

Brooks v Westfield, LLC
2011 NY Slip Op 31025(U)
April 8, 2011
Supreme Court, Nassau County
Docket Number: 015181/08
Judge: Randy Sue Marber
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.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 18

GAIL H. BROOKS and QUINCY BROOKS, X

Plaintiffs,

Index No.: 015181/08
Motion Sequence...03, 04
Motion Date...02/04/11

-against-

WESTFIELD, LLC and SUNRISE MALL, LLC
and INTERGRATED SAFETY RESOURCES, INC.,

Defendants.

SUNRISE MALL, LLC, X

Third-Party Plaintiff,

-against-

INTERGRATED SAFETY RESOURCES, INC.,

Third-Party Defendant.

X

Papers Submitted:

- Notice of Motion (Mot. Seq. 03).....X
- Notice of Motion (Mot. Seq. 04).....X
- Affirmation in Opposition.....X
- Affirmation in Opposition.....X
- Affirmation in Partial Opposition.....X
- Affirmation in Partial Opposition.....X
- Reply Affirmation.....X
- Reply Affirmation.....X

Upon the foregoing papers, the motion by the Defendant/Third-Party Plaintiff, Sunrise Mall, LLC., sued herein as Westfield Group, LLC. a/k/a Westfield, LLC. (hereinafter referred to as “the Mall”), seeking an order granting summary judgment in the third-party action, awarding defense costs and indemnification in favor of the Mall and granting summary judgment dismissing the Plaintiffs’ action and any and all cross-claims and counterclaims as against the Mall and the motion by the Defendant/Third-Party Defendant, Integrated Safety Resources, Inc. (hereinafter referred to as “ISR”) seeking an order pursuant to CPLR § 3212 granting it summary judgment dismissing the complaint and any and all third-party and/or cross-claims asserted against ISR, are determined as hereinafter provided.

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff, Gail H. Brooks, on June 30, 2007. On said date, at approximately 8:00 p.m., the Plaintiff exited the Mall and was walking through the parking lot in the Mall when she “was approached by a dark colored Sport Utility Vehicle when a person reached his hand out from the driver’s side window of said vehicle and grabbed the plaintiff’s purse off of her right shoulder, causing her to violently fall to the ground . . .” (See ¶ 6 of the Plaintiff’s complaint).

The Defendant, Westfield, LLC. and Sunrise Mall, LLC. owned and operated the parking lot at the Westfield Sunrise Mall. The Defendants, Westfield and ISR entered into a Contractor’s Service Agreement for the performance of services on the property commonly known as Westfield Sunrise. (See Exhibit N attached to ISR’s motion).

The contract became effective on January 2, 2006 and continued in effect until December 31, 2008. It states, in pertinent part, as follows:

“Manager is not a supervisor or foreman with respect to contractor and its labor and employees. Contractor is completely responsible for supervising the activities of its labor, employees, contractors and subcontractors with respect to the subject matter of this contract, including but not limited to the services. During negotiation of this contract, Manager has required evidence of contractor’s qualifications, its training programs and the service offered and is executing this contract based on those representations. Manager expects Contractor to implement those representations as part of the services provided.”

The contract further indicates on page 6, paragraph 18:

“Independent Contractor Relationship. The relationship of Contractor to Manager during the term of this agreement shall be that of an independent contractor. Contractor shall remain and maintain its independent contractor relationship, and Contractor shall at no time be considered an employee or agent of Manager or Owner.”

On October 15, 2009, the Plaintiff, Gail H. Brooks testified, in pertinent part, that she was in the area where cars would drive to park when she was aware of an SUV type vehicle approaching from the rear. She stopped in the parking lot and then realized that an arm extended from the car, grabbed her pocketbook and took off as the driver was grabbing the pocketbook (See Exhibit I, pgs. 13-16, attached to the motion of the Defendant, Mall).

On January 15, 2010, Chris Brivio, the General Manager of Sunrise Mall, testified that he oversaw the contract with ISR to “ensure that it was complied with.” (See Exhibit J, p. 13, attached to the motion of the Defendant, Mall). The Mall had no employees

responsible for security (*Id.* at p. 12).

On June 11, 2010, Linda Fitzgerald, President and General Manager of ISR, testified as follows:

“They had people inside the Mall 24 hours a day, had roving patrol cars and she was not aware of any prior similar incidents at the Mall. (Exhibit K, pgs. 48-56). Furthermore, the local Nassau County Police Department would not advise her company of any activity in the parking lot after the Mall closed and the roving patrols were not needed. (Exhibit K, p. 50).

She had spoken to the Mall about the number of incidents at the property and ISR believed that the number and type of security was sufficient. (Exhibit K, p. 60). ISR never expressed an opinion to the Mall that they were unable to perform their job properly at the Mall based on the current level of security personal. (Exhibit K, p. 69).”

The Mall now moves for summary judgment on the grounds that ISR was an independent contractor and as such no liability attaches thereto since the Mall did not exercise any supervisory control over the alleged dangerous condition.

The Mall further claims that it is entitled to defense costs and indemnification from ISR pursuant to the service agreement. Specifically, paragraph 16 of the contract states that:

“Contractor agrees to indemnify, defend, protect and hold Owner, Manager or any other management company hired by Owner . . . harmless from and against any and all claims . . . causes of action, liability . . . arising from or related to or in connection with, or caused by: (1) the Services to be provided - -, (2) the failure to provide the Services, . . .”

As to the claims asserted by the Plaintiff, the Mall contends that it met its duty

to take minimal precautions to protect parties of the Mall from reasonably foreseeable criminal acts of third parties; and the Plaintiff has not established that it had any notice of prior similar criminal activities which reached a heightened security presence on the premises.

In opposition to the Mall's application, the Plaintiff submits, *inter alia*, that the Mall and ISR failed to adhere to the policies set forth in the contract. The Plaintiff argues that the Mall is clearly liable for the actions of the third party and resulting injuries to the Plaintiff inasmuch as it failed to discover both the criminal acts that were taking place on its property as well as the failure to prevent against the foreseeable harm i.e., future robberies on its premises. In the month leading up to the subject incident, the Mall was the location of two (2) robberies, one on May 9, 2007 and the other on May 31, 2007. (See Plaintiff's Exhibit 2, Nassau County Police Department Case Report). The Mall, however, contends that it was unaware that these robberies took place (see Defendant, Sunrise's Exhibit J, pg. 23).

Based on the foregoing, the Plaintiff maintains that the Mall is directly liable to the Plaintiff because it failed to oversee the contract that it had with the Defendant, ISR, to "ensure that the contract was complied with" (see Defendant, Sunrise's Exhibit J, pg. 21).

ISR moves for summary judgment on the grounds that it did not owe a contractual or common-law duty to protect the injured Plaintiff from physical injury/attack. Additionally, ISR argues that the injured Plaintiff was not a third-party beneficiary of the

agreement to provide security services for the Mall.

In opposition to ISR's motion, the Plaintiff submits that ISR was contracted to perform security service for the Mall at the time of the accident. The subject contract's description of services, the "Security Guard Job and Duties" include the following:

"Provide a secure and safe environment for all Westfield staff, contractors, tenants, customers and visitors to Westfield hopping Center;
Undertake Patrols of the Shopping Center, vehicle parking areas, associated buildings or entertainment complex, to identify and deter security and safety risks;
Use best efforts to reduce the incidence of shop theft and crime within the Shopping Center and associated building and entertainment complex;
Maintain an environment which fosters crime reduction;
Provide advice to Westfield Shopping Center Management when security risks are identified;
Report identified breaches of security to the Westfield Shopping Center Manager and follow the procedures regarding breaches of security."

In response thereto, ISR submits that "a review of the contract between ISR and the Mall Defendants (Exhibit N) is completely devoid of any indication that it was intended to protect the Plaintiffs from physical injury as a result of criminal actions by third parties. ISR argues that the undisputed facts indicate that the ISR security guards are unarmed and, at no time, undertook an obligation to protect the Plaintiff against injuries inflicted by unknown criminal assailants. Specifically, ISR's counsel asserts that the remainder of Plaintiff's arguments as to ISR's duty to the Plaintiff hinges on the misconception that the guards hired by the Mall and employed by ISR were to essentially act

as police and prevent crimes and physical attacks on the premises. The key words in the contract as to ISR's duties are "deter" (not prevent), "reduce the incident of shop theft and crime" (not prevent or eradicate), "foster" crime reduction (not eliminate crimes), and "report."

Generally, landowners have a duty to act in a reasonable manner to prevent harm to those on their property. An owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such persons and is reasonably aware of the need for such control. (*D'Amico v. Christie*, 71 N.Y.2d 76 [1987]). Further, a possessor of real property may be cast in liability for injuries to another person on the property caused by the criminal activity of a third party if the possessor knew or should have known from past experience that there was a likelihood of criminal conduct which would endanger the safety of such person (*Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 519 [1980]). Lacking such notice, there is no duty on the part of the landowner to provide protective measures, as foreseeability of harm is the measure of a landowner's duty of care (see *Basso v. Miller*, 40 N.Y.2d 233, 241 [1976]; see generally *Miller v. State of New York*, 62 N.Y.2d 506 [1984], on remand to 110 N.Y.2d 627 [1985]).

Where liability is based on supervision, care or control of the premises, the proprietor of an inn or similar business is under a duty to protect his guests from injury, annoyance, or mistreatment. The degree of care imposed varies in different courts, but the prevailing view is that reasonable care is required. There must be notice, that is, reasonable

cause to anticipate conduct on the part of third persons which is likely to endanger a patron's safety (*Stevens v. Kirby*, 86 A.D.2d 391, 394 [4th Dept. 1982]).

The Mall has established that it took minimal security precautions to protect members of the public from foreseeable criminal acts of third parties (*Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 548 [1998]) and the attack here was unforeseeable. The Plaintiff has failed to raise a triable issue of fact to defeat the Mall's motion. Hence, the Mall is entitled to summary judgment dismissing the complaint.

In determining whether the Plaintiff is entitled to pursue her negligence case against ISR to trial, we must first determine whether ISR owed a duty of care to the Plaintiff. (*Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138 [2002]).

In *Espinal*, the Court of Appeals observed that its prior decisions "identify three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care – and thus be potentially liable in tort – to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches[s] a force or instrument of harm' (*H. R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 168 [1928]); (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (*see Eaves Brooks Costume Co., Inc. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 226 [1990]); and, (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*see Palka v. Servicemaster Management Services, Corp.*, 83 N.Y.2d 589 [1994]). These principles are firmly rooted in

our case law, and have been generally recognized by other authorities (*see e.g.*, Restatement [Second] of Torts § 324A).”


As noted above, “a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party” (*Espinal v. Melville Snow Contrs., supra* at 138). “Before an injured party may recover as a third-party beneficiary for failure to perform a duty imposed by contract, it must clearly appear from the provisions of the contract that the parties thereto intended to confer a direct benefit on the alleged third-party beneficiary to protect him [or her] from physical injury” (*Bernal v. Pinkerton’s, Inc.*, 52 A.D.2d 760 [1976], *aff’d* 41 N.Y.2d 938 [1977]). ISR’s obligations under the contract were not limited to protecting property. One of ISR’s duties was to provide security to the Mall’s customers and visitors. As such, ISR failed to establish, *prima facie*, as a matter of law, that the Plaintiff was not an intended third-party beneficiary of its contract with the Mall. (*Kotchina v. Luna Park Housing Corp.*, 27 A.D.3d 696 [2d Dept. 2006]; *Flynn v. Niagra Univ.*, 198 A.D.2d 262 [2d Dept.1993]).

In view of the foregoing, the Mall’s motion is **GRANTED** and ISR’s motion is **DENIED**.

All applications not specifically addressed herein are **DENIED**.

This decision constitutes the order of the court.

DATED: Mineola, New York
April 8, 2011



Hon. Randy Sue Marber, J.S.C.

ENTERED
APR 11 2011
NASSAU COUNTY
COUNTY CLERK’S OFFICE