

Zelster v Goldmore Realty Co.
2005 NY Slip Op 30563(U)
September 14, 2005
Supreme Court, New York County
Docket Number: 108719/05
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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OLGA ZELSTER

Plaintiff,

Index No. 108719/05
Mtn Seq. 001

-against-

GOLDMORE REALTY CO., A.J. CLARKE REAL
ESTATE CORP., MILTON GOLDWORTH and
MORTON KAHN,

Defendants.

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WALTER B. TOLUB, J.:

By this motion defendants move to dismiss plaintiff's complaint in its entirety pursuant to CPLR 3211(a)(7) and CPLR 3211(a)(1).

Plaintiff is a tenant in an apartment building owned and managed by the defendants, and located at 65-50 Wetherole Street, Kew Gardens, New York ("the building"). On November 28, 2004, at about 3:00 am, as plaintiff entered the building, an unknown male who was standing outside, followed her into the building, and raped her at gunpoint.

Plaintiff then commenced this action for personal injury. Plaintiff's primary claim is that the defendants were under a duty to exercise reasonable care to protect persons lawfully on the premises from the criminal acts of third parties by providing minimal security. Furthermore, plaintiff claims that the defendants represented to the tenants of the building that security cameras would be monitored at all times and maintained in a properly

functioning condition, and that by these actions and representations, the defendants voluntarily assumed a duty to provide, maintain and monitor security cameras at the premises. Plaintiff asserts that she reasonably relied to her detriment upon the security cameras and was lulled into a false sense of security when the security camera was out of order.

The defendants claim that there is only one security camera in the common areas of the building, which is a recording camera and not a monitored camera, and deny that any representation was made to the contrary. It is not in dispute that the building was secured by two sets of self locking doors and an intercom system all in good working order at the time of the incident, and that the assailant gained entry to the building when plaintiff used her key.

Discussion

In deciding a CPLR 3211(a)(7) motion to dismiss a complaint the court looks within the four corners of the complaint, to determine whether any cognizable cause of action has been stated (See, Scott v Bell Atlantic Corp., 282 AD2d 180 [1st Dept 2001]). The court must liberally construe the complaint, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion (see, 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 NY2d 144 [2002]). Dismissal based on a defense founded upon documentary evidence (CPLR 3211(a)(1)) is

warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see, 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 NY2d 144 [2002]).

Under New York law it is well established that a landlord's common law duty to take minimal security precautions against reasonably foreseeable criminal acts of third parties is discharged when a landlord provides self locking doors and an intercom system (see, James v. Jamie Tower Housing Co. Inc., 99 NY2d 639 [2003]; Nallan v. Helmsley-Spear Inc., 50 NY2d 507 [1980]). In the instant case, the parties do not dispute that the building was secured by two sets of self locking doors and an intercom system that was in good working order at the time of the incident. Therefore, defendants cannot be held in breach of their common law duty to protect persons lawfully on the premises from the criminal acts of third parties. Furthermore, the evidence (police report) shows, and it is not in dispute, that the assailant obtained access to the building not through a broken door lock, but rather by following the plaintiff into the building as she used her key to gain entry. Under these circumstances, the necessary causal link between a landlord's culpable failure to provide adequate security and a tenant's injuries resulting from a criminal attack in the building has been negated (see, Raghu v. XYZ Corporation., 7 AD3d 455 [1st Dept. 2004]).

However, plaintiff contends that by undertaking to place a security camera in the building and representing to tenants that the camera was monitored at all times, the defendants assumed a duty, the negligent performance of which would lead to liability, even if there was no legal obligation to provide such service to begin with. One who assumes duty to act, even though gratuitously, may thereby become subject to this duty, if his conduct in undertaking the service somehow placed the injured party in a more vulnerable position (see, Nallan v. Helmsley-Spear Inc., 50 NY2d 507 [1980]).

Taking this into consideration it is possible that following discovery, plaintiff may be able to show that she was given the impression that a security attendant was monitoring the building's entrance at all times. Plaintiff may also be able to demonstrate that she was lulled into a false sense of security, and as a consequence, neglected to take the precautions she might otherwise have taken had the building owner never assumed the duty in the first instance (see, Nallan v. Helmsley-Spear Inc., 50 NY2d 507 [1980]).

Taking all plaintiff's allegations as true, it is this court's opinion that plaintiff has presented a cause of action cognizable at law at this point in the proceedings. Accordingly, this court denies defendants' motion to dismiss and the parties shall proceed to discovery.

Accordingly, it is

ORDERED that defendants' motion to dismiss plaintiff's complaint in its entirety is denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within ten (10) days after service of a copy of this order with notice of entry.

Counsel for parties are directed to appear for a Preliminary Conference at I.A. Part 15, Room 335, 60 Centre St., New York, NY on November 18, 2005 at 11:00 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/14/05


HON. WALTER B. TOLUB, J.S.C.

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