

**Haire v Bonelli**

2007 NY Slip Op 33197(U)

October 5, 2007

Supreme Court, Ulster County

Docket Number: 0298906/2007

Judge: George B. Ceresia

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ULSTER

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THOMAS HAIRE,

Plaintiff,

-against-

ROBERT BONELLI, JR., THE PYRAMID COMPANIES, PCK DEVELOPMENT COMPANY, PCK DEVELOPMENT COMPANY, LLC, PCK DEVELOPMENT COMPANY, LLP, PYRAMID MANAGEMENT GROUP, INC., Individually and doing business as "Hudson Valley Mall", and HUDSON VALLEY MALL, ROBERT G. HARRINGTON, SCOTT GERMAIN, HVM COMPANY, LLC, HUDSON MALL CORP., PCK2, L.L.C., HVM COMPANY, II, L.L.C., HUDSON MALL TARGET CORP., S & R COMPANY OF KINGSTON, S & R COMPANY OF KINGSTON, LLC, MARC A. MALFITANO, ROBERT J. CONGEL, SCOTT R. CONGEL, J. A. TUOZZOLO, a/k/a JAMES TUOZZOLO, BRUCE KEENAN, RICHARD E. MONTAG, and DAN THEISAN a/k/a DANIEL THEISAN, All Individually, and doing business as "Hudson Valley Mall",

Defendants.

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All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI: 55-06-01567 Index No. 2989-06

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PCK DEVELOPMENT COMPANY,  
LLC, PCK DEVELOPMENT  
COMPANY, LLP, PYRAMID MANAGE-  
MENT GROUP, INC., Individually and doing  
business as “Hudson Valley Mall”, and  
HUDSON VALLEY MALL, ROBERT G.  
HARRINGTON, SCOTT GERMAIN, HVM  
COMPANY, LLC, HUDSON MALL CORP.,  
PCK2, L.L.C., HVM COMPANY, II, L.L.C.,  
HUDSON MALL TARGET CORP., S & R  
COMPANY OF KINGSTON, S & R COM-  
PANY OF KINGSTON, LLC, MARC A.  
MALFITANO, ROBERT J. CONGEL,  
SCOTT R. CONGEL, J. A. TUOZZOLO,  
a/k/a JAMES TUOZZOLO, BRUCE KEENAN,  
RICHARD E. MONTAG, and DAN THEISAN  
a/k/a DANIEL THEISAN, All Individually, and  
doing business as “Hudson Valley Mall”  
One North Lexington Avenue  
White Plains, NY 10601-1700

## **DECISION/ORDER**

George B. Ceresia, Jr., Justice

The above-captioned action arises out of an incident which occurred on February 13, 2005 when the defendant Robert Bonelli, Jr. entered the Hudson Valley Mall located in Kingston, New York with an assault rifle and fired a large number of rounds, one of which allegedly struck the plaintiff in the left leg.

The action was commenced on August 14, 2006 against “Robert Bonelli, Jr., The Pyramid Companies, PCK Development Company, PCK Development Company, LLP, Pyramid Management Group, Inc., Individually, and doing business as ‘Hudson Valley Mall’, and Hudson Valley Mall, Robert G. Harrington and Scott Germain”. By notice of motion dated November 3, 2006 said defendants (other than defendant Bonelli) moved to dismiss the complaint pursuant to CPLR 3211 (a) (7). Plaintiff, on March 30, 2007 filed and served a supplemental summons and amended complaint which added more parties<sup>1</sup> and a tenth cause of action. The defendants, in May 2007, made a second motion to dismiss pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7).

In accordance with the reasoning set forth in Sage Realty Corp. v Proskauer Rose, L.L.P. (251 AD2d 35 [1<sup>st</sup> Dept., 1998]), and in the absence of any showing of prejudice to the plaintiff, the Court will entertain the motions as a combined motion to dismiss pursuant to CPLR 3211 (a) (1), and (a) (7).

It is well settled that in response to a motion pursuant to CPLR 3211, pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (see, Leon v. Martinez, 84 NY2d 83, 87; see also Nonnon v The

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<sup>1</sup>Unless otherwise specified herein, the Court will collectively refer to all defendants other than Robert Bonelli, Jr. as the “defendants”). The Court will collectively refer to the various defendant companies and corporations (including the Pyramid Companies, PCK Development Company, PCK Development Company, LLC, PCK Development Company, LLC, Pyramid Management Group, Inc., Individually and Doing Business as “Hudson Valley Mall”, Hudson Valley Mall, HVM Company, LLC, Hudson Mall Corp., PCK2, L.l.c., HVM Company, II, LLC, Hudson Mall Target Corp., S & R Company of Kingston, S & R Company of Kingston, LLC), as the “Mall entities”.

City of New York, 9 NY3d 825 [2007]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (see, Guggenheimer v. Ginzburg, 43 NY2d 268, 275). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (see, Leon v Martinez, 84 NY2d 83, 87-88; Nonnon v The City of New York, *supra*; Matter of Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v. State Educ. Dept., 116 AD2d 939 [3rd Dept., 1986]). Only affidavits submitted by the plaintiff in support of his or her causes of action may be considered on a motion of this nature (see, Rovello v. Orofino Realty Co., 40 NY2d 633, 635-636). On such a motion, the court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (see, Leon v Martinez, 84 NY2d 82, 87-88; Pietrosanto v Nynex Corp., 195 AD2d 843, 844 [3rd Dept., 1993]). With respect to CPLR 3211 (a) (1), "...the court may grant dismissal when "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law"" (see, Beal Savings Bank v Sommer, 8 NY3d 318, 324 [2007], quoting Goldman v Metropolitan Life Ins. Co., 5 NY3d 561, 571 [2005], citing Held v Kaufman, 91 NY2d 425, 430-431 [1998]).

Turning to plaintiff's sixth cause of action in negligence, and addressing first the various Mall entities, the defendants indicate that the Hudson Valley Mall is owned by two entities: PCK Development Company, LLC, which owns the entire mall other than the

parcel under the Target store; and PCK 2, LLC which owns the parcel on which the Target store is situated. According to the defendants, Pyramid Management Group, Inc. is the property manager for the entire Hudson Valley Mall. In defendants's view, PCK Development Company, LLC, and Pyramid Management Group, Inc. are the only entities who should be named defendants in the instant action. As a part of their argument, the defendants point out that PCK Development Company, LLC is a limited liability company. HVM Company, LLC is the managing member of PCK Development Company, LLC. Hudson Mall Corp. is the managing member of HVM Company, LLC. In a similar fashion, HVM Company II, LLC is the managing member of PCK 2, LLC. Hudson Mall Target Corp., is the managing member of HVM Company II, LLC.

A significant portion of the defendants' argument rests upon a defense predicated upon Limited Liability Company Law § 609 (a), which provides that a member or manager of a limited liability company is not liable for the torts of the limited liability company. The defendants take the position that the complaint should be dismissed as against HVM Company, LLC, managing member of PCK Development Company, LLC, and Hudson Mall Corp., managing member of HVM Company, LLC, as well as HVM Company II, LLC, managing member of PCK II, LLC, and Hudson Mall Target Corp., managing member of HVM Company, II, LLC.

It is well settled that liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of the premise (Foley v Golub

Corporation, 252 AD2d 905 [3<sup>rd</sup> Dept., 1998]; O'Brien v Trustees of the Troy Annual Conference of the United Methodist Church, 257 AD2d 954, 955-956 [3<sup>rd</sup> Dept., 1999]).

In this instance the allegations of the amended complaint can be read to allege that each of the Mall entities, in their separate capacities, were negligent in the operation, management, control and maintenance of the Mall. Notably, members of a limited liability company may be held personally liable if they participate in the commission of a tort in furtherance of company business (see Rothstein v Equity Ventures, LLC, 299 AD2d 472 [2<sup>nd</sup> Dept., 1999]). For this reason, the Court concludes that the amended complaint adequately states a cause of action in negligence as against said defendants.

Defendants argue that the action should be dismissed as against PCK 2, LLC, HVM Company II, LLC and Hudson Mall Target Corp. because, *inter alia*, none of the relevant events with respect to the shootings occurred on PCK 2, LLC's property (where the Target store is located). Defendants also argue that the action should be dismissed as against S & R Company of Kingston by reason that it does not own the Hudson Valley Mall, but rather owns real property to the north of Hudson Valley Mall. These issues are dependent upon the presentation of facts with respect to the location of the shooting, and the location of the parcels owned by PCK 2, LLC and S & R Company of Kingston which, while appropriate on a motion for summary judgment, is inappropriate on a motion pursuant to CPLR 3211 (a) (7). The Court finds, for purposes of the instant motion, that the complaint states a cause of action as against PCK 2, LLC, HVM Company II, LLC and Hudson Mall Target

Corp.

As set forth in the affidavit of William F. Baker, Esq., Assistant General Counsel of the Pyramid Management Group, Inc., defendants assert that The Pyramid Companies is a general partnership which does not own, operate, manage or control any individual mall property, and does not employ any individual at the Hudson Valley Mall. In the same affidavit Mr. Baker indicates that PCK Development Company, LLP, Hudson Valley Mall, and S & R Company of Kingston, LLC do not exist as legal entities. In the Court's view all of these matters are dependent upon facts which, again, are more appropriately considered on a motion for summary judgment. The Court finds for purposes of the instant motion, that the complaint states a cause of action against all of the foregoing defendants.

Turning to PCK Development Company, Mr. Baker indicates that this is a New York general partnership, which was converted into PCK Development Company, LLC. A certificate of conversion of PCK Development Company to PCK Development Company, LLC, dated December 28, 1998, has been submitted. The Court finds that this documentary evidence is sufficient under CPLR 3211 (a) (1) to warrant dismissal of the complaint as to PCK Development Company.

With regard to the liability of the individual defendants, ordinarily, where an employee's conduct constitutes an act of nonfeasance, the employee will not be held accountable to the third party. Where, however, the employee is guilty of active negligence or misfeasance, the employee will be held liable to the third party (see generally, 2-16

Warren's Negligence in the New York Courts § 16.03.; Jones v. Archibald, 45 AD2d 532, 535 [4th Dept., 1974]); Lennon v Oakhurst Gardens Corporation, 229 AD2d 897, [3rd Dept., 1996] Mathis v. Yondata Corp., 125 Misc2d 383 [Supreme Ct, Monroe County, 1984]). In addition, a managing agent of a building may be held liable, even for nonfeasance, where the agent has complete and exclusive control of the management and operation of the building (see Lennon v Oakhurst Gardens Corporation, 229 AD2d 897, [3rd Dept., 1996]; Ioannidou v Kingswood Mtg Corp., 203 AD2d 248; see also, Mollino v Ogden & Clarkson Corp., 243 NY 450).

Plaintiff's allegations of negligence can be construed to encompass malfeasance as well as nonfeasance. In addition, plaintiff alleges, in the alternative, that each of the individual defendants controlled, maintained, managed and operated the Mall. Under the circumstances, the Court finds that the complaint adequately states a cause of action against the individual defendants.

One further point should be made. Defendants argue that no New York Court has ever imposed liability under circumstances similar to those present here. This may, indeed, be true. It would be inappropriate, however, for the Court to abandon established legal precedent which provides a guide to the analytical approach which must be applied in such circumstances. It is well settled that "New York landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition" ( Maheshwari v City of New York, 2 NY3d 288, 294 [2004] quoting Tagle v

Jakob, 97 NY2d 165, 168 [2001], and citing Basso v Miller, 40 NY2d 233, 241 [1976]). “Although landlords and permittees have a common law duty to minimize foreseeable dangers on their property, *including the criminal acts of third parties*, they are not the insurers of a visitor's safety” (*id.*, citations omitted, emphasis supplied). “Where injuries are sustained on another's property at the hands of a third person, the landowner's duty depends upon whether he or she 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 the visitor””” (Crowningshield v Proctor, 31 AD3d 1001, 1002 [3<sup>rd</sup> Dept., 2006], quoting Nallan v Helmsley-Spear, Inc., 50 NY2d 507, 519 [1980], quoting Restatement [Second] of Torts § 344, Comment f, and citing Maheshwari v City of New York, 2 NY3d 288, 294 [2004] and Pizzimenti v Henn, 16 AD3d 1070, 1072 [2005], *lv denied* 5 NY3d 713 [2005]). Thus, it is premature at this juncture to conclude that plaintiff's complaint fails to state a cause of action.

Turning to plaintiff's seventh cause of action in gross negligence, the Court notes that “gross negligence is reckless conduct that borders on intentional wrongdoing and is ‘differ[ent] in kind [and] degree’ from ordinary negligence (Lemoine v Cornell University, 2 AD3d 1017, 1020 [3<sup>rd</sup> Dept., 2003] quoting Sutton Park Dev. Corp. Trading Co. v Guerin & Guerin Agency, 297 AD2d 430, 431 [3<sup>rd</sup> Dept., 2002], and citing Green v Holmes Protection of N.Y., 216 AD2d 178, 178-179, [1995]). The complaint alleges that the defendants had a policy of restricting their employees from publicly discussing criminal

activity at the Hudson Valley Mall and downplaying criminal activity. It is alleged that there were at least 848 criminal acts in the year prior to February 13, 2005 at the Hudson Valley Mall. It is alleged that prior to embarking on his rampage, Mr. Bonelli parked his motor vehicle illegally on the sidewalk near the entrance to the Best Buy store, and remained there for approximately fifteen to twenty minutes. It is alleged that no Mall security personnel were present or observed during the entire afternoon of February 13, 2005; and that the Mall security force did not make any emergency calls to the Ulster Police Department during the course of the shooting.

With respect to a policy of directing Mall employees to refrain from publically discussing criminal activity at the Hudson Valley Mall, this fact, in and of itself, has no direct bearing on the issue of Mall security. The remaining allegations, while certainly supportive of a cause of action in negligence, do not, of themselves, allege facts demonstrating conduct bordering on intentional wrongdoing. The Court finds that the complaint fails to state a cause of action in gross negligence.

Plaintiff's eighth cause and ninth causes of action allege that the defendants created a public and private nuisance. As stated in 532 Madison Ave. Gourmet Foods, Inc. v Finlandia Center, Inc. (96 NY2d 280, 292 [2001]):

“[a] public nuisance exists for conduct that amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons. A public nuisance is a

violation against the State and is subject to abatement or prosecution by the proper governmental authority” (532 Madison Ave. Gourmet Foods, Inc. v Finlandia Center, Inc., *supra*, at 292 [2001] citing Copart Indus. v Consolidated Edison, 41 NY2d 564, 568).

It has been held that a public nuisance involves the interference with the public’s right in the use of its own property (see Anderson v University of Rochester, 91 AD2d 851, 851 [4<sup>th</sup> Dept., 1982], appeal dismissed 59 NY2d 968 [1983]; see also Townsend v County of Allegany, 233 AD2d 881, 882 [4<sup>th</sup> Dept., 1996]; Reid v Kawasaki Motors Corp. 189 AD2d 954, 957 [3<sup>rd</sup> Dept., 1993]). In this instance, while the Mall is open to the public, it is not a public place in the sense that it is not owned, controlled or maintained by the public. The public has no rights in or to the property. It is not alleged that the nuisance extends beyond the physical boundaries of the Mall property. The Court finds that the complaint fails to state a cause of action in public nuisance.

“A private nuisance threatens one person or a relatively few (McFarlane v City of Niagara Falls, 247 NY 340, 344), an essential feature being an interference with the use and enjoyment of land (Blessington v McCrory Stores, Corp., 198 Misc 291, 299, *affd* 279 App Div 806, *affd* 305 NY 140)” (Copart Industries, Inc. v Consolidated Edison Co., 41 NY2d 564, 568 [1977]). Appellate decisions since Copart have repeatedly stated that a private nuisance involves the interference with the use and enjoyment of land (Lajoy v Luck Bros., Inc., 34 AD3d 1015, 1016-1017 [3<sup>rd</sup> Dept., 2006]; Hitchcock v Boyack, 277 AD2d 557, 558 [3<sup>rd</sup> Dept., 2000]; Chenango, Inc. v County of Chenango, 256 AD2d 793, 794 [3<sup>rd</sup> Dept.,

1998]). “The term ‘use and enjoyment’ encompasses the pleasure and comfort derived from the occupancy of land and the freedom from annoyance” (Domen Holding Co. v Aranovich, 1 NY3d 117, 123-124 [2003] citing, Restatement [Second] of Torts § 821D, Comment b, and Nussbaum v Lacopo, 27 NY2d 311, 315 [1970]). Here, very clearly, plaintiff’s injuries do not arise out of the use and enjoyment of his land. The Court finds that the complaint fails to state a cause of action in private nuisance.

Finally, the tenth cause of action seeks recovery on allegations of common law fraud and violations of General Business Law §§ 349 and 350. Such claims involve entirely different elements and should not have been joined in one cause of action.

“To plead a prima facie case of fraud, the plaintiff must allege ‘a material misstatement, known by the perpetrator to be false, made with an intent to deceive, upon which the plaintiff reasonably relies and as a result of which he sustains damages’ (Megaris Furs v Gimbel Bros., 172 AD2d 209, 213 [emphasis omitted] ), and each element must be pleaded with particularity (see CPLR 3016[b]).” (Rotterdam Ventures v Ernst & Young, 300 AD2d 963, 964 [3<sup>rd</sup> Dept., 2002]).

In order to meet the specificity requirements of CPLR 3016 (b) the complaint must allege at a minimum the substance of the misrepresentations, the dates and the persons to whom the misrepresentations were made (see Mountain Lion Baseball v Gaiman, 263 AD2d 636, 638 [3<sup>rd</sup> Dept., 1999]). The complaint herein contains only the vaguest allegations that the defendants represented that the Hudson Valley Mall was reasonably safe. No detail as to the actual substance of the alleged misrepresentations, the dates when made or the persons to whom they were made has been alleged. As such, the complaint fails to state a cause of

action for fraud.

The elements of the cause of action pursuant to General Business Law § 349 are “first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act (see, Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 25; see also, Gaidon v Guardian Life Ins. Co., 94 NY2d 330, 344; Small v Lorillard Tobacco Co., 94 NY2d 43, 55-56).” (Stutman v Chemical Bank, 95 NY2d 24, 29 [2000]).

“As shown by its language and background, section 349 is directed at wrongs against the consuming public. General Business Law article 22- A, of which section 349 is a part, is entitled ‘Consumer Protection from Deceptive Acts and Practices.’ \*\*\* Finally, the Governor's Memorandum approving the bill (L 1970, ch 43) lauds its consumer-protective purpose: ‘Consumers have the right to an honest market place where trust prevails between buyer and seller. The power to obtain injunctions against any and all deceptive and fraudulent practices will be an important new weapon in New York State's long standing efforts to protect people from consumer frauds’ (Mem of Governor Rockefeller, 1970 NY Legis Ann, at 472).” (Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, 85 NY2d 20, 24-25 [1995]).

The statute clearly contemplates a transaction of some sort, that is, the purchase and sale of goods or services (see Weiss v Polymer Plastics Corp., 21 AD3d 1095, 1097 [2<sup>nd</sup> Dept., 2005]) and is not applicable to advertisements or statements which do not promote specific products or services (see New York Pub. Interest Research Group v Insurance Info. Inst., 161 AD2d 204, 205 [1<sup>st</sup> Dept., 1990]).

The complaint herein does not allege that the plaintiff entered into a transaction with any of the defendants. Moreover, it is clear from the allegations of the complaint that none of the defendants are in the business of retail or consumer sales. Rather, the defendants are in the business of leasing space to businesses. They are thus at least one step removed from any consumer transaction, just as a wholesale distributor is (see e.g. Weiss v Polymer Plastics Corp., 21 AD3d at 1097). In fact, the plaintiff has not even alleged that he was at the mall to purchase goods or services. It is therefore determined that the complaint fails to allege any consumer oriented act or practice as required to state a cause of action under General Business Law § 349.

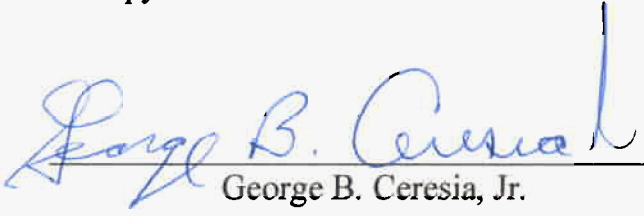
General Business Law § 350 prohibits false advertising. It also is addressed to consumer oriented advertisements. Plaintiff must prove that the advertisement had an impact on consumers at large, was deceptive or misleading in a material way, and resulted in injury (see Andre Strishak & Assoc. v Hewlett Packard Co., 300 AD2d 608, 609 [2<sup>nd</sup> Dept., 2002]). Just as with General Business Law § 349, the test is whether the advertisement is likely to mislead a reasonable consumer acting reasonably under the circumstances (*id.*). The complaint does not allege any specific advertising by the defendants, and as such, necessarily fails to state a cause of action for false advertising. Moreover, as above, even if there were some advertising by defendants, it would not have been consumer oriented. It is therefore determined that the tenth cause of action fails to state a cause of action and shall be dismissed.

Accordingly, it is

**ORDERED**, that the motion to dismiss is granted with respect to all causes of action against PCK Development Company, and with respect to the seventh, eighth, ninth and tenth causes of action in plaintiff's amended complaint, but is otherwise denied.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for the defendants, who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: October 5, 2007  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Defendants' Notice of Motion dated November 3, 2006, Supporting Papers and Exhibits
2. Plaintiff's Affirmation/Memorandum In Opposition To Defendant's Motion to Dismiss Amended Verified Company dated March 29, 2007 and Appendix
3. Defendants' Notice of Motion dated May 4, 2007, Supporting Papers and Exhibits
4. Plaintiff's Affirmation/Memorandum In Opposition To Defendant's Motion to Dismiss Amended Verified Company dated June 8, 2007
5. Defendants' Reply Affirmation dated July 11, 2007