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Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LUTHER V. DYE IAS TERM, PART 7
Justice

_____ x

JOHN PASCARELLI,

Plaintiff,

-against-

Index No. 732/96

Decision Date: Nov. 27, 2000

LAGUARDIA-ELMHURST HOTEL CORP. d/b/a
DAYS INN - LAGUARDIA, BURNS
SECURITY INC. and AIRPORT
INNKEEPERS, INC.

Defendants.

_____ x

Defendant, Burns International Security Services, Inc., s/h/a Burns Security, Inc., hereinafter referred to as BURNS had an agreement to provide unarmed services to co-defendant, LaGuardia-Elmhurst Hotel Corp. d/b/a Days Inn-LaGuardia and Airport Innkeepers, Inc., hereinafter DAYS INN, and plaintiff was a long term tenant in this commercial hotel, DAYS INN.

Both defendants move to set aside a verdict on a post-trial motion under C.P.L.R. 4404(a). It is clear that the court has the alternative of granting a new trial instead of awarding outright judgment to the plaintiff or dismissing the action.

It is clear that plaintiff has failed to prove BURNS by any agreement agreed to provide security service to him, nor has he proven he is a third party beneficiary for failure to perform a duty to him imposed by any contract. In fact, there was no contract or other agreement admitted into evidence, nor did BURNS owe any common law duty to the plaintiff.

The verdict against BURNS is set aside and the action is dismissed.

The verdict against defendant DAYS INN is decided as follows:

In a commercial setting such as a **hotel**, a landlord “has a duty to exercise reasonable care to protect guests or **tenants**, while on the premises, against injury at the hands of third persons who are not employees of the **hotel** ... and is required to take reasonable protective measures, including providing adequate security, to protect guests or tenants against third-party criminal acts ... particularly where the occurrence of criminal activity on the premises was reasonably foreseeable”. (see, Cyzio v. Rihga Int’l U.S.A. 172 Misc. 2d 363; see generally, Penchas v. Hilton Hotels Corp., 198 AD2d 10, 10-11.)

Without a doubt, there must be foreseeability and the defendant hotel must have prior knowledge of third party criminal activity in the hotel.(Penchas v. Hilton Hotel Corp., 198 AD2d 10, Rudel v. Naitonal Jewelry Exchange Co., 213 AD2d 301.)

A plaintiff who is assaulted in commercial building need not demonstrate the manner of the assailant’s entry but must prove that the landlord breached its duty to maintain minimal security measures related to the specific building itself in the fact of foreseeable criminal intrusion upon tenants.

There was testimony that the only “criminal incident” involved break-ins of the cars that were in the parking lot, and at times persons who appeared to be “homeless” are removed from the lobby.

There was no testimony of criminal conviction or other complaints regarding the hotel building itself. Nor was there any record of prior security reports.

Plaintiff did not offer expert testimony that he/she is familiar with hotel security measures, but an employee of the hotel testified that the hotel’s security policy is not to question guests or other

persons entering the hotel. Except when the person was not properly dressed or appeared homeless. He also testified that the back door was to be locked at midnight, but the front entrance was never locked and was kept open at all times and there was a security guard.

In Garret v. Twin Parks Northeast Site Two Houses Inc., 256 A.D.2d 224; 682 N.Y.S.2d 349, the Appellate Division First Dept. held that a landlord's duty to maintain his property in a safe condition includes the taking of minimal precautions to protect against the reasonably foreseeable criminal acts of third persons and this duty arises where the person possessing the property knows, or has reason to know of the likelihood of conduct which is likely to endanger the public ...

Landlords have a common-law duty to take minimal precautions to protect tenants and visitors from foreseeable criminal activity by third parties (Burgos v. Aqueduct Realty Corp., 684 N.Y.S.2d 139, 706 N.E.2d 1163; Jacqueline S. v. City of New York, 81 N.Y.2d 288, 293; 598 N.Y.S.2d 160, 614 N.E.2d 723; Smith v. New York City Hous. Auth., 261 A.D.2d 390, 689 N.Y.S.2d 237). This duty arises when the landowner knows or has reason to know that there is a likelihood that third persons may endanger the safety of those lawfully on the premises (Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 519; 429 N.Y.S.2d 606, 407 N.E.2d 45; Cooney v. Town of Oyster Bay, 251 A.D.2d 364; 672 N.Y.S.2d 813; Maria S. v. Willow Enters., 234 A.D.2d 177, 178; 654 N.Y.S.2d 486), as where the landlord is aware of prior criminal activity on the premises (Todorovich v. Columbia Univ., 245 A.D.2d 45, 46; 665 N.Y.S.2d 77, *iv.*, denied 92 N.Y.S.2d 85; 677 N.Y.S.2d 781, 700 N.E.2d 320).

In this case, plaintiff failed to adduce sufficient evidence of prior criminal activity at the building to establish the element of foreseeability (*see*, Luisa R. v. City of New York, 253 A.D.2d 196, 686 N.Y.S.2d 49; Rios v. Jackson Assocs., 259 A.D.2d 608,—, 686; N.Y.S.2d 800, 802).

Therefore, this Court finds that plaintiff has failed to demonstrate the crime rate in the immediate vicinity of the hotel, as well as any crime in the hotel building, itself (other than break-in of cars in the parking lot). There was no expert testimony that inoperative security cameras or the failure to lock the rear door at all times would have had the effect of preventing plaintiff's assault in this commercial hotel building or that defendant's security policy was not adequate.

There was insufficient evidence to charge contributory negligence by plaintiff who allegedly opened the door to unknown assailants prior to the assault.

The court should have charged PJI 1:55 requested by defendant "Admission against Interest by Statement" regarding the alleged statement of plaintiff, to wit "somebody had knocked on his door, when he answered, punched him in the face and dragged him out into the hallway, and continued to beat him".

This section should have been charged as requested because the plaintiff testified that the incident took place in the hallway near the elevator. But the court concludes this was harmless not to charge.

Verdict against DAYS INN is set aside and the case is dismissed as a matter of law since there is simply no valid line of reasoning and permissible inferences which could possibly lead rational persons to the conclusion reached by the jury on the basis of the evidence presented at trial.

Motions made under C.P.L.R. 4401 are deemed moot.

Dated: November 27, 2000