

**Silverman v Fifth Avenue of Long Island Realty
Associates**

2007 NY Slip Op 34361(U)

February 19, 2007

Supreme Court, Queens County

Docket Number: 0005853/2006

Judge: Augustus C. Agate

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

the complaint insofar as asserted against it on the ground that it did not owe a legal duty of care to plaintiff. The Realty defendants move to dismiss on the ground that they did not breach a duty of care to plaintiff. The motions are opposed by plaintiff.

It is well settled that the proponent of the motion has the initial burden of submitting competent evidence eliminating any material issues of fact from the case (Winegrad v New York University Med. Ctr., 64 NY2d 851 [1985]). The burden then shifts to the opposing party to submit evidence which raises an issue of fact for trial (id.).

Motion by Squire

In support of their respective motions, the movants submitted, inter alia, the pleadings, the security services agreement with Squire, portions of the deposition transcript of plaintiff, Michael McCann, on behalf of Squire and Robert Ronzoni, on behalf of Castagna Realty. Plaintiff testified, in relevant part, that she was at her car with the door open in the parking lot when someone approached her and attempted to steal her handbag; she resisted and the bag and other possessions were forcibly taken from her. Plaintiff further testified that, she recalled, when she entered the parking lot there was a uniformed traffic guard directing traffic at the light near the main entrance. After the robbery, she "hobbled" to the traffic agent at the main entrance and began screaming for help; the guard was wearing "warm headgear" and "didn't hear" plaintiff; she then began to hobble another fifteen yards closer to him and informed him that she had just been robbed.

Squire's witness testified that Squire provides general security at the Mall and, when asked whether crime prevention was one of the reasons that the company was hired, the witness indicated that it was and that (prior to the subject incident) he had contacted the police to discuss incidents although he could not recall if it was to discuss the neighborhood crime patterns.

A copy of the security agreement between Squire and Castagna, was also submitted. Under the terms of the Agreement, Squire contracted to "respond to and provide assistance in security related situations," and to patrol the parking lots in a car.

Squire contends that it owed no duty to the plaintiff, who was not an intended third-party beneficiary of its agreement with the Realty defendants; that the attack on plaintiff in the parking lot was not foreseeable and therefore any alleged negligence on the part of Squire was not the proximate cause of the attack.

The question of whether a duty exists in a particular case is generally a question of law for the court (see Palka v Servicemaster Mgmt Services Corp., 83 NY2d 579 [1994]). New York courts have narrowly circumscribed the following situations in which an agreement or contractual relationship between two parties will be held to give rise to a tort duty to a third-party: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (see Espinal v Melville Snow Contractors, Inc., 98 NY2d 136 [2002]; Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp., 76 NY2d 220 [1990]).

Applying these standards to the instant facts, Squire met its initial burden of establishing its prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against it based on inadequate security. Squire owed no common-law duty to protect the plaintiff from injury (see Durham v Beaufort, 300 AD2d 435 [2002]; Haston v East Gate Sec. Consultants, 259 AD2d 665 [1999]; Buckley v I.B.I. Sec. Serv., 157 AD2d 645 [1990]). Squire also did not assume any contractual duty to protect the plaintiff (see Anokye v 240 East 175th St. Housing Development, 16 AD3d 287 [2005]; Morgan v New York City Police Dept., 294 AD2d 416 [2002]). The contract between Squire and the Realty defendants contains no expression of intent to confer a contractual benefit on the plaintiff as a customer of the Mall (see Haston v East Gate Sec. Consultants, *supra*; Marun v Sunrise Mall Assocs., 249 AD2d 519 [1998]; Charleen F. v Cord Meyer Dev. Corp., 212 AD2d 572 [1995]; Abramian v Travellers Hotel Assocs. of LaGuardia, 203 AD2d 398 [1994]; Buckley v I.B.I. Sec. Serv., *supra*). In any event, even assuming that Squire owed a duty to plaintiff, Squire established its entitlement to summary judgment by demonstrating that it exercised reasonable care in performing its security services. Plaintiff testified that Squire was present in the lot and that she observed them when she entered to park, and there is no evidence in the record that the security efforts undertaken by Squire at the subject property were unreasonable. Also, the sudden attack on plaintiff was not foreseeable and was committed by a third-party over whom neither defendant had any control.

In opposition to the motion, the plaintiff failed to come forward with evidence sufficient to raise a triable issue of fact as to whether Squire was negligent (*cf.* Mason v U.E.S.S. Leasing Corp., 96 NY2d 875 [2001]). Accordingly, the motion by Squire for

summary judgment in its favor dismissing all claims and cross claims against it is granted.

Motion for Summary Judgment by The Realty Defendants

In order to prove a prima facie case of negligence, a plaintiff must establish: (1) the existence of a duty on the part of the defendant to the plaintiff, (2) a breach of that duty, and (3) injury suffered by the plaintiff as a result of the breach (Boltax v Joy Day Camp, 67 NY2d 617 [1986]; Solomon v City of New York, 66 NY2d 1026 [1985]; Akins v Glens Falls City School Dist., 53 NY2d 325 [1981]). A person who possesses realty as either an owner or a tenant (Nallan v Helmsley-Spear, Inc., 50 NY2d 507 [1980]) is under a duty to exercise reasonable care under the circumstances to maintain the property in a safe condition (Kush v City of Buffalo, 59 NY2d 26 [1983]; Basso v Miller, 40 NY2d 233 [1976]). That duty includes an obligation to take minimal precautions to protect members of the public from the reasonably foreseeable criminal acts of third persons (Nallan v Helmsley-Spear, Inc., supra; see also, Miller v State of New York, 62 NY2d 506 [1984]; Kush v City of Buffalo, supra).

According to plaintiff, by hiring the defendant Squire, the Realty defendants undertook to provide some protective services to Mall customers and that the absence of Squire from the location in the parking lot where plaintiff was robbed at the time of the incident, could be construed by a jury as a legal proximate cause of the plaintiff's injuries. Plaintiff contends that questions of fact exist for a jury as to whether the measures undertaken by the Realty defendants were sufficient and whether defendant Squire properly exercised its duties and had enough personnel to accomplish its contractual obligations. Further, according to plaintiff, the types of safety precautions that may reasonably be required of a landowner is almost always a question of fact for a jury (see Nallan v Helmsley-Spear, Inc., 50 NY2d 507 [1980]).

Landlords have a firmly established common-law duty to take only "minimal precautions" to protect tenants and visitors from foreseeable harm, including foreseeable criminal acts (Mason v U.E.S.S. Leasing Corp., 96 NY2d875 [2001]). Landlords are not insurers of the safety of those who enter upon such realty and, thus, in order to establish the existence of a duty by the landlord to take minimal protective measures, it must be shown "that he (or she) 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 the visitor" (Nallan v Helmsley-Spear, Inc., supra, at p 519, quoting from Restatement [Second] of Torts § 344 comment f). "The question of the scope of an alleged tort-feasor's duty is, in the first instance, a legal issue for the court to resolve" (Williams v Citibank, 247 AD2d 49 [1998], lv denied 92 NY2d 815 [1998]; see Gross v Empire State Building, 4 AD2d 45 [2004]).

To establish a prima facie case of proximate cause, a plaintiff must show "that the defendant's negligence was a substantial cause of the events which produced the injury" (Derdiarian v Felix Contr. Corp., 51 NY2d 308, 315 [1980]). "Where the acts of a third person intervene between defendant's conduct and plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" (id.). An intervening act may break the causal nexus when it is "extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct" (id.).

Here, the Realty defendants failed to establish their entitlement to summary judgment as a matter of law. Plaintiff established that prior to the robbery, the Realty defendants were aware of criminal incidents on the premises, and that the police had been called in response thereto. By employing the security services of Squire, the Realty defendants undertook a duty of protection to the Mall customers. The record revealed that a manager at the Hermes store (which overlooks the rear parking lot of the Mall near where the robbery occurred), observed a person fitting the assailant's description, loitering in the parking for approximately 20 minutes prior to the robbery. Ronzoni, Squire's witness, testified that the Mall owners delegated security measures entirely to Squire; that while he did not know how many incidents the Mall owners had received on a yearly basis, in the year prior to the robbery, the police had been called in response to other incidents. Ronzoni "did not know" how many security cars might be circulating at any given time, or the frequency of the security cars patrolling the parking lot. There was also evidence in the record that the Realty defendants had dismissed the idea of purchasing a surveillance system for reasons relating to the costs of installing such devices.

Summary judgment is a "drastic remedy [which] should not be granted where there is any doubt as to the existence of a material

and triable issue of fact" (Blatt v New York City Housing Authority, 123 AD2d 591 [1986]). Based upon the evidence in the instant case, a question of fact exists as to whether the Realty defendants failed to take reasonable security measures and, if so, whether such failure was the proximate cause of plaintiff's robbery and assault (see King v Resource Property Management Corp., 245 AD2d 10 [1997]). Therefore, the motion by the Realty defendants for summary judgment in their favor dismissing the complaint insofar as asserted against them, is denied.

Conclusion

The motion by Squire for summary judgment in its favor is granted. The motion by the Realty defendants for summary judgment in their favor is denied.

Dated: February 19, 2007

AUGUSTUS G. AGATE, J.S.C.