Radicevic v Laguardia Assoc., L.P.

2011 NY Slip Op 30305(U)

February 7, 2011

Sup Ct, Queens County

Docket Number: 12620/2008

Judge: Denis J. Butler

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.

[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IA Part 12
Justice

ALEKSANDRA RADICEVIC x	Index Number 12620 2008
-against-	Motion Date November 9, 2010
LAGUARDIA ASSOCIATES, L.P., et al.	Motion Cal. Number 37
x	Motion Seq. No. 2
LAGUARDIA ASSOCIATES, L.P., et al.	
-against-	
SECURITY INTERNATIONAL CORPORATION, et al. x	

The following papers numbered 1 to 10 read on this motion by defendants for summary judgment dismissing the complaint pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits......................................	1-4
Answering Affidavits - Exhibits..	5-7
Reply Affidavits..	8-10

Upon the foregoing papers it is ordered that the motion is denied.

Plaintiff in this negligence action seeks damages for personal injuries sustained on June 2, 2005, when she was assaulted while performing her duties as a security guard at the Crown Plaza Hotel located at 104-04 Ditmars Blvd., Astoria, New York. Specifically, plaintiff was struck in the head with a frozen can of soda. Neither plaintiff nor defendants can identify the assailant and/or from where the can of soda was thrown. At the time of the incident, plaintiff was employed by Security International Corporation (who has failed to appear in this action).

Plaintiff contends that, at the time of the incident, the hotel was involved in an ongoing labor dispute with its hourly employees, who were maintaining a disorderly picket line outside the main entrance to the hotel, and that, in the months preceding June 2, 2005, the picketing employees were allegedly responsible for numerous acts of vandalism, disruption of the hotel's business and threats of violence. It is also alleged that the hotel owner had frequently taunted the picketing employees during his weekly visits to the hotel, which further inflamed the labor dispute and angered striking employees.

Plaintiff alleges that, on the day of the incident, plaintiff was forced by the hotel's general manager to put aside her usual duties and stand guard over the hotel owner's luxury sports car, a Mercedes convertible worth in excess of $100,000, parked in front of the hotel, and that she was instructed to stand guard by the car because it was perceived as a target for vandalism by striking employees. While plaintiff was standing guard over the car, she was struck from behind by a frozen can of soda, causing her injury. Defendants now move for summary judgment on the ground that they owed no duty to plaintiff and that the incident was unforeseeable. Plaintiff opposes the motion.

"To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff" (*Alvino v Lin*, 300 AD2d 421 [2002]; *see Nappi v Incorporated Vil. of Lynbrook*, 19 AD3d 565 [2005]; *Schimmenti v Ply Gem Indus.*, 156 AD2d 658, 659 [1989]; *Prescott v Newsday, Inc.*, 150 AD2d 541, 542 [1989]). Defendants argue in the first instance that they cannot be held liable in negligence because they owed no duty of care to plaintiff, who was hired as a security guard. This contention is without merit.

"A duty of care is said to exist where plaintiff's interests are entitled to legal protection against the defendant's conduct" (Prosser and Keeton, Torts § 53, at 357 [5th ed]; *see Pulka v Edelman*, 40 NY2d 781, 782 [1976]). The scope and extent of the duty is defined by the risk of harm reasonably to be perceived (*see Sanchez v State of New York*, 99 NY2d 247, 252 [2002]; *Basso v Miller*, 40 NY2d 233, 241 [1976]; *Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 344 [1928]). Thus, where it is reasonably foreseeable that a

defendant's failure to use ordinary care in his or her own conduct will create a risk of harm to a plaintiff with whom he or she has a cognizable legal relationship, the defendant has a duty to use such ordinary care to avoid the risk (*see Havas v Victory Paper Stock Co.*, 49 NY2d 381, 386 [1980]; *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 585 [1994]).

The gravamen of this case concerns defendants' duty to act in the face of a known and specific danger and whether defendants breached their duty to plaintiff under the circumstances (*Vetrone v Ha Di Corp.*, 22 AD3d 835 [2005]). To be entitled to summary judgment, defendants must show they owed no duty to plaintiff, as they were unaware that the picketing employees posed a foreseeable risk of harm to plaintiff, and defendants did not put plaintiff in harm's way by forcing her to stand guard over the owner's car in the front of the hotel. Defendants have failed to sufficiently satisfy these requirements, as the evidence supports the claim that plaintiff was instructed to guard the luxury automobile because the hotel's general manager was concerned that the striking employees would cause harm to it.

With respect to defendants' "duty to take minimal security precautions against foreseeable criminal activity, including assaults upon individuals on the premises" (*Jenkins v Ehmer*, 272 AD2d 976, 976 [2000]; *see generally Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 518-519 [1980]), the Court concludes that defendants did not establish, as a matter of law, that such duty was met. Generally "[w]hat safety precautions may reasonably be required of a landowner is almost always a question of fact for the jury" (*Nallan*, 50 NY2d at 520 n 8; *see Jenkins*, 272 AD2d at 977).

Furthermore, under the circumstances, the court rejects the contention that the defendants owed no duty to plaintiff (*see Burgundy Basin Inn v Watkins Glen Grand Prix Corp.*, 51 AD2d 140 [1976]; *see also* Restatement [Second] of Torts § 344). There can be no doubt that defendants owed a duty of care to individuals on the premises (*see Gerbino v Tinseltown USA*, 13 AD3d 1068, 1070-1071 [2004]). Nor is the duty of care to plaintiff negated by the fact that plaintiff was on site as a contractor rather than as a patron (*see Gerbino v Tinseltown USA*, *supra*; *Backiel v Citibank*, 299 AD2d 504 [2002]). Plaintiff, who was present because she was hired as a security guard for the hotel, reasonably had the right to expect that defendants would not put her in harm's way so as to require her, acting alone, to face a large crowd of angry picketers who, allegedly, had previously been prone to violence, destruction of property and other disruptions. Nor does the Court agree with defendants' alternate contention that, in effect, they owed no duty to plaintiff, because, as a security guard, she necessarily assumed the risk that there would be violence and other unruly behavior (*see Gerbino v Tinseltown USA*, *supra*). The Court concludes, therefore, that defendants have failed to demonstrate that defendants did not owe a duty to plaintiff.

Moreover, the court disagrees with the contention that it was unforeseeable, as a matter of law that, when picketers who have previously damaged property and made threats against persons would suddenly turn violent against the security guard. The question, then, is whether defendants are nonetheless relieved of all liability on the ground that, as a matter of law, the assault constituted a superseding cause of plaintiff injuries. The court concludes that they were not.

The acts of a third person may constitute a superseding cause, breaking the causal connection between a defendant's negligence and a plaintiff's injuries, where the acts are not a foreseeable consequence of the circumstances created by the defendant's negligence, or where they are independent of, or far removed from, the defendant's conduct, so that responsibility for the injuries may not reasonably be attributed to the defendant (*see Kush v City of Buffalo*, 59 NY2d 26 [1983]; *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308 [1980]). The fact that the third person's acts may constitute criminal conduct does not necessarily make them a superseding cause as a matter of law (*see Nallan v Helmsley-Spear, Inc.*, *supra* at 507). To the contrary, intervening criminal acts may still give rise to liability under ordinary principles of negligence where there is a sufficient underlying legal relationship between the parties (*see Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222 [2001]) and where the acts are "a 'reasonably foreseeable' consequence of circumstances created by the defendant" (*Bell v Board of Educ. of City of N.Y.*, 90 NY2d 944, 946 [1997], quoting *Kush v City of Buffalo*, *supra*; *see also Gerbino v Tinseltown USA*, *supra* [injury to theater security guard who was assaulted while trying to prevent a fight between two patrons was normal and a foreseeable consequence of theater owner's negligence]; *Mancuso v State of New York*, 226 AD2d 320 [1996] [whether fight among spectators at a basketball game was foreseeable as to stadium owner presented issues of fact precluding summary judgment]; *Rotz v City of New York*, 143 AD2d 301, 306 [1988] [foreseeability of risk that crowd would become disorderly and begin a riot or stampede was question of fact for jury to decide]; *Watson v Adirondack Trailways*, 45 AD2d 504 [1974] [foreseeability of assault at bus terminal by passenger who had not been permitted to board bus presented genuine issue of fact for jury to determine]; *cf. Burgundy Basin Inn v Watkins Glen Grand Prix Corp.*, *supra* at 144 [risk that property might be vandalized by crowd at outdoor concert was foreseeable]). Under the circumstances of this case, there are triable issues of fact here that preclude summary judgment.

<u>Incident Reports</u>

Plaintiff claims that the there were numerous incidents which chronicled the destruction of property, harassment and other disruptions at the hotel caused by the striking workers during the time frame relevant to plaintiff's complaint; that these incidents included threats of violence and vandalism to cars on the hotel premises, and that such were

documented in incident reports prepared and maintained by the hotel. According to plaintiff, these incident reports were in existence at a time when the hotel and its insurance company had notice of potential for a claim by plaintiff arising out of this incident, and yet the hotel has failed to produce the said reports. Plaintiff contends that these incident reports constitute crucial evidence without which she is unable to prove her case and that the remedy of an adverse inference charge at trial will ameliorate the prejudice caused by spoliation.

Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, thereby depriving the nonresponsible party of the ability to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading (*see Denoyelles v Gallagher*, 40 AD3d 1027 [2007]; *Baglio v St. John's Queens Hosp.*, 303 AD2d 341 [2003]; *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41 [1998]). However, a less severe sanction is appropriate where the absence of the missing evidence does not deprive the moving party of the ability to establish his or her case (*see Gerber v Rosenfeld*, 18 AD3d 812 [2005]; *Iannucci v Rose*, 8 AD3d 437 [2004]). The determination of a sanction for spoliation is within the broad discretion of the court (*see Dennis v City of New York*, 18 AD3d 599 [2005]; *Allstate Ins. Co. v Kearns*, 309 AD2d 776 [2003]).

Plaintiff attempts to informally seek the adverse inference charge against defendants by requesting the same in her opposing papers. That affirmative relief, however, should have been sought in a notice of cross motion to the Court (*see* CPLR 2215; *Free in Christ Pentecostal Church v Julian*, 64 AD3d 1153 [2009]). Therefore, the Court cannot entertain the application at this time.

Accordingly, the motion to dismiss the complaint is denied.

Dated: February 7, 2011

____

J.S.C.