

Marr v Seventh Day Adventist Church

2005 NY Slip Op 30315(U)

February 18, 2005

Supreme Court, Queens County

Docket Number: 28334 2001

Judge: James P. Dollard

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD IA PART 13
Justice

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GLENN MARR, et al.	Index Number <u>28334</u> 2001
- against -	Motion Date <u>January 19,</u> 2005
SEVENTH DAY ADVENTIST CHURCH, etc.	Motion Cal. Number <u>34</u>

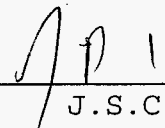
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The following papers numbered 1 to 3 read on this motion by plaintiff Glenn Marr and plaintiff Linda Marr for leave to reargue and to renew their opposition to defendant Seventh Day Adventist Church's prior motion for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Reply Affidavits	3

Upon the foregoing papers it is ordered that leave to reargue and to renew is granted. Upon reargument and renewal, the court adheres to its decision and order dated October 21, 2004. (See the accompanying memorandum.)

Dated: February 18, 2005



 J.S.C.

M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY
IA PART: 13

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GLENN MARR, et al.

INDEX NO. 28334/01

BY: DOLLARD, J.

-against-

DATED: FEBRUARY 18, 2005

SEVENTH DAY ADVENTIST CHURCH,
etc.

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Plaintiff Glenn Marr and plaintiff Linda Marr have moved for leave to reargue and to renew their opposition to defendant Seventh Day Adventist Church's prior motion for summary judgment.

Defendant Linden Church of Seventh Day Adventists owns and operates premises located at 228-20 137th Street, Laurelton, New York. The premises are improved by a two-story building, one side of which is a church and the other side of which is a school. On November 14, 1998, a Saturday observed by church members as the Sabbath, at 10:45 A.M., plaintiff Glenn Marr, a deacon of the church, attended a deacons' meeting on the second floor of the building. The plaintiff then went downstairs with the other deacons to conduct a security patrol of the premises. As he passed the kitchen, someone informed him that the smoke alarm system had gone off. Shortly thereafter, he heard the alarm himself. About five minutes later, the plaintiff smelled smoke in the school section of the building. He opened the door to the boiler room and

smoke "hit" him. He went into the boiler room, didn't see any flames there, and came out because of the thickness of the smoke. He saw some of the other deacons and began running with them. They ran up a stairway on the outside of the building in the school area, and they saw smoke coming from the inside. The other deacons forced a door open, and the plaintiff, inhaling smoke, "almost collapsed." Plaintiff Marr, 49 years of age with a family history of serious coronary problems, developed chest pains, and he was taken to Mary Immaculate Hospital where a CT scan showed a dissection of the descending aorta. The plaintiff subsequently had cardio-thoracic surgery to replace the descending thoracic aorta using a 22 millimeter woven Dacron graft.

The plaintiff, contending that the defendant church is liable for, inter alia, the coronary event which occurred on the day of the fire, brought this personal injury action on November 7, 2001. He alleges, inter alia, that the defendant negligently failed to maintain fire alarm and sprinkler systems and that the defendant failed to properly secure its facilities from criminals. The plaintiff alleges that on November 14, 1998, a boy who had made an unauthorized entry into the building through an unsecured window started the fire by igniting an American flag.

By decision and order dated October 21, 2004, this court granted a motion by the defendant church for summary judgment. The court's decision reviewed the relevant law and applied it to the

facts of this case as follows: "Landlords have a common-law duty to take minimal precautions to protect tenants, visitors, and members of the public from foreseeable harm, including foreseeable criminal conduct by a third person. (See, Mason v. U.E.S.S. Leasing Corp., 96 NY2d 875; Burgos v. Aqueduct Realty Corp., 92 NY2d 544; Gross v. Empire State Bldg. Associates, 4 AD3d 45; Lester v. New York City Housing Authority, 292 AD2d 510; Wayburn v. Madison Land Ltd. Partnership, 282 AD2d 301.) "While this legal obligation does not require a landlord to become an insurer of a tenant's safety ***, it imposes a minimum level of care on landlords and managing agents who know or have reason to know that there is a likelihood that third parties may endanger the safety of those lawfully on the premises ***." (Wayburn v. Madison Land Ltd. Partnership, 282 AD2d 301, 303; see, Nallan v. Helmsley-Spear Inc., 50 NY2d 507; Gross v. Empire State Bldg. Associates, supra.) However, in order to prove a cause of action based on the landlord's common-law duty to take minimal precautions to protect against foreseeable criminal conduct, a party must establish, inter alia, that the landlord's conduct was a proximate cause of his injury. (See, Burgos v. Aqueduct Realty Corp., supra; Miller v. State of New York, 62 NY2d 506; Ramos v. 1199 Housing Corp., 6 AD3d 416; Luisa R. v. City of New York, 253 AD2d 196.) Foreseeability is one of the important guidelines used in determining proximate cause. (See, Dowling v. Consolidated Carriers Corp., 103 AD2d 675;

Loeser v. Nathan Hale Gardens, Inc., 73 AD2d 187; Pagan v. Goldberger, 51 AD2d 508.) The record in this case does not permit the fact finder to reasonably infer that the defendant church's alleged failure to take proper security measures was a proximate cause of the plaintiff's coronary problems. (See, Maheshwari v. City of New York, 2 NY3d 288; Ramos v. 1199 Housing Corp., supra; Acosta v. MEC Realty, 304 AD2d 778; Lester v. New York City Housing Authority, supra.) Under all of the circumstances of this case, including (1) the unforeseeable link between the unsecured window and the plaintiff's coronary event, (2) the plaintiff's family history of serious coronary disease (his father died at age forty-seven and his brother died at age forty-one), and (3) the plaintiff's running around the premises at the time of the fire by his own volition, the plaintiff cannot prove the element of proximate cause against the defendant church."

Leave to reargue is granted. The plaintiffs have attempted to show that "the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (Schneider v. Solowey, 141 AD2d 813; see, CPLR 2221[d]; Grassel v. Albany Med. Ctr. Hosp., 223 AD2d 803; William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22.) The plaintiffs contend that the court erroneously reached the issue of proximate cause on the defendant's prior motion for summary judgment. Although it is well settled that a tenant asserting a breach of the

landlord's duty to take minimal security precautions "may recover damages*** only on a showing that the landlord's negligent conduct was a proximate cause of the injury" (Burgos v. Aqueduct Realty Corpp, supra, 548), the court will permit the plaintiffs to reargue in order to remove any doubt that they have had a full and fair opportunity to be heard. Leave to renew is granted to remove the plaintiffs' excuse for not making a complete record. (See, N.A.S. Partnership v. Kligerman, 271 AD2d 922; Wagman v. Village of Catskill, 213 AD2d 775.)

The plaintiffs' submissions on the instant motion establish first of all that plaintiff Glenn Marr suffered from a pre-existing heart condition. For example, the plaintiffs themselves submitted a letter dated July 6, 1999 from Dr. Mark Pecker, one of plaintiff Glenn Marr's treating physicians, which states: "Mr. Marr's family history indicates that he has [a] genetic defect similar [to] those found [in] the Ehlers-Danlos Syndromes, which predisposed him to the aorta dissection. He is in danger of further vascular catastrophes." The plaintiffs themselves submitted a report from Garet M. Gordon, M.D., the defendant's expert, who opines: "I feel with a reasonable degree of medical certainty that Mr. Marr has a hereditary defect in his aorta which predisposed him to an aortic dissection and vascular calamity."

The plaintiffs' papers submitted on the instant motion do

not adequately address the matter of proximate cause as a legal concept. The plaintiffs have submitted an affirmation from Dr. Mark Pecker which states in relevant part: "**** although Mr. Marr suffers from a genetic condition which predisposed him to an aortic dissection, I can state to a reasonable degree of medical certainty that the fire of November 14, 1998 was a causative factor in his aortic dissection on that date." Dr. Pecker's affirmation does not satisfy the guidelines used in determining proximate cause. In its decision dated October 21, 2004, this court emphasized that "[f]oreseeability is one of the important guidelines used in determining proximate cause. (See, Dowling v. Consolidated Carriers Corp., 103 AD2d 675; Loeser v. Nathan Hale Gardens, Inc., 73 AD2d 187; Pagan v. Goldberger, 51 AD2d 508.)" The plaintiffs have ignored this part of the court's decision. They have utterly failed to create a genuine issue of fact regarding whether under all of the circumstances of this case the plaintiff's aortic dissection was foreseeable when the defendant church allegedly omitted to place a lock on a window. Moreover, while it may be "familiar tort doctrine that one who is negligent is chargeable for all of the harm that the negligent act causes, even if the injuries are activated or exacerbated by a preexisting vulnerability or condition" (Martin v Volvo Cars, 241 AD2d 941, 943; see, Pacella v. Masone, 262 AD2d 291), a plaintiff having a pre-existing vulnerability or condition is not excused thereby from

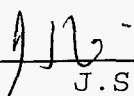
establishing all of the elements of negligence including foreseeability and proximate cause. Under all of the circumstances of this case, the fire merely "furnished the occasion" for the plaintiff's coronary event, but the fire was not a proximate cause of it. (See, Loder v. Greco, 5 AD3d 978, 979; Scarver v. County of Erie, 2 AD3d 1384, 1386 ["While the fallen pipe 'furnished the occasion' for plaintiff's injuries, it was not the proximate cause thereof, because plaintiff's jump from the ladder 'was not a normal or foreseeable consequence of any situation created by the defendants' *** "].)

The plaintiffs cannot prevail in this case even if the fire was a cause of the coronary event. Plaintiff Glenn Marr voluntarily sought out the fire, thereby placing himself in a situation where he engaged in vigorous activity and inhaled smoke. The medical documents submitted by the plaintiffs themselves show that elevated blood pressure is a risk for someone with plaintiff Glenn Marr's condition. The record in this case permits the court to conclude as a matter of law that plaintiff Glenn Marr's own voluntary actions including running around the church grounds and up a stairway "constituted a superseding cause of the accident which relieved the defendant of any liability." (See, Wadhwa v. Long Island Rail Road, 13 AD3d 615.) "It is *** well established that while a defendant is liable for all natural and foreseeable consequences of its acts, an intervening act will constitute a

superseding cause and will serve to relieve a defendant of liability when the act is of such an extraordinary nature or so attenuated from the defendant's conduct that responsibility for the injury should not reasonably be attributed to the defendant ***." (Barth v. City of New York, 307 AD2d 943 [emphasis added]; see, Jones v. City of New York, 10 AD3d 411.)

Upon reargument and renewal, the court adheres to its prior decision and order.

Short form order signed herewith.



J.S.C.