

Roehrig v Nazzareno

2009 NY Slip Op 32616(U)

October 23, 2009

Supreme Court, Nassau County

Docket Number: 003548/07

Judge: Daniel Martin

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**SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice**

WILLIAM ROEHRIG.
Plaintiff.
- against -

**TRIAL/IAS, PART 30
NASSAU COUNTY**

Sequence No.: 002
Index No.: 003548/07

**CARMINE NAZZARENO and BEECHWOOD
ORGANIZATION d/b/a MEADOWBROOK
POINTE HEALTH CLUB AND SPA.**

Defendants.

CARMINE NAZZARENO.

Counterclaim Third-Party Plaintiff.
- against -

AGS INVESTIGATIVE SERVICE, INC.

Counterclaim Third-Party Defendant.

**BEECHWOOD ORGANIZATION d/b/a
MEADOWBROOK POINTE ATHLETIC
CLUB AND SPA (s/h/a "BEECHWOOD
ORGANIZATION d/b/a MEADOWBROOK
POINTE HEALTH CLUB AND SPA.**

Second Third-Party Plaintiff.
- against -

**AGS INVESTIGATIVE SERVICES, INC. And
FOUR STAR SECURITY & INVESTIGATIONS,
INC.**

Second Third-Party Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Motion pursuant to CPLR 3212 by defendant/second third-party plaintiff Beechwood

Organization d/b/a Meadowbrook Pointe Athletic Club and Spa s/h/a Beechwood Organization d/b/a Meadowbrook Pointe Health Club and Spa (Beechwood) for summary judgment dismissing the complaint and all cross-claims/counterclaims asserted against said defendant and for summary judgment in favor of Beechwood on its indemnification claims against defendant/third-party plaintiff Carmine Nazzareno and third-party defendant/second third-party defendant AGS Investigative Services, Inc. (AGS) is granted.

FACTUAL BACKGROUND

In this action, plaintiff, a security guard employed by AGS, the company retained to provide security services for the condominium site, seeks to recover damages for injuries he sustained on November 7, 2006 during the course of his employment at the residential condominium complex known as Meadowbrook Pointe located at 1100 Corporate Drive, Westbury, New York, when he was assaulted by defendant Carmine Nazzareno. The incident occurred at approximately 9:30 p.m. when Mr. Nazzareno, who was under contract to purchase condominium unit 2701, then under construction at Meadowbrook Pointe, drove up to the guard house and attempted to gain access to the complex after regular business hours. Since it was 9:30 at night, and the business office was no longer open, Mr. Nazzareno was denied entry by plaintiff security guard. A physical altercation ensued in which both plaintiff and Carmine Nazzareno claim they sustained injury.

In his complaint plaintiff asserts causes of action against Carmine Nazzareno for assault and battery and against Beechwood for negligence. By way of cross claims asserted in his second amended answer, Carmine Nazzareno seeks an apportionment of damages against Beechwood, the owner/developer of the complex, based on the parties' relative culpability and damages arising from Beechwood's alleged negligence. His counterclaims against plaintiff and AGS sound in negligence and vicarious liability respectively. Beechwood has counterclaimed against Carmine Nazzareno and AGS for contribution/ indemnification.

By its instant motion, Beechwood seeks summary dismissal of all claims asserted against it by plaintiff, Carmine Nazzareno and AGS as well as summary judgment in its favor on its indemnification claims against both Carmine Nazzareno and AGS.

LEGAL ANALYSIS

It is well established that a landowner has a duty to maintain his property in a safe condition including the duty to take minimal precautions to protect against the reasonably foreseeable criminal acts of third persons. Michelle K. v. Stonehurst III Associates, 50 A.D.3d 639 [2nd Dept. 2008]. The duty arises where the possessor of the property knows or has reason to know of a likelihood of conduct by third persons that is likely to endanger the safety of those lawfully on the premises. Howard-Seay v. Dorchester Towers Associates, 227 A.D.2d 525 [2nd Dept. 1996]. There is no duty, however, to protect against unforeseeable/unexpected assaults. Petras v. Saci, Inc., 18 A.D.3d 848 [2nd Dept. 2005]; Browne v. GWRI, Inc., 6 A.D.3d 640, 641 [2nd Dept. 2004].

A plaintiff alleging a negligent failure to provide secure premises must show not only that the harm suffered was foreseeable, but also that the defendant owed a duty to plaintiff and his negligence was a proximate cause of plaintiff's injury. Miller v. State, 62 N.Y.2d 506, 514 [1984]. Foreseeability is the measure of a landowner's duty not only in the landlord/tenant context but with respect to business patrons and employees generally. Scalice v. Kullen, 274 A.D.2d 426 [2nd Dept. 2000]. Owners are not insurers of the safety of those present on their premises. Gross v. Empire State Bldg. Associates, 4 A.D.3d 45, 46 [1st Dept. 2004].

According to the complaint, Beechwood's liability is predicated on the grounds that it was aware of the likelihood of criminal encounters and failed to take prudent measures to ensure plaintiff's safety and prevent the assault and battery perpetrated against him by Carmine Nazzareno. There is nothing in the record, however, to support such a theory. There is no showing that Beechwood knew, or from past experience, would have had reason to know that there was a likelihood of conduct, criminal or otherwise, likely to endanger the safety of those on its premises. The alleged assault on plaintiff was not foreseeable. Under the facts extant, neither Carmine Nazzareno's nor plaintiff's alleged conduct was reasonably predictable based on prior occurrences at the location. Mazurenko v. Beach Haven Apts. #6, Inc., 281 A.D.2d 522 [2nd Dept. 2001], *leave to appeal denied* 96 N.Y.2d 717 [2001].

The record is bereft of any facts sufficient to raise an issue *vis a vis* whether Beechwood breached its duty to provide minimal security precautions against the foreseeable criminal acts of a third party or that Beechwood was aware of criminal conduct at the location which would endanger either plaintiff or Carmine Nazzareno. Novikova v Greenbriar Owners Corp., 258 A.D.2d 149, 152-53 [2nd Dept. 1999]. Nothing that Beechwood did, or failed to do was a proximate cause of the injuries allegedly sustained by plaintiff or Carmine Nazzareno. Mazurenko v. Beach Haven Apts. #6, *supra*.

On a motion for summary judgment, the issue is not whether a plaintiff can ultimately establish liability but rather whether there is a substantial question of fact on the issue of liability which requires a trial. Barr v. Albany County, 50 N.Y.2d 247, 254 [1980]. A shadowy semblance of an issue of fact or bald conclusory assertions are not enough to defeat summary judgment. Gordian v. Consolidated Edison Co. of New York, Inc., 60 A.D.3d 600 [1st Dept. 2009]. The scope of an alleged tortfeasor's duty is, in the first instance, a legal issue for the court to resolve. Williams v. Citibank, N.A., 247 A.D.2d 59, 51-52 [1st Dept. 1998], *leave to appeal denied* 92 N.Y.2d 815 [1998]. Here plaintiff has failed to raise any issue of fact as to whether Beechwood breached its duty to maintain its property in a safe manner.

With respect to Carmine Nazzareno, Beechwood relies on paragraph 40 of the Purchase Agreement [October 17, 2006] which was signed by Mr. Nazzareno. Regarding visits to the site to inspect a unit still under construction, the provision provides as follows:

“[u]nless specifically agreed to by the Seller, Purchaser shall not visit the construction site except the Sales Office. Purchaser acknowledges that unsupervised visits to the construction site present a dangerous circumstance and could incur liability to

Seller. Purchaser hereby releases and agrees to indemnify, defend and hold Seller harmless for all claims and liabilities incurred by Seller resulting from the presence of Purchaser or Purchaser's family members or invitees on the Premises or Seller's other property during the terms of this Agreement. Purchaser further agrees to execute simultaneously with the execution of this agreement the Express Assumption of Risk Form attached to and made a part of this Agreement as Exhibit d-4 but such form shall not be Seller's consent to visit the site, which consent shall only be given pursuant to Seller's separate written consent."

Given the plain language of this provision, Carmine Nazzareno's purported belief that he was rightfully entitled to visit the premises after hours, and had done so on four or five occasions without incident, and his understanding that his name had been placed on a list of purchasers, whose units were not yet complete, who were permitted to visit their units after business hours are insufficient to defeat Beechwood's motion to dismiss the cross claims asserted against Beechwood by Mr. Nazzareno and/or its request for summary judgment in Beechwood's favor on its cross claim against him for indemnification. In addition to the Purchase Agreement, Mr. Nazzareno signed an Express Assumption of the Risk, pursuant to which he "expressly assum[ed] all risks associated with the construction site."

Defendant AGS does not oppose Beechwood's request for summary judgment on its indemnification claim pursuant to the parties' written agreement dated January 24, 2005 which provides that:

"[t]o the fullest extent permissible by law the subcontractor agrees to indemnify and hold the contractor, including the contractor's agents, and employees harmless from and against any and all losses, claims, damages, penalties or expenses, including reasonable attorneys fees arising from bodily injury or death to any person and/or property damage including loss of use arising out of or in any way relating to the work performed or omission caused by the subcontractor, agents, or employees of the subcontractor under this contract."

Accordingly, that branch of Beechwood's motion is granted. The extent, if any, to which AGS is entitled to contribution from Carmine Nazzareno for his share of the expenses of the litigation borne, thus far solely by AGS, remains to be determined.

So Ordered.

Dated: October 23, 2009


A.J.S.C.

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NASSAU COUNTY
COUNTY CLERK'S OFFICE