

Flynn v Esplanade Gardens, Inc.

2009 NY Slip Op 31743(U)

July 2, 2009

Supreme Court, New York County

Docket Number: 111631/05

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. M. J. ...
Justice

PART 11

Index Number : 111631/2005
FLYNN, MARK
VS.
ESPLANDE GARDENS
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 10-2-08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion ^{+ cross motion} ~~is~~ for summary judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion ^{and cross motion are decided}
^{in accordance with the appended Memorandum Decision & Order.}

FILED
JUL 28 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 21, 2009

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----X
MARK FLYNN,

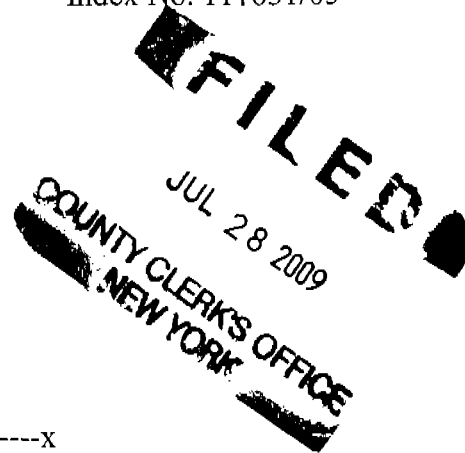
Index No. 111631/05

Plaintiff,

- against -

ESPLANADE GARDENS, INC.,
PRESTIGE MANAGEMENT, INC. and
SECURITAS SECURITY SERVICES
USA, INC.,

Defendants.
-----X



JOAN A. MADDEN, J.:

In this negligence action arising out of defendants' alleged failure to provide adequate security at a residential apartment building, defendants Esplanade Gardens, Inc. (Esplanade) and Prestige Management, Inc. (Prestige) move for summary judgment dismissing the complaint against them on the ground that any negligence by them was not a proximate cause of plaintiff's injuries. Defendant Securitas Security Services USA, Inc. (Securitas) cross moves for summary judgment dismissing the complaint and cross claims on the additional grounds that it did not owe a duty to plaintiff as plaintiff is not a third-party beneficiary of its contract with Esplanade to provide security at the building. For the reasons set forth below, the motion is denied and the cross motion is granted in part and denied in part.

Background

Plaintiff Mark Flynn (Flynn) resides on the first floor at 2569 Seventh Avenue ("the Building"), a residential apartment building owned by Esplanade and managed by Prestige

(Flynn Deposition, 6; Securitas Motion, ¶2). Securitas contracted with Esplanade to provide security services at the Building. (Securitas Motion at ¶2).

Flynn testified at his deposition that on March 31, 2005, at approximately 7:30 a.m., he heard a knock at his apartment door. (Flynn Deposition, 31, 35). Flynn looked through his door's peephole to see who was there and saw his ex-girlfriend, Maria Smith (Smith) standing outside. Flynn then asked, "Who is it?" to which Smith replied, "Maria." (Id. at 37, 49). Flynn opened his door and Smith entered the apartment. As soon as she came in, Patrick Mulligan (Mulligan), who was at Smith's side, ran into the apartment and began arguing and fighting with Flynn. (Id. at 36, 48). Mulligan then picked up a cocktail table stationed in the doorway and struck Flynn in the head with the table. (Id. at 36, 70, 72). A leg broke off the table and Mulligan continued to hit Flynn in the head with the table leg. (Id. at 36). Mulligan also attempted to choke Flynn and gouge his eyes out. (Id. at 52-53). As a result of the altercation, Flynn alleges to have sustained injuries, including a concussion and partial loss of vision in both eyes.

Flynn alleges that Smith and Mulligan entered through the front entrance of the Building. (Id. at 44). According to Dinella Dudley (Dudley), Securitas' site manager at the time of the incident, there were several doors through which an intruder could possibly enter the Building: a front entrance door, an emergency exit, two doors leading to a management office on the side of the building, a door leading to the Building's compactor room, and a door leading to a maintenance office. (Dudley Deposition, 65, 79).

According to Dudley, the Building's front entrance was supposed to be locked at all times. A visitor could gain entry into the Building through the front entrance by contacting a tenant via an intercom outside the front door, and having the tenant press a button (from the tenant's apartment) which would unlock the door. If no tenant buzzed the visitor in, a security

guard in the Building's front lobby could instead open the door and then require the visitor to show identification and sign in a logbook. The guard would then inform the tenant of the visitor's presence via a phone in the lobby. With the tenant's consent, the visitor could then proceed to the tenant's apartment. (Id. at 22 - 25). The procedure was supposed to be done for each and every visitor; unauthorized "piggybackers" were not allowed enter along with authorized guests. (Id. at 23). However, guards would frequently neglect these protocols. (Id. at 25).

The emergency exit was accessible from a gated parking lot behind the Building. (Id. at 82). According to Dennis Combs (Combs), the superintendent for Esplanade at the time of the incident, the gated lot was fully enclosed and the entrance was locked; however, the lock was regularly vandalized and did not always work. (Combs Continued Deposition, 28, 31). According to Combs, the exit was supposed to remain locked from the outside and constantly alarmed, (Id. at 28, 34), but tenants would frequently prop the door open and leave it open. (Id. at 42). Combs further testified that the batteries for the exit's alarm would regularly die. (Id. at 45).

Combs also testified that the Building's guards informed him that Flynn would regularly enter the Building through the exit, would also bring his friends in that way, and would leave the door propped open.. (Id. at 50 - 51). Flynn testified that Smith entered through the front entrance both on the day of the incident and also the previous time she came to his apartment, two or three weeks earlier. (Flynn Deposition, 44).

According to Combs, the two doors to the management office were regularly locked, although one door would stay unlocked when someone was present in the office. (Combs Continued Deposition, 12). At the time of the incident, the door connecting the office to the Building was connected to an alarm. (Combs Deposition at 20).

Concerning the doors to maintenance office and compactor room, Dudley testified that neither door was locked, nor was the door leading from either room into the building. The doors were supposed to be alarmed, but the alarm did not work. (Dudley Deposition, 86 - 90). Combs testified that both doors were always locked from the outside, and the compactor room door was also locked from the inside. (Combs Continued Deposition, 19 - 21).

According to Combs, a security camera would monitor activity directly outside of the front entrance (Id. at 61). However, according to Dudley, the security camera at the time of the incident was out of order. (Dudley Deposition, 70). The record shows that the Building's security cameras did not monitor any of the doors aside from the front door. (Id. at 74).

Securitas' security guards were on duty twenty-four hours a day seven days a week. Securitas stationed one guard in the lobby of the front entrance and provided another "roving guard" who stayed outdoors and patrolled, on foot, the Building and two neighboring buildings. (Id. at 13). Neither guard was armed. (Id. at 15) Dudley testified that she would oversee the guard stationed in the lobby two or three times daily to ensure that the guard would check visitors' identification and make them sign in. (Id. at 7) Dudley also testified that the roving guards would regularly slam the emergency exit closed when they would find it propped open. (Id. at 83 - 84).

Defendants argue that summary judgment should be granted since Flynn has failed to establish that the assailants who caused his injuries entered the Building through a negligently maintained entrance. Defendants also argue the criminal act of Smith, who regularly visited the Building, was unforeseeable. Defendants further argue that even if the security guard negligently permitted Flynn's assailants to enter the Building, this purported negligence was not a proximate cause of Flynn's injuries since Flynn would not have been harmed had he not

unlocked and opened his apartment door. Securitas additionally argues that it cannot be found liable since its contract with Esplanade did not create a special duty to protect Flynn from criminal acts by third persons.

In opposition, Flynn argues that Smith and Mulligan appeared at his apartment door unannounced; he did not buzz them in nor did he receive a call from a security guard,¹ and that these facts establish that either that Smith and Mulligan entered either through the Building's main entrance and the security guard negligently authorized their entry, or that Smith and Mulligan entered through one of the Building's other doors which the defendants failed both to patrol and to keep locked and alarmed. Flynn further argues that Esplanade's contract with Securitas for twenty-four hour security evidences that the defendants knew that criminal activity could occur if unauthorized visitors were permitted entry into the Building. Flynn also asserts that he took all possible measures to ensure his safety by looking through his peephole and asking who was in the hallway. In such an instance, "it is for a jury to decide if plaintiff is comparatively negligent." (Affirmation in Opposition, ¶170).

Lastly, Flynn argues that Securitas is liable for his injuries as its employees' negligence "place[d him] in an unreasonably risky setting greater than had [it] never entered into the contract at all." (Affirmation in Opposition, ¶¶179-83).

In reply, defendants assert that Flynn has not met his burden of proof since he has not provided sufficient evidence that the assailants entered through a negligently maintained

¹ Flynn also asserts that neither Smith's nor Mulligan's name appears on the guard's sign in log. However, the paper attached to Flynn's Affirmation in Opposition as evidence in support of this assertion contains names of visitors signing into the building on March 31, 2005, from 9:21 a.m. and onward (Flynn Affirmation in Opposition, Exhibit A). There is no indication from the paper that Smith and Mulligan did not sign in at approximately 7:30 a.m. on the previous page of the log. A request was placed to produce the previous page of the log, but no further evidence has been brought to the court's attention.

entrance. Defendants also argue that regardless of how Smith and Mulligan made it to Flynn's door, Flynn voluntarily opened the door, breaking any causal connection between the defendants' negligence and Flynn's injuries. Defendants also argue that Smith's and Mulligan's intent on harming Flynn was "truly extraordinary and unforeseeable and served to break the causal connection" between defendants' negligence and Flynn's injuries. (Securitas Reply Affirmation, ¶12).

Additionally, Securitas contends that the guard's presence at the lobby entrance could only have decreased Flynn's risk of harm but in no way increased the risk; therefore, Securitas cannot be liable for Flynn's injuries.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986).

A landlord has the duty to take "minimal precautions to protect against the reasonably foreseeable criminal acts of third persons." Maria S. v. Willow Enterprises, Inc., 234 AD2d 177, 178 (1st Dept. 1996) (citations omitted). However, no such duty arises unless it is shown that the possessor of the land "knows or has reason to know from past experience of a likelihood of conduct by third persons which is likely to endanger the public." Id. Whether an entrance was maintained negligently is therefore determined by assessing both the foreseeability of the incident at issue and whether minimal precautions were taken by the defendant to prevent such

an incident. Florman v. City of New York, 293 AD2d 120, 124 (1st Dept. 2002) (“A landlord . . . has a common-law duty to take minimal precautions to protect tenants . . . from foreseeable harm, including the criminal conduct of third parties.”). In order for a plaintiff to establish the foreseeability of a third person’s criminal conduct, “the criminal conduct at issue must be shown to be reasonably predictable based on prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location.” Maria T. v. New York Holding Co. Asscs., 52 AD3d 356, 357 (1st Dept), lv denied, 11 NY3d 708 (2008), citing Novikova v. Greenbriar Owners Corp., 258 AD2d 149, 152-53 (2d Dept. 1999).

On this motion, defendants do not argue that they are entitled to summary judgment on the ground that the incident was not foreseeable in view of the prior history of criminal activities in Building. Instead, they argue that Flynn has not shown that any failure by defendants to provide adequate security was a proximate cause of his injuries.

“In premises security cases particularly, the necessary casual link between a landlord’s culpable failure to provide adequate security and a tenant’s injuries resulting from a criminal attack in the building can be established only if the assailant gained access to the premises through a negligently maintained entrance.” Burgos v. Aqueduct Realty Corp., 92 NY2d 544, 551 (1998). Thus, “[i]n order to defeat a motion for summary judgment in a negligent security case, a plaintiff . . . must raise triable issues of fact concerning whether it was ‘more likely or more reasonable than not that the assailants . . . gained access to the premises through a negligently maintained entrance.’” Raghu v. 24 Realty Co., 7 AD3d 455, 456 (1st Dept. 2004) quoting Torres v. New York City Hous. Auth., 93 NY2d 828, 830 (1999).

Here, Flynn has sufficiently met his burden of raising a triable issue of fact that it was more likely or reasonable that Smith and Mulligan gained entrance to the Building through a

negligently maintained door. The record indicates that the procedure at the front door required that the tenant press a button (from the tenant's apartment) which would unlock the door, or that if tenant did not buzz the visitor in, a security guard in the Building's front lobby could instead open the door and then require the visitor to show identification and sign in a logbook, and then obtain the tenant's consent. However, according to Flynn, on the morning of the incident, he did not buzz Smith or Mulligan in and security did not inform him they were in the lobby.

Moreover, other evidence in the record-- including Dudley's testimony that the above-described protocol used by security to allow visitors who were not buzzed in by a tenant to enter the Building was often disregarded, that the emergency exit at the back of the Building was frequently propped open, and that the doors to the maintenance office and compactor room were not locked and their alarms did not work --raise factual questions as to whether Smith and Mulligan gained access through a negligently maintained door.

Defendants argue that even if Smith and Mulligan entered the Building through a negligently maintained door, Flynn's opening the door to his apartment constitutes an independent intervening act which broke the casual connection between defendants' alleged negligence and the injuries to Flynn resulting from the assault in his apartment. Defendants also argue that since Flynn knew Smith the assault was not "an extraordinary and unforeseeable event" that broke the chain of causation. Tarter v. Schildkraut, 151 AD2d 414, 416 (1st Dept), appeal denied, 74 NY2d 616 (1989).

"Depending upon the nature of the case a variety of factors may be relevant in assessing legal cause....If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus....Because questions concerning

foreseeability and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues are generally for the fact finder to resolve [although] [t]here are certain instances, to be sure, where only one conclusion may be drawn from the established facts and where the question of legal cause may be decided as a matter of law.” Mason v. UESS Leasing Corp., 274 AD2d 79, 82 (1st Dept. 2000), aff’d, 96 NY2d 875 (2001), quoting, Derdiarian v. Felix Contr. Corp., 51 NY2d 308, 314-315 (1980).

In general, courts have found that “where a plaintiff alleging negligence in building security let an intruder into an apartment during evening hours without first checking who was at the door, the action of plaintiff served as an intervening cause of a criminal act committed in the apartment premises, severing any liability of the defendant for failure to provide adequate security.” Del Carmen Madera v. New York City Hous. Auth., 264 AD2d 579 (1st Dept 1999)(internal citations and quotations omitted); see also Carmen P. by Maria P v. PS & S Realty Corp., 259 AD2d 386 (1st Dept 1999). In contrast, when a plaintiff (or other occupant of the apartment) looks through the peephole before the intruder gains entry, it has been held that “the question whether [such] conduct of [plaintiff] constituted an intervening cause [is] a factual issue that cannot be resolved on a motion for summary judgment.” Del Carmen Madera v. New York City Hous. Auth., 264 AD2d at 580. Here, as there is evidence in the record that Flynn looked through the peephole before letting Smith in and that Mulligan pushed his way into the apartment immediately afterward, it cannot be said on this record that Flynn’s opening of the door constituted a superceding cause of his injuries.

Likewise, the record is insufficient for the court to conclude as a matter of law that the acts of Mulligan and Smith “were truly extraordinary and unforeseeable” such that they served to “break the casual connection” between any negligence by defendants and Flynn’s injuries.

Tarter v. Schildkraut, 151 AD2d at 416. Specifically, while the record reflects that Smith was Flynn's former girlfriend and had visited the Building with Flynn previously, the attack was also perpetrated by Mulligan, who had no previous relationship with Flynn and had not been to the Building with him. In addition, there is insufficient evidence that the attack on Flynn was planned or that Smith and Mulligan were intent on harming Flynn so as to sever the causal connection between any negligence by defendants and Flynn's injuries. Compare Cynthia B. v. 3156 Hull Ave. Equities, Inc., 38 AD3d 360 (1st Dept 2007)(holding that evidence that a serial rapist who was posing as a plumber targeted the infant plaintiff who let him into her apartment on the date before the rape and on the date of the rape were sufficient to sever any causal connection between plaintiff's injuries and the alleged negligence of defendants); Buckeridge v. Broadie, 5 A.D.3d 298 (1st Dept. 2004) (holding that an intentional and targeted attack of sophisticated armed robbers disguised as workers from the environmental protection agency broke the causal connection between defendant home owner's negligence and plaintiff's injuries).

Accordingly, as there are triable issues of fact as to whether defendants' alleged negligence proximately caused Flynn's injuries, defendants' motion for summary judgment is denied.

On the other hand, the cross motion for summary judgment by Securitas must be granted as there is no evidence that it assumed any special protective duty for the Building's tenants, including Flynn. It is well established that a company, like Securitas, which contracts to provide security services, owes no special duty to tenants or occupants of a building who are not third party beneficiaries of the security contract. Anokye v. 240 East 175th Street Housing Development Fund Corp., 16 AD3d 287, 288 (1st Dept. 2005) (dismissing complaint against security company even though the security guard was absent from his lobby post at the time of

the incident since in its security contract with the building owners “[the security company] did not expressly assume any protective duty enforceable by the tenants”); Four Acres Jewelry Corp. v. Smith, 257 AD2d 510, 511 (1st Dept 1999)(a security company’s limited undertaking to provide security guards for lobby area of the building “did not give rise to a duty of care to a party such as plaintiff with whom [the security company] was not in privity.”).

On the other hand, since the contract between Esplanade and Securitas requires Securitas to indemnify Esplanade and hold it harmless, including for reimbursement of attorney’s fees, for “any injury to persons ...which arises from or as a consequence of the conduct of [Securitas],” Securitas is potentially liable on Esplanade’s cross claim against it for contractual indemnification.

Accordingly, Securitas is entitled to summary judgment dismissing the complaint against and any cross-claims except for Esplanade’s cross claim against it for contractual indemnification.

Conclusion

In view of the above, it is


ORDERED that the motion for summary judgment by defendants Esplanade Gardens, Inc. and Prestige Management, Inc. is denied; and it is further

ORDERED that the cross motion for summary judgment by defendant Securitas Security Services USA, Inc. is granted to the extent of dismissing the complaint and cross claims against it except for Esplanade’s cross claim against it for contractual indemnification.; and it is further

ORDERED that the parties will appear for a pretrial conference in Part 11, room 351 on July 30, 2009 at 2:15 pm.

DATED: July 27, 2009

FILED
JUL 28 2009
COUNTY CLERK'S OFFICE
NEW YORK


J.S.C.