

A.K. v The State of New York

2004 NY Slip Op 30395(U)

June 1, 2004

Court of Claims

Docket Number: 99425

Judge: Diane L. Fitzpatrick

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This opinion is uncorrected and not selected for official publication.

A.K. v. STATE OF NEW YORK , #2004-018-305, Claim No. 99425**Case Information**

UID:	2004-018-305
Claimant(s):	A.K. The caption has been amended sua sponte by the Court to protect the identity of the claimant.
Claimant short name:	A.K.
Footnote (claimant name) :	The caption has been amended sua sponte by the Court to protect the identity of the claimant.
Defendant(s):	STATE OF NEW YORK
Footnote (defendant name) :	
Third-party claimant(s):	
Third-party defendant(s):	
Claim number(s):	99425
Motion number(s):	
Cross-motion number(s):	
Judge:	DIANE L. FITZPATRICK

Claimant's attorney:	SHKANE AND SHAHEEN LAW OFFICES By: Joan T. Shkane, Esquire
Defendant's attorney:	ELIOT SPITZER Attorney General of the State of New York By: BOHL, DELLA ROCCA & DORFMAN, P.C. By: John E. Dorfman, Esquire
Third-party defendant's attorney:	
Signature date:	June 1, 2004
City:	Syracuse
Comments:	
Official citation:	
Appellate results:	
See also (multcaptioned case)	

Decision

Claimant seeks damages from the State as a result of being sexually assaulted in her dormitory room when she was a student at SUNY at Morrisville. The trial was not bifurcated.

For the most part, the key facts are undisputed. In late August 1997, claimant began her freshman year at Morrisville College. She met Jason Vedder, a football player and wrestler, who was also starting school. They began dating and eventually became intimate. Over the course of the first semester, claimant became acquainted with other football players through Jason and because she was a cheerleader. Among those acquaintances was Terrell Colbert whose nickname was Tank.

During the fall of 1997, Jason and Terrell argued at a film meeting^[1] because Jason did not like the things Terrell was saying about claimant. Later, Jason told Terry M. Dow, the football coach, that Terrell had told him that he was going to f__ claimant and that he would get her pregnant.^[2] Jason complained to Mr. Dow about the things Terrell was saying and told him he did not like the comments. Mr. Dow did not take any action against Terrell to Jason's knowledge, and Terrell's conduct continued.

Jason testified that he told claimant of Terrell's threats involving her but claimant recalled only that she knew Jason and Terrell argued. Claimant did recall at least five times during the first semester when Terrell stopped by her dorm room and spoke with Jason. These conversations apparently were uneventful.

In January 1998, Jason left school due to poor grades. Claimant moved into Onondaga Hall where she was assigned a single room. Jason had lived in Onondaga Hall the first semester and knew the Resident Director, Amy Williams, to whom he spoke about claimant moving into the new dorm. Jason helped claimant move in on January 26, 1998. He recalled that the back door they used to move claimant's belongings into her new room was propped open during the move.

Claimant testified that she wanted to move into Onondaga Hall because she thought it would be safer than her first dorm, and she would have a room to herself. To her knowledge, only a few people (Jason, the Resident Advisor, and her new neighbors) knew where she lived. In her prior dorm, at the end of the first semester, claimant and her roommate had received "hang-up" phone calls at all hours of the night. At that time, claimant wanted to change their number, but claimant's roommate did not. After moving, claimant felt safer because no one knew where her new room was nor did anyone know her new telephone number.

After attending an evening class and meeting friends on the evening of January 27, claimant testified she returned to her dorm room about midnight, turned on the television, and got ready for bed. Some time thereafter, claimant heard a knock on the door. Claimant was surprised by the knock because she did not know anyone in the dorm except for her next-door neighbor, Erin. Claimant testified, on direct, that she went and looked out the peephole but didn't see anyone there. A few minutes later, there was another knock and claimant quickly opened the door to find Terrell Colbert (Tank) and another football player, Chris Maier (Dogs) at the door. Although claimant did not invite them in, the boys entered claimant's room, sat down, and started talking. Claimant was left standing at the doorway with the door open, and the door remained open while they were in her room. Chris sat at the desk, and Terrell sat on the far end of the bed from the door. At this point, although they were uninvited, claimant was unconcerned. They spoke about football, asking questions about Jason, and Chris Maier made a call from claimant's room. At one point, Chris Maier left and then returned. Claimant said she hinted about them leaving but they did not acknowledge it. After about one-half hour, they left. Claimant cleaned up

water on the floor which was left where Chris had been sitting, then she sat on the bed. A few minutes later, Terrell returned. He walked right into claimant's room and closed the door. Claimant's door was not locked. He sat on the end of the bed again. He was looking at pictures on her wall and asking her questions. He kept moving closer. He then forced himself on her and raped her.

As Terrell left, he asked claimant, repeatedly, if she was going to tell anyone. She said no. Terrell forgot his hat and returned to claimant's room to get it a few minutes later. He again asked if she was going to tell anyone.

Claimant recalled feeling numb. She sat in her room for awhile, then called Jason at his parents' home in Stratford, New York. Jason recalled receiving the telephone call at approximately 2:00 a.m. on January 28. Claimant asked Jason to come to Morrisville, and although she did not tell him what happened, he could tell by her voice something was wrong. He arrived at Morrisville at approximately 4:00 a.m. and found the back door to claimant's dorm ajar. This was the same door they had used to move claimant into Onondaga Hall.

Jason found claimant very upset but she initially refused to tell him what happened. He eventually coaxed her into talking about the incident and then into getting help. Jason took claimant to the infirmary and from there they were sent to Community Memorial Hospital in Hamilton, New York. Claimant's mother and Jason's parents were notified and they all went to the hospital. From the hospital, they all went to Onondaga Hall and moved claimant out of the dorm. She left school that day.

Terrell Colbert was prosecuted and pled guilty to sexually assaulting claimant. The fact that claimant was sexually assaulted was never in dispute.

SUNY Morrisville had instituted a Night Host Program in the dormitories to lessen unwanted or criminal behavior.^[3] Onondaga Hall had two sets of double doors with key pads for residents to use to unlock the interior door. Guests could call residents' rooms from inside the outer door and be allowed entry into the dorm by a resident. From 11:00 p.m. to 3:00 a.m., two students, admittedly employees of the school, would man the night host table from which both sets of doors were visible.^[4] During this time period, all guests were required to sign in with the night hosts, identify the resident or room they were visiting, show identification, and sign out when they left. The night hosts were responsible for patrolling the halls each hour to check for dangerous, undesirable, or emergency situations, such as open fire doors or disruptive guests.

The log^[5] from Onondaga Hall the night of January 27 into January 28 does not reflect the presence of either Terrell Colbert or Chris Maier in the dorm during the night host hours. Kendor Gray, one of the night hosts on duty that night, testified in his deposition^[6] that his co-host, Ato Sharpels let Chris Maier

in, but he never saw "Tank" (Terrell) that night. His written statement from April 26, 1999^[7] states neither young man was let in to Onondaga Hall that night.

During the second night host shift, from 1:00 to 3:00 a.m., only Kendor Gray was manning the night host table. According to Gray, Ato Sharpels was scheduled to work but never showed up.^[8] With only one night host, no one was available to patrol the hallways.

Donald Greene, a retired FBI agent and security expert, testified for claimant. He reviewed numerous documents and did a site visit in preparation for his testimony. It was his opinion that the security plan, with mechanical and human components, in place in Onondaga Hall failed for various reasons. First, he noted that the training the night hosts received was inadequate. It consisted of a 1½ hour session with Amy Williams, the Resident Director. There was no training, oversight, or coordination with the campus police. Second, the night hosts failed to follow the instructions to have all guests sign in and out and to patrol the hallways at least every hour. Third, if the back door was ajar, no alarm was triggered, although Mr. Greene's inspection of the dormitory indicated an alarm should have been activated when the door was opened. Kendor Gray also testified that an alarm would sound if a back door was left open for longer than 20 seconds. The alarm, once activated, could only be turned off in the Resident Director's office. No alarm sounded the evening of January 27 or the early morning of January 28.

The claimant also called Dr. Maria Burgio, who was claimant's treating psychologist. Dr. Burgio testified to the trauma and life-long struggle rape victims experience. Claimant would have permanent issues with fear, security, and intimacy as a result of the rape. Claimant's mother testified to claimant's fears while she lived home immediately after the incident.

The State called no witnesses.

Claimant relies on three theories of recovery. First, that the State, as a landowner, failed to provide reasonably safe premises. Second, claimant argues that the State took specific actions and established procedures to provide security for the students housed in Onondaga Hall but implemented them negligently thereby failing to protect claimant from a sexual assault. Third, that the State was placed on notice that Terrell posed a threat to claimant when Jason told the school's football coach, Mr. Dow, about threatening comments made involving claimant, yet the State failed to take reasonable steps to protect claimant.

The State, as the owner in control of the SUNY Morrisville campus owed the same duty to claimant as any other private landowner: the duty to maintain its property in a reasonably safe condition under the circumstances (*Preston v State of New York*, 59 NY2d 997, 998). However, the State, as a governmental entity, also retains its immunity from liability for its actions in providing traditional governmental

services such as police protection, unless a special relationship has been established with claimant creating a specific duty to her (*Miller v State of New York*, 62 NY2d 506, 510). Where the claim raises allegations of wrongdoing against the State within the context of essentially a landlord-tenant relationship but includes allegations of inadequate security and a failure to protect, at issue is the State's dual role, both proprietary and governmental (*Miller v State of New York*, 62 NY2d at 511). Under these circumstances, closer scrutiny must be given to the specific acts of wrongdoing to determine where on the continuum between its proprietary and governmental functions the allegations fall in order to determine whether the State's actions are immune from liability absent proof of a special relationship (*Miller v State of New York*, 62 NY2d at 512).

Although challenging the security provided by the State at Onondaga Hall on the SUNY Morrisville campus, claimant's proof focused upon the failure of the night hosts to properly follow the established procedures for admitting non-residents into the dormitory and failing to make the required observation rounds. She also suggests that the back door of the dormitory was propped open, permitting unlocked access to the building away from the night hosts' surveillance of the main doors. Claimant makes no assertion that a special relationship existed and presented no evidence to support such a relationship (see *Pike v State of New York*, 214 AD2d 934, 935). Claimant's proof was more in line with the allegations raised in *Weitz v State of New York*, 182 Misc 2d 320, in which Judge Collins found the *Weitz* claimant to be challenging the actions of defendant in its proprietary capacity as a landlord.

As a landlord, the State has a "common-law duty to take minimal precautions to protect tenants from foreseeable harm," including the harm caused by a third party's criminal conduct on the premises (*Jacqueline S. v City of New York*, 81 NY2d 288, 293, 294; *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507). However, to recover damages from a landlord for the criminal conduct of a third party, the tenant must demonstrate that the criminal incident was foreseeable, by showing, for example, that the landlord was on notice of recent crimes in the building (see, *Francis v Ocean Vil. Apts.*, 222 AD2d 551; *Iannelli v Powers*, 114 AD2d 157, 161-164). In addition, a plaintiff must prove that the landlord's negligent conduct was a proximate cause of his injury, such as by presenting evidence that his assailant was an intruder who had gained access to the premises through a negligently-maintained entrance (see, *Burgos v Aqeduct Realty Corp.*, 92 NY2d 544; *Miller v State of New York*, 62 NY2d 506, 513-514)" (*Rios v Jackson Assocs.*, 259 AD2d 608, 609).

Here, the State did have notice of recent crimes on campus. Crime statistics for 1997^[9] indicate there was one reported sexual offense in a residence hall, two robberies (one of which was in a residence hall), two aggravated assaults, (one of which was in a residence hall), and 33 on-campus burglaries (28 of which were in residence halls). To meet the burden of showing the foreseeability of criminal conduct by third parties, the past criminal conduct doesn't have to be of the same type or at the same location; rather it depends upon "the location, nature, and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question" (*Jacqueline S. v City of New York*, 81 NY2d 288, 295).

Although claimant did not establish any specifics for the other crimes, the fact that there were other assaults in the residence halls on this campus, including a sexual offense, is sufficient to show the foreseeability of another sexual assault in a residence hall. The State had the duty to take reasonable precautions to ward off such criminal activity.

In fact, there were several components to the security provided by the State at Onondaga Hall, as Mr. Greene testified. The campus had its own police service, the University Police. In Onondaga Hall specifically, all exterior doors to the dormitory locked automatically. Two of the doors also had an alarm system which could only be turned off in the Resident Director's office. The other outer doors to the dormitory provided access to residents by means of keypunching a specific code. The main entrance to the dormitory was also equipped with an intercom system so that visitors could utilize the intercom to contact residents for access. Each dormitory room was equipped with a peephole and door locks. In addition to these components, there was also the Night Host Program. Although these security provisions were reasonable measures taken by the State for the safety of its resident students, in this instance, these measures failed. The failure was the result of the night hosts' lack of compliance with the established procedures for allowing guests into the dormitory. Kendor Gray admitted that on the night claimant was sexually assaulted, his co-host, Ato Sharpels, admitted Chris Maier into the dormitory without following the established protocol. Kendor Gray also acknowledged his failure to follow-up on the location of Mr. Maier and his failure to make rounds of the dormitory on an hourly basis. Mr. Gray, however, did not see Terrell Colbert that night, nor did he hear any alarm indicating the back door was ajar. Despite the negligent compliance with the established Night Host Program procedures, there was insufficient evidence to show how Mr. Colbert entered the dormitory and that his entry was proximately, or more aptly, legally, caused by the negligent conduct of defendant's employees, Mr. Gray and Mr. Sharpels (*see Price v New York City Hous. Auth.*, 92 NY2d 553, 558; *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544).

Even if we presume that it was defendant's lack of compliance with the established Night Host Program procedures which permitted Mr. Maier to enter and remain in the dormitory, and let Mr. Colbert into claimant's dormitory that night, claimant's actions in failing to utilize the security features available to her, specifically locking her door, was an intervening cause, severing any liability of defendant (*see Torres v New York City Housing Authority*, 292 AD2d 519, *lv denied* 98 NY2d 605; *Radlin v Brenner*, 283 AD2d 948; *cf. Mason v U.E.S.S. Leasing Corp.*, 96 NY2d 875, 876).

Claimant also argues that the State, based upon the State's actual notice of Terrell Colbert's intention to sexually assault her (from Jason Vedder's comments to Coach Dow) breached a duty to protect her. First, Mr. Dow denied such knowledge in his deposition; however, even if we impute such knowledge, the State University has no duty to supervise student activities outside the classroom or to protect the students from the dangerous activities of their classmates who are violent or even criminal (*Eiseman v State of New York*, 70 NY2d 175, 190). The State's duty is limited to its role as landowner/landlord unless

[*8]

a special relationship has been established. Claimant's proof has failed to establish defendant's liability despite these tragic circumstances.

The claim must be DISMISSED. LET JUDGMENT BE ENTERED ACCORDINGLY.

June 1, 2004
Syracuse, New York

HON. DIANE L. FITZPATRICK
Judge of the Court of Claims

[1] Jason testified that a film meeting involved the football team meeting to watch films of opponent teams playing or to review his team's game performance.

[2] There were extensive discussions at trial regarding the issue of the admissibility of Mr. Colbert's statements. The Court has allowed in only what Jason Vedder testified he told Mr. Dow.

[3] Exhibit 6 indicates there were 33 burglaries on campus in 1997, 28 of them were in residence halls.

[4] See Exhibits 8 and 12.

[5] Exhibit 15.

[6] Exhibit 17.

[7] Exhibit 17-A.

[8] Amy Williams, the Resident Director, testified that Sharpels was not scheduled to work the second shift. See Exhibit 18-A.

[9] The information regarding crime statistics was in a brochure revised in 2001, three years after the incident involving claimant; as a result, the only crime information admitted were the statistics for 1997.