (CPLR §214).

Accordingly, plaintiff's applications to amend the complaint are denied in their entirety.

Plaintiff moves (005) for an order directing discovery. In support of the motion, plaintiff submits, among other things, his own affidavit, as near as can be ascertained a proposed order regarding specific documents, a request for production, and the summons and complaint.

Plaintiff moves (007) for a "motion to compel production of documents from defendant" pursuant to "Rule 37 (a) of the Federal Rules of Civil Procedure." In support of the motion, plaintiff submits his own affidavit and a list of "Insurance Questions."

Defendant has not opposed motions (005) and (007) but does move (009) for a stay of all discovery pursuant to CPLR § 3214 (b) or in the alternative for a protective order. In support of the motion (009), defendant Howard Johnson, submits, among other things, an affirmation of counsel, the summons and complaint, the answer, a summons and complaint in *Stanley Davis v Chartis Ins. Company, Goldberg & Segalla LLP, The Walnut Advisory Corp., HMB Management LLC, Partners Speciality Group, LLC, and Howard Johnson Crop.* (sic) under index No. 14745/2015, a notice of deposition, "notice of plaintiff's live witness list," and various correspondence with plaintiff. In opposition, plaintiff submits, among other things, his own affidavit, "an answer of motion," and "verified answer" both in *Stanley Davis v Chartis Ins. Company, Goldberg & Segalla LLP, The Walnut Advisory Corp., HMB Management LLC, Partners Speciality Group, LLC, and Howard Johnson Crop.* (sic) under index No. 14745/2015 (which are misidentified, but are actually plaintiff's opposition to the motions to dismiss in that matter), an affirmation in opposition to plaintiff's motion (007) (which has not otherwise been supplied to the court), various webcrims documents relating to defendant, Carlos Rodriguez, a response to demand for production of documents, various correspondence with the Suffolk County Police Department, FOIL emails, the preliminary conference order, various attorney correspondence, a demand for production of documents, a notice to admit, a demand for production of documents, the front desk log book, and certified Suffolk County Police affidavits and reports relating to the homicide investigation. Plaintiff also submits an "affidavit in reply, dated August 24, 2015," which as near as can be determined, is an affidavit in opposition to this motion.

Parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR § 3101[a]). This provision has been liberally construed to require disclosure "of any facts bearing on the controversy which will assist [the parties'] preparation for trial by sharpening the issues and reducing delay and prolixity" (***Allen v Crowell-Collier Publ. Co.***, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered 'evidence material * * * in the prosecution or defense'" (***Allen v Crowell-Collier Publ. Co.***, *supra*, at 407, 288 NYS2d 449, *quoting* CPLR § 3101). Nonetheless, litigants do not have carte blanche to demand production of any documents or other tangible items that they speculate might contain useful information (*see* ***Beckles v Kingsbrook Jewish Med. Ctr.***, 36 AD3d 733, 830 NYS2d 203 [2d Dept 2007]; ***Smith v Moore***, 31 AD3d 628, 818 NYS2d 603 [2d Dept 2006]; ***Vyas v Campbell***, 4 AD3d 417, 771 NYS2d 375 [2d Dept 2004]). Thus, a party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information, or are otherwise improper (*see e.g.* ***Astudillo v St. Francis-Beacon Extended Care Facility, Inc.***, 12 AD3d 469, 784 NYS2d 645 [2d Dept 2004]; ***Bettan v Geico Gen. Ins. Co.***, 296 AD2d 469, 745 NYS2d 545 [2d Dept], *lv dismissed* 99 NY2d 552, 754 NYS2d 204 [2002]; ***Crazytown Furniture v Brooklyn Union Gas***

Co., 150 AD2d 420, 541 NYS2d 30 [2d Dept 1989]).

However, a motion (006) for summary judgment dismissing the complaint dated April 22, 2015 was submitted by defendant Howard Johnson on January 12, 2016. Service of a motion for summary judgment automatically stays all disclosure in an action until such motion is determined unless the court orders otherwise (*see* CPLR § 3214 [b]).

Plaintiff's motions (005 and 007), which seek discovery and to compel the production of certain documents are denied as it is evident from plaintiff's submissions on both this case as well as in *Stanley Davis v Chartis Ins. Company, Goldberg & Segalla LLP, The Walnut Advisory Corp., HMB Management LLC, Partners Speciality Group, LLC, and Howard Johnson Corp.* under index No. 14745/2015 that much, if not all of the documents he demands have been supplied. Plaintiff is granted leave to renew the motion, after a determination of what, if any documents, remain outstanding. While the court is aware plaintiff is pro se, he is reminded that the Uniform Rules for Trial Courts (22 NYCRR § 202.7 [a]) provides that a motion relating to disclosure must be supported by an affirmation or affidavit that the moving party "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." The affirmation or affidavit of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (22 NYCRR §202.7 [c]). Litigants do not have carte blanche to demand production of documents they speculate might contain useful information (*see* ***Geffner v Mercy Med. Ctr.***, 83 AD3d 998, 922 NYS2d 470 [2d Dept 2011]; ***Foster v Herbert Slepoy Corp.***, 74 AD3d 1139, 902 NYS2d 426 [2d Dept 2010]). Indeed, a disclosure request will be considered palpably improper if it seeks information of a confidential and private nature that does not appear to be relevant to the issues in the case, is vague, or is overly broad and burdensome (*see* ***Accent Collections, Inc. v Cappelli Enters., Inc.***, 84 AD3d 1283, 924 NYS2d 545 [2d Dept 2011]; ***Velez v South Nine Realty Corp.***, 32 AD3d 1017, 822 NYS2d 86 [2d Dept 2006]). Therefore, a party seeking to compel the production of documents must make a showing of necessity and demonstrate the inability to obtain the information from other sources (*see* ***Williams v New York City Hous. Auth.***, 22 AD3d 315, 802 NYS2d 55 [1st Dept 2005]; ***Samide v Roman Catholic Diocese of Brooklyn***, 5 AD3d 463, 773 NYS2d 116 [2d Dept 2004]).

Accordingly, plaintiff's motions for discovery (005) and to compel production of documents (007) are denied, with leave to renew. Defendant, Howard Johnson's motion (009) to stay discovery, including 18 examinations before trial, is granted pursuant to CPLR § 3214 (b). The automatic stay, however, shall be vacated 30 days after service of the decision herein, and plaintiff may re-notice depositions, limited to the issue of damages.

Defendant, Howard Johnson, moves (006) for summary judgment dismissing the complaint and all claims against it pursuant to CPLR § 3212. In support of the motion, defendant submits, among other things, the pleadings, the deposition transcripts of Dinesh Patel, Stanley Davis, Sr., and Crystal Vivas, a property receipt, front desk notes, certified Suffolk County Police reports, sign-in paperwork, and plea minutes in *People of the State of New York v Carlos Rodriguez,* Indictment No. 00429/2011. Plaintiff opposes the motion in a document labeled "verified answer (in opposition to the motion)" and submits his own affidavit. In documents labeled, notice of cross motion and amended notice of cross motion, plaintiff opposes the motion, and moves for "judgment against the defendants." In support of plaintiff's notice of

cross motion, plaintiff submits, among other things, his own affidavit. Defendant, Howard Johnson, has submitted opposition to plaintiff's "cross-motion," which consists of an affirmation of counsel.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property. They have a duty to control the conduct of third-parties on their premises when they have the opportunity to control such persons, and are reasonably aware of the need for such control (*see* ***D'Amico v Christie***, 71 NY2d 76, 524 NYS2d 1 [1987]; ***Del Bourgo v 138 Sidelines Corp.***, 208 AD2d 795, 618 NYS2d 59 [2d Dept 1994], *lv dismissed* 85 NY2d 924, 627 NYS2d 325 [1995]; ***Pellegrino v Trapasso***, 114 AD3d 917, 980 NYS2d 813 [2d Dept 2014])

An owner is obligated to take reasonable precautionary measures to minimize the risk of criminal acts and make the premises safe for visitors when the owner is aware, or should be aware, that there is a likelihood of conduct on the part of third-parties that would endanger visitors (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 50 NY2d 507 [1980]; ***Alonso v Branchinelli***, 277 AD2d 408, 715 NYS2d 761 [2d Dept 2000]; ***Novikova v Greenbriar Owners Corp.***, 258 AD2d 149, 694 NYS2d 445[2d Dept 1999]; *see generally* Restatement [Second] of Torts: Negligence § 344). To establish that criminal acts were foreseeable, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location (*see* ***Ishmail v ATM Three, LLC***, 77 AD3d 790, 791-792, 909 NYS2d 540 [2d Dept 2010]; ***628 Beato v Cosmopolitan Assoc., LLC***, 69 AD3d 774, 893 NYS2d 578 [2d Dept 2010]; ***Novikova v Greenbriar Owners Corp.***, 258 AD2d 149, 694 NYS2d 445 [2d Dept 1999]).

Defendant, Howard Johnson, contends that the complaint should be dismissed as Carlos Rodriguez's conduct in assaulting Davis was not foreseeable. It maintains that, "Commack Hotel had no knowledge of violent criminal activity taking place on its property," and that it employed, "appropriate security measures at the hotel." It maintains that, "[t]here were no prior similar acts at the hotel." Howard Johnson's has failed to establish its prima facie entitlement to summary judgment, as the overwhelming documentary and testimony evidence establish that it was both aware of extensive and violent criminal activity on its premises and that it failed to maintain any security, let alone adequate security. Contrary to the defendant hotel's assertions, the police were called to its premises 93 times between 2009 and 2010. Many of the incidents were minor disturbances between the hotel and patrons, but a careful review of the certified police reports, submitted by the defendant hotel, reveals a pattern of prostitution, theft, drug use, uncontrolled large parties, and serious, substantial, and violent criminal activity as indicated below.

Prostitution

On February 27, 2009, unknown males were acting suspiciously. On July 1, 2009, a male was knocking on all the hotel room doors looking for "Naiomi." On July 20, 2009, two males were walking down the hallways, "acting strangely." On September 4, 2010, a patron of the hotel, when questioned about his loitering, indicated to the police he was waiting at 3:00 am for a prostitute. On May 4, 2010, a hotel guest was charged with the crime of Patronizing a Prostitute. He indicated to the police that the escort advertised on Craigslist.

Theft

On December 5, 2008, a driver's side window was smashed and a GPS stolen. On February 9, 2010, a lap top computer was stolen from a guest's room. On February 6, 2009, $50.00 was stolen from a guest's room. On March 29, 2010, an individual was charged with Petit Larceny for the theft of a 30 inch Samsung flat screen television. On March 22, 2009, an ACER computer netbook was stolen from the hotel lobby. On April 12, 2009, a vehicle's rear hatch and rear passenger side window were broken, and a license plate was also stolen. On May 30, 2010, a phone was lost or stolen. On September 5, 2010, an HP notebook was stolen from a guest's room. On October 4, 2010, at 11:30 pm the left front glass was broken on a guest's 2000 Chevy Suburban.

Grand Theft

On March 18, 2009, a GMC 2500 pickup was stolen from the hotel parking lot. On May 22, 2009, a van was stolen from the hotel parking lot. On August 13, 2009, police investigated a Grand Larceny where a 2009 Chevy HHR Suburban was stolen. On November 21, 2009, police investigated a Grand Larceny charge where a 2008 Ford Explorer was stolen.

Drug Activity

On September 27, 2009, the staff reported to the police, "a female was high." On December 2, 2009, an individual was charged with Criminal Possession of a Controlled Substance in the Seventh Degree, and Criminal Possession of a Hypodermic Needle, and police observed the purchase of heroin. On March 16, 2010, an individual was arrested and charged with Criminal Possession of a Controlled Substance in the Seventh Degree, Unlawful Possession of Marijuana, involving possession of a crack pipe. On August 3, 2010, police surveillance of the parking lot at 11:35 pm revealed a hand-to-hand sale of crack cocaine.

Large Gatherings

On November 9, 2008, a large group caused a disturbance. On January 9, 2009, the front desk panic alarm was activated. On April 5, 2009, 100 vehicles were drag racing on hotel property. On May 31, 2009, a large group caused a disturbance in the rear of the hotel. A second call to the police involved many youths in the rear of the hotel. On June 19, 2009, police responded to a disturbance in the rear of the hotel. On January 20, 2010, there was a loud, large party in one room with 20 guests. On June 5, 2010, the police reported 40 guests in one room. On October 30, 2010, five guests refused to leave the hotel.

Serious Violent Crime

On May 26, 2010, an individual was charged with Robbery in the First Degree, where he forcibly entered a room, beat the complainant, and stole the victim's cell phone and U.S. currency. A 38 Smith & Wesson handgun was recovered. On July 7, 2010, police charged an individual with Attempted Robbery in the First Degree and a Criminal Sex Act, where the perpetrator displayed a handgun, forced the victim into a room and sexually assaulted her.

Other Crime

On October 9, 2009, a strikingly similar incident as November 13, 2010 occurred, a Hispanic male went to the hotel, and asked to speak with Kenya Dandridge, because she testified against the subject's brother. Dandridge was not working that night. The police confirmed the complainant testified on February 9, 2009 and the subject's brother was in jail. On November 10, 2009, police investigated Criminal Mischief where four tires were slashed. On November 13, 2009, an individual wearing a hospital mask and gloves made a terror threat. On November 17, 2009, police investigated an Assault where a complianant was struck with a clothing iron. On April 3, 2009 and June 13, 2010, the police reports are completely redacted, indicating on-going investigations.

The Front Desk Log Book

The front desk log book is also revealing in its candor. The September 25, 2010 entry reads:

> MD Networking Group all got drunk fighting acting stupid the guys were barging on peoples doors 207 complained once. everyone:
>
> There have been a lot of rooms being rented for party's. This is not good. Today Oct 22 I had to call police because at around 7 am 2 men from 142 started fighting there was about 15 people in this room. The police are getting tired of this place. We need to stop letting thease (sic) people in. If you think of (sic) know they are going to be a problem. Do not rent to them. If you don't want to tell them no all rooms are 139.00 a night for them. So they will leave. If there are complaints please call 911 so they know they can not do these things any more.

The November 12, 2010, entry admits the foreseeablity of the stabbing:

> Cops were called for room 142 someone got stabbed The Cops said we need to stop renting to children the cops stated they took weapons from the kids guns and knives. ***Just another night at the HOJO!!*** (emphasis added) They said we need to shut down they had to make that room a crime scene. . .

The log book also details numerous crimes from 2008 including Robbery (July 9, 2008), car break-ins (August 4, 2008, and August 23, 2008), a death threat to the front desk clerk (October 5, 2008), rental to a

gang leader, who had been in jail for a long period of time (October 11, 2008), and an FBI arrest for prostitution (November 4, 2010).

Howard Johnson's also contends that it had adequate security. It maintain's the doors were locked, the front desk clerk does not leave her position, and the video cameras were working. Dinesh Patel, the hotel's operations manager, who received one week of training, however, testified at his examination before trial that, " at that time we didn't have security." He explained, "[w]hen the incident happened we didn't have security, and then we have security again, because we were looking for security." Contrary to Howard Johnson's position, a lack of security cannot be considered adequate security.

Accordingly, Howard Johnson's motion for summary judgment is denied.

Turning to plaintiff's unnumbered cross motion[1] and amended cross-motion for summary judgment, plaintiff has established his prima facie entitlement to summary judgment on the issue of liability. To be sure, the great majority of the certified police reports, submitted by the defendant hotel, do not rise to the level of criminal activity that demonstrates foreseeability of the crime here. The Court of Appeals has held that there is no requirement "that the past experience relied on to establish foreseeability be of criminal activity at the exact location where the plaintiff was harmed or that it be of the same type of criminal conduct to which plaintiff was subjected", or that "the operative proof must be limited to crimes actually occurring in the specific building where the attack took place" (***Jacqueline S. v City of New York***, 81 NY2d 288, 598 NYS2d 160 [1993]. However, this does not mean that the criminal activity relied upon by the plaintiff to support his claim of foreseeability need not be relevant to predicting the crime in question. The courts have repeatedly held that ambient neighborhood crime alone is insufficient to establish foreseeability (*see* ***Todorovich v Columbia Univ.***, 245 AD2d 45, 665 NYS2d 77 [1st Dept 2008]; ***Evans v 141 Condominium Corp.***, 258 AD2d 293, 685 NYS2d 191 [1st Dept 1999]; ***Levine v Fifth Hous. Co.***, 242 AD2d 564, 662 NYS2d 95 [2d Dept 1997]; ***Mendez v 441 Ocean Ave. Assocs.***, 234 AD2d 524, 651 NYS2d 175 [2d Dept 1996]; ***Rozhik v 1600 Ocean Parkway Assocs.***, 208 AD2d 913, 617 NYS2d 535 [2d Dept 1994]). Rather, to establish foreseeability, the criminal conduct at issue must be shown to be reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location (***Novikova v Greenbriar Owners Corp.***, 258 AD2d 149, 694 NYS2d 445 [2d Dept 1999]). Here, the crimes of prostitution, larceny of computers, grand larceny of vehicles, disturbances of guests and the condition of rooms do not rise to the required level. However, the Robbery in the First Degree charge with the recovery of a Smith & Wesson handgun on May 26, 2010 coupled with the July 7, 2010 Attempted Robbery in the First Degree charge and Criminal Sex Act in the First degree charge where a handgun was displayed and the victim sexually assaulted are sufficient to establish foreseeability of a violent crime. This is especially so when on October 9, 2009, a Hispanic male went to the hotel, and asked to speak with Kenya Dandridge because she testified against the subject's brother. The police confirmed the complainant testified on February 9, 2009 and that the subject's brother was in jail. Had Dandridge been working that night, no

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[1] Defendant has fully opposed the motion and amended motion and thereby waived any procedural objection. In any event, CPLR § 3212 (b) provides that if it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross motion.

doubt she would have been assaulted. These three serious incidents, together with the hotel's formal log book admission, "just another night at the HoJo!!" demonstrate foreseeability. The certified police reports and affidavits confirm that more than 50 people attended the 19th birthday party for Crystal Vivas on November 13, 2010. Summer Jones, advised the police that she was staying in a room across the yard from the party and she heard a lot of yelling. She called the hotel desk several times, "and they did nothing." Earlier in the night, a skinny black male from Central Islip pulled out a gun in the middle of a fight between two girls. The notes of Nina Green, the desk clerk that night indicate, "I was unaware of a party until I seen some kids in the hall I told them to go back in there (sic) rooms which they did. No one came to the desk to complain." It is noted that on January 20, 2010, Howard Johnson's permitted 20 people to have a party in a room before the police were called. On June 5, 2010, 40 people were permitted to attend a party in one room before the police were called.

Crediting the testimony of Dinesh Patel, there was no security personnel working that evening, let alone, "adequate security." Moreover, the police investigation reveals that many of the more than 50 party attendees were under-age and a substantial amount of alcohol including dozens of Corona and Heineken beer bottles were recovered, along with (3) 750 ml Hennessy Black Cognac bottles, a 750 ml Bacardi Limon Rum bottle, (2) 1 liter Grey Goose Vodka bottles, and a 200 ml Patron Silver bottle.

Given the hotel's lack of security, the permitted over-crowding of the room, the use of alcohol, the presence of minors, weapons, and the history of both minor and extraordinary serious and violent crime, plaintiff has established the defendant hotel breached a duty of care to plaintiff's decedent that was the proximate cause of his death.

Accordingly, plaintiff has established his entitlement to partial summary judgment on the issue of liability on the first and third causes of action, and the defendant hotel has not raised any triable issue of fact regarding liability on the issues of negligence or conscious pain and suffering.

Finally, as defendant Carlos Rodriguez, has not opposed the motion or amended motion and testified at his plea to Manslaughter in the First Degree, that on November 13, 2010, he stabbed Stanley Davis, Jr. and caused his death, plaintiff has established his entitlement to partial summary judgment on the issue of liability against Rodriguez as well.

Dated: February 22, 2016

PETER H. MAYER, J.S.C.