

Candela v Regal Entertainment Group

2011 NY Slip Op 30189(U)

January 24, 2011

Sup Ct, Richmond County

Docket Number: 100887/2009

Judge: Joseph J. Maltese

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

**Index No.: 10087/2009
Motion No.: 3 & 5**

JOHN CANDELA

Plaintiff

against

**REGAL ENTERTAINMENT GROUP;
FC FOREST AVENUE ASSOCIATES, LLC;
STEVEN WALSH;
STEPHEN GREGOREADIS;
MARIA FONSECA;
AMANDA CERULLO;
WILLIAM LABARBERA;
JOSEPH FONSECA; and
EASTERN SECURITY CORP.**

Defendants

**DECISION & ORDER
HON. JOSEPH J. MALTESE**

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

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Order to Show Cause	2
Answering Affidavits	3 & 4
Replying Affidavits	5, 6 & 7
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this motion and this cross motion for summary judgment is as follows:

The motion for summary judgment made by the defendant Eastern Security Corp. is denied. That part of the cross motion for summary judgment made by the defendant Regal Entertainment Group, as management of a movie theater is denied. That part of the cross motion made by FC Forest Avenue Associates, LLC, as landlord of that movie theater is granted.

Facts

This is an action seeking compensation for injuries resulting from an assault upon John Candela.

Steven Walsh and Stephen Gregoreadis have plead guilty in criminal court to charges stemming from that assault. Maria Fonseca, Amanda Cerullo, William LaBarbara, and Joseph Fonseca are each alleged to have participated in the assault, but this court is not aware of adjudication by any court

The assault occurred outside United Artists 16 (UA 16), a movie theater located at 2427 Forest Avenue, Staten Island, New York. The theater is leased to Regal Entertainment Group (Regal Entertainment), which manages UA 16. The owner and landlord of the theater is FC Forest Avenue Associates, LLC (FC Forest). Eastern Security Corp. (Eastern Security) supplied security for Regal Entertainment at UA 16 for at least three days each week, on Friday, Saturday, and Sunday during the month of January 2009.

On the evening of Wednesday, January 14, 2009, the plaintiff was outside UA 16, waiting to purchase tickets at a ticket booth in which there was an employee of Regal Entertainment. A car drove into the parking lot of UA 16, its occupants exited the car and aggressively approached Mr. Candela. He attempted to flee and he alleges he tried to enter the UA 16 building, but was denied entrance to the inside of the building by another employee of Regal Entertainment. The actual assault then took place within a parking lot adjacent to UA 16. Mr. Candela alleges his assailants beat him with a baseball bat, with tire irons, and with their hands and feet. As a result of the vicious beating, the plaintiff suffered multiple serious injuries including a fractured skull.

Notwithstanding any actual relationships between the defendants, the plaintiff alleges in pleadings that Regal Entertainment, FC Forest, and Eastern Security each owned, operated, maintained, managed, and controlled UA 16. Further, Regal Entertainment and Eastern Security are both alleged to have failed to hire, employ or retain an adequate number of properly trained personnel and that both failed to manage, supervise, control or inspect employees. The plaintiff also alleges that the specific geographic location of UA 16 is inherently dangerous for its patrons. Additionally, the plaintiff alleges that Eastern Security was supposed to have provided security at the premises of UA 16 at the time of the assault.

In an affidavit, Mr. Candela alleges that prior to the onset of the assault, he was third in line to purchase tickets and was visible to the individual in the ticket booth. The plaintiff perceived impending danger when the occupants of the vehicle exited and approached him. He ran to one of the theater doors to UA 16 followed by his assailants. In front of the door, a theater employee was sweeping. According to the plaintiff, the employee told him he could not enter the building. The employee is alleged to have stated that he did not want any trouble within the theater. Mr. Candela specifically asserts he was blocked from entering the theater door by the employee. Immediately after the plaintiff failed to find refuge within UA 16 the assault began. The plaintiff thereby asserts that his injuries resulted from the failure of UA 16 employees to assist him. The plaintiff also asserts that no necessary discovery has been conducted.

Regal Entertainment state they did not create any dangerous conditions at UA 16, and did not have actual or constructive knowledge of dangerous conditions. Specifically, Regal Entertainment asserts an absence of any knowledge of the attack until it ended. According to a theater manager, Eric Erlaube, he was informed of the assault by a woman employee at UA 16 only after the assault was completed. Regal Entertainment and FC Forest assert that for the five years prior to the assault, there had been no incidents requiring outside security on a weekday. Moreover, FC Forest states that it is an out-of-possession landlord, and consequently could not have any knowledge of the impending assault.

Procedural History

This action commenced with filing of a Summons and Complaint against Eastern Security, Regal Entertainment, and FC Forest on June 26, 2009. Issue was joined with Eastern Security on November 24, 2009 when that defendant served its Verified Answer on the plaintiff. Issue was joined with Regal Entertainment and FC Forest on November 13, 2009 when these defendants served a Verified Answer on the plaintiff. No Note of Issue has been filed.

Discussion

“Summary judgment is often termed a drastic remedy, and will not be granted if there is any

doubt as to the existence of a triable issue. ... It does not deny the parties a trial, it merely ascertains there is nothing to try.”¹ “A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions.”²

Here, a copy of the pleadings is attached. The available proofs for the respective motion and cross motion include affidavits by Lee Stern, the Executive Vice-President of Eastern Security; by Leon Saunders, the general manager of UA 16; by Mr. Erlaube, another manager at UA 16 who was present on the night of the incident; and by Deborah Levinson, Vice-President of FC Forest. The motion and cross motion for summary judgment rely upon these affidavits made by individuals “with knowledge of the facts.”³ Additionally, the cross motion for summary judgment includes a copy of the lease agreement between Regal Entertainment and FC Forest. The other defendant s offer no additional proofs. In opposition, the plaintiff provides an affidavit executed by Mr. Candela.

The motion and cross motion for summary judgment are timely.

The plaintiff argues that the motion and cross motion for summary judgment are untimely because discovery is not complete. The New York Civil Practice Law and Rules (CPLR) states “[a]ny party may move for summary judgment in any action, after issue has been joined; provided that the court may set a date after which no such motion may be made ... no earlier than thirty days after the filing of the note of issue.”⁴ Here, issue has been joined, but no Note of Issue has been filed. Consequently, the motion and cross motion for summary judgment are timely.

¹*Gilson v Metropolitan Opera*, 5 NY 3d 574, 578 [2005]; *quoting* Siegal, New York Practice, § 278 at 459-460 [4th ed.].

²CPLR 3212 (b).

³*Id.*

⁴CPLR § 3212 (a).

The motion for summary judgment made by Eastern Security is denied.

In support for its motion for Summary judgment, Eastern Security submits an affidavit from Mr. Stern, which avers that Eastern Security provided security services at UA 16 based upon an oral contract with Regal Entertainment. He further states that during January 2009, security services at UA 16 were provided only on Fridays, Saturdays, and Sundays. Under its agreement, Eastern Security alleges that they only provided security services inside UA 16 and its obligations did not extend to the parking lot. The affidavit made by Mr. Saunders does not specify the nature of Regal Entertainment's contract with Eastern Security. He further states that Eastern Security "primarily" provided security on Fridays, Saturdays and Sundays. Mr. Saunders is silent as to the locations at UA 16 for which Eastern Security provided security.

Mr. Candela's affidavit does not directly contradict the facts offered by Eastern Security. In opposition to Eastern Security's motion for summary judgment, the plaintiff cites decisions from so-called slip and fall actions. The current action is not an example of that genre. Further the plaintiff cites *Ugarriza v Schmieder* in which summary judgment was denied to the plaintiff when a bare-bones assertion, without support of admissible evidence, was made by the plaintiff that there were no triable issues of fact.⁵ In distinction, here it is the defendant Eastern Security seeking summary judgment, not a plaintiff. Further, it is Eastern Security that offers an affidavit as admissible evidence. The plaintiff cites an additional action in which the defendant opposed the plaintiff's motion for summary judgment with evidence from both an engineering expert and from a Vice-President of the company.⁶ In contrast, the plaintiff in this current action responds to the defendant's motion for summary judgment without presenting evidence in admissible form to rebut the submissions made by Eastern Security.

Eastern Security cites an action, in which the New York Court of Appeals made clear that when

⁵*Ugarriza v Schmieder*, 46 NY 2d 471 [1979].

⁶*Roman Maronite Catholic Church v Metropolitan Heat and Power Co.*, 137 AD 2d 513, 514 [2d Dept 1988].

failure to provide security is the cause of action, it is that failure that must be a substantial factor in causing any injury.⁷ Eastern Security further emphasizes that a negligent act or omission must be the proximate cause of a foreseeable injury. However, proximate cause is not a matter of law, but is a matter for a finder of fact to determine.⁸ Consequently, a determination of proximate cause, or of its absence, is not here suitable for a motion for summary judgment.

The plaintiff has also argued that summary judgment should not be granted because discovery has not been held, and the plaintiff specifically argues that the precise nature of the contract between Eastern Security and Regal Entertainment is not yet disclosed. Under certain circumstances, a motion for summary judgment may not be ripe for decision prior to discovery.⁹ “Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.”¹⁰

Here, the plaintiff has argued in opposition to the motion and cross motion that other facts exist regarding a contract between Eastern Security and Regal Entertainment. The nature of any such contract is known only to the defendants, and those facts cannot now be stated. Therefore, the opposition to this motion for summary judgment based upon a lack of discovery, rests upon the likelihood of specific evidence that is not known to the opponent, but which may be known to the movant of the motion for summary judgment. Facts that are as yet unknown include the precise nature and contents of the contract between Eastern Security and Regal Entertainment. Discovery is required to delineate the nature of that contract. In negligence actions, duty is established as a

⁷*Maheshwari v City of New York*, 2 NY 3d 288, 295 [2004].

⁸*Derdarian v Felix Contractor Corp.*, 51 NY 2d 308, 315 [1980].

⁹*Adrianis v Fox*, 30 AD 3d 550, 550-551 [2d Dept 2006]; and *Afzal v Bd of Fire Commissioners of Bellmore Fire District*, 23 AD 3d 507, 507-508 [2d Dept 2005].

¹⁰CPLR § 3212 (f); see also *Groves v Land's End Housing Co., Inc.*, 80 NY 2d 978 [1992].

matter of law.¹¹ Whether Eastern Security owed a duty to the plaintiff is at least partly dependent upon whether a duty was owed to Regal Entertainment under Eastern Security's contract with Regal Entertainment.

Therefore, the facts pertaining to the contract, and the duties owed under the contract between Eastern Security and Regal Entertainment are not yet known but could be determined by further discovery. Consequently, the motion for Summary judgment made by Eastern Security is denied in its entirety.

The cross motion for summary judgment made by the out-of-possession landlord FC Forest is granted.

The cross motion for summary judgment made by FC Forest is supported by an affidavit from Ms. Levinson. Ms. Levinson states that FC Forest has not had any control over the premises of UA 16 from the time that Regal Entertainment, the management of UA 16, began its lease. This was long before the incident in question. Further, Ms. Levinson states FC Forest had no knowledge or notice of dangerous or defective conditions at UA 16. As additional evidence, FC Forest submits a copy of its lease with Regal Entertainment. To make a *prima facie* showing that an entity is an out-of-possession landlord, it is necessary to submit a lease in which the tenant is obligated to maintain the interior of the premises and to make all necessary repairs.¹² The lease between FC Forest and Regal Entertainment requires the latter to keep and maintain the premises in proper repair and allows FC Forest to have the right but not the duty to inspect UA 16. Here, FC Forest's submission that it is an out-of-possession landlord is not controverted. Generally, out-of-possession landlords are not liable for injuries resulting from the condition of the premises.¹³ Exceptions to the general rule include where control and repair by the landlord was contractually required, where defendants created the allegedly dangerous condition, or where the premises were leased knowing of a

¹¹See for example, *Simmons v Sacchetti*, 15 NY 3d 797, 798 [2010].

¹²*Travers v RCPI Landmark Properties, LLC*, 74 AD 3d 956, 957 [2d Dept 2010].

¹³*Butler v Rafferty*, 100 NY 2d 265, 268 [2 d Dept 2003].

dangerous condition.¹⁴ Those exceptions are not asserted by the plaintiff in this action.

Therefore, FC Forest has shifted the burden to the plaintiff to show evidence in admissible form of negligence or of information that is controlled by FC Forest that is not known to the plaintiff. Here the plaintiff has not established controversy grounded in issues of fact, nor has the plaintiff asserted that FC Forest has information available to itself that is not known to the plaintiff.

Consequently, the plaintiff has neither overcome the showing of FC Forest that it is an out-of-possession landlord, nor has the plaintiff rebutted the evidence submitted by FC Forest. Therefore, in the absence of a triable controversy, with no showing of facts known to FC Forest but not known to the plaintiff, and with FC Forest showing it is an out-of-possession landlord, summary judgment is granted to FC Forest.

The cross motion for summary judgment made by Regal Entertainment is denied.

“Although a jury determines whether and to what extent a particular duty was breached, it is for the court to determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society generally.”¹⁵ “It is beyond dispute that landowners and business proprietors have a duty to maintain their properties in a reasonably safe condition. It is reasonably clear that this duty may extend to controlling the conduct of third persons who frequent or use the property, at least under some circumstances.”¹⁶ “Duty is essentially a legal term by which we express our conclusion that there can be some liability ... It tells us whether the risk to which one person exposes another is within the protection of the law.”¹⁷ Prior to determining liability, the court must first determine

¹⁴*McElroy v Bernstein*, 72 AD 3d 757, 758 [2d Dept 2010].

¹⁵*Rivera v Nelson Realty, LLC*, 7 NY 3d 530, 534 [2006]; *quoting Tagle v Jakob*, 97 NY 2d 165, 168 [2001]; *and see also Di Ponzio v Riordan*, 89 NY 2d 578, 582 [1997].

¹⁶*Di Ponzio v Riordan*, 89 2d at 582-583.

¹⁷*Waters v New York City Housing Auth.*, 116 AD 2d 384, 386 [2d Dept 1986]; *quoting De Angelis v Lutheran Medical Ctr.*, 58 NY 2d 1053, 1055 [1983].

whether Regal Entertainment owed a duty to Mr. Candela.

The plaintiff calls for access to specific information including discovery as to Regal Entertainment's contracts for security services, its knowledge regarding neighborhood risks, and a delineation of the actions of its employees. On the facts currently available, it is not yet possible to definitively determine whether a duty runs from Regal Entertainment to Mr. Candela. Deciding the issue of duty will require properly informed deliberation. Therefore, the determination of duty will be deterred until it can be based upon adequate additional clarifying information.

The cross motion made by Regal Entertainment is supported by affidavits from Mr. Saunders and Mr. Erlaube . Mr. Saunders states that no significant weekday-night incidents occurred in the five years prior to the assault upon the plaintiff. Further, Mr. Saunders states that there had been no incidents requiring outside security prior to the attack upon this plaintiff. Mr. Erlaube states he had no foreknowledge the assault would take place. He further states that he was not informed of the events of Wednesday, January 14, 2009 until immediately after the event.

In contrast, the plaintiff asserts that the initial stages of the attack were witnessed by the box office attendant and by another employee while each of those individuals was engaged in working for Regal Entertainment. Mr. Candela states he urgently sought to enter UA 16 immediately prior to the assault, seeking refuge from obviously aggressive individuals. He alleges he was denied entry to UA 16 by a theater employee cleaning the area of the theater. According to Mr. Candela, his entry to UA 16 was actually blocked, even though it was obvious he was being chased. Mr. Candela further asserts a reason was given for refusing him refuge. According to him, it was to keep trouble outside of the theater.

An employer may be liable for the acts or omissions of employees if they are in the furtherance

of the employer's business and are within the scope of employment.¹⁸ Here, the employees were stated to be engaged in typical activities related to the course of their employment and Mr Candela's entry to UA 16 was blocked by an employee with an alleged purpose of furthering Regal Entertainment's goal of keeping trouble outside of UA 16. The available evidence indicates that no assistance was rendered to Mr. Candela, nor was any assistance summoned by Regal Entertainment or its employees prior to the assault. There may be a duty owed to a victim of an assault when an observer, from a protected site of observation, fails to summon aid.¹⁹ Evidence supplied by Mr. Erlaube that there was no notice of the assault until it was completed is rebutted in the form of admissible evidence presented by the plaintiff. This is a triable controversy involving opposing presentations of fact.

Consequently, in order to determine whether Regal Entertainment owed a duty to Mr. Candela, and to determine whether that duty was breached requires a determination that derives from additional facts that may be known to the defendants, but not to the plaintiff. Therefore, the cross motion for summary judgment made by Regal Entertainment is denied.

Accordingly, it is hereby

ORDERED, that the motion made by the defendant Eastern Security Corp. requesting summary judgment against the plaintiff John Candela is denied in its entirety; and it is further

ORDERED, that the cross motion made by the defendant FC Forest Avenue Associates, LLC requesting summary judgment against the plaintiff John Candela is granted in the entirety; and it is further

ORDERED, that the caption of this action shall be amended by the deletion of FC Forest

¹⁸*N. X. v Cabrini Medical Center*, 97 NY 2d 247, 251 [2002].

¹⁹*Crosland v New York City Transit Auth.*, 68 NY 2d 165, 170 [1977].

Avenue Associates, LLC; and it is further

ORDERED, that the cross motion made by the defendant Regal Entertainment Group requesting summary judgment against the plaintiff John Candela is denied in the entirety; and it is further

ORDERED, that the remaining parties shall return to **DCM Part 3, 130 Stuyvesant Place, Third Floor for a compliance conference on February 10, 2011 at 9:30 AM.**

ENTER,

DATED: January 24, 2011

Joseph J. Maltese
Justice of the Supreme Court