

**Safeguard Ins. Co. v Lopez**

2007 NY Slip Op 31190(U)

May 11, 2007

Supreme Court, Richmond County

Docket Number: 0102770/2005

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND PART DCM 3**

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**Index No.: 102770/2005  
Motion No.: 1 & 2**

**SAFEGUARD INSURANCE COMPANY, as Subrogee  
of JOSEPH MORMINO,**

*Plaintiff*

*against*

**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

**ANGELO LOPEZ,**

*Defendant*

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The following items were considered in the review of this motion for summary judgment and to compel

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion and Affidavits Annexed</b>	<b>1, 2</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Replying Papers</b>	<b>3</b>
<b>Exhibits</b>	<b>Attached to Papers</b>
<b>Memorandum of Law</b>	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

In motion number 1 the defendant, Angelo Lopez, moves this court for an order pursuant to CPLR § 3212 granting summary judgment and dismissing the complaint and any and all cross claims. The plaintiff opposes motion number 1 and simultaneously cross moves in motion number 2 to compel a non-party deposition of an employee from the “The Chubb Insurance Company” with knowledge of the file regarding the fire damage to Angelo Lopez’s premises. The defendant opposes motion number 2.

This action arises to recover property damage allegedly sustained by the plaintiff’s subrogor, Joseph Mormino, on June 12, 2003 as a result of a fire that occurred at the nearby dwelling of defendant Angelo Lopez. The plaintiff alleges that as a result of a fire at the defendant’s dwelling located at 303 Flagg Place, Staten Island, New York, the plaintiff’s subrogor, Joseph Mormino, sustained property damage to the exterior and interior parts of his home located at 40 Iron Mine Drive, Staten Island, New York.

Angelo Lopez appeared for an Examination Before Trial on March 28, 2005 and testified that he purchased the property known as 303 Flagg Place in 2001, however his family never moved into the house because they wanted to expand it first. In June 2003, the Lopez family was residing at 148 McLaughlin Street.

He then testified that he obtained all of the necessary construction permits and hired Lou Star Development, a general contractor to do the work. The owner of Lou Star Development was Vincent LaRocca and that in March of 2003, Vincent LaRocca and the defendant had a dispute and Lou Star Development was fired. The defendant then undertook to complete the construction project himself hiring new contractors and plumbers to do the job.

Angelo Lopez stated that there was a chain link fence installed around all four sides of the property at 303 Flagg Place. Specifically, the fence in front of the property was a permanent 6 foot galvanized fence with posts grounded into the floor. On the remaining sides of the property was an existing, chain link fence, approximately four to six feet high. The property was kept in a locked state when work was not being done to it and there was permit posted on the foundation of the property with the defendant's name and phone number. There also may have been a "keep out" sign in place.

The defendant testified that at approximately 3 a.m. on June 12, 2003, he first became aware that there was a fire when he received a phone call from a neighbor. By the time that he arrived at the house, it had already collapsed. Police officers who were at the scene stated that there had been two people present who were not from the neighborhood; one of the men was an employee of Lou Star Contracting and had previously worked in the defendant's house. After an investigation, the Fire Marshall stated that the cause of the fire was "definitely arson."

It is well settled that the duty of a property owner is to exercise reasonable care under the circumstances to maintain his property in a safe condition. This includes the obligation of taking precautions to protect members of the public from criminal acts of third persons that are reasonably foreseeable. (*Ianelli v. Powers* 114 AD2d 157 [2d Dept 1986]; *M.D. v. Pasadena Realty Co.* 300

A.D.2d 235, 237 [1<sup>st</sup> Dept. 2002].) The Appellate Division, Second Department held in *Ianelli* that “in order to establish the existence of a duty on his part to take minimal protective measures, it must be shown that he either knows or has reason to know from past experience that there is a likelihood of conduct on the part of third persons which is likely to endanger the safety” of others. It is the actual or constructive knowledge of the likelihood of third-party conduct that creates the duty to take reasonable precautions (*Nallan v. Helmsley-Spear, Inc.* 50 NY 2d 507 [1980]).

Absent prior, similar occurrences there is no notice, and therefore no duty to take protective measures to protect against unforeseeable criminal acts of third parties. (*Novikova v. Green briar Owners Corp.* 258 AD2d 149 [2d Dept 1999]). “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*, supra). In examining all of the deposition testimony, especially that of Vincent L. Montanti, who stated that for the 39 years he was living at 309 Flagg Place, “nothing like the fire to Defendant’s property had ever happened before,” the court finds that the defendant did not have actual or constructive notice of foreseeable criminal acts of third persons on his property. As a result, the defendant did not have a duty to take protective measures, above and beyond the fences installed, to prevent criminal activity on his property. Accordingly, absent the notice, there is no duty and the defendant cannot be liable for the property damage sustained by the plaintiff’s subrogor.

Accordingly, it is hereby:

ORDERED, that the defendant’s motion for summary judgment pursuant to CPLR § 3212 is granted and this action, including all claims and cross claims is dismissed; and it is further

ORDERED, that plaintiff’s motion number 2 to compel an examination before trial of an employee from Chubb Insurance is denied as moot.

ENTER,

DATED: May 11, 2007

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Joseph J. Maltese  
Justice of the Supreme Court