

**Ramnarine v Cozy Soup & Burger, Inc.**

2011 NY Slip Op 32352(U)

August 29, 2011

Sup Ct, NY County

Docket Number: 107913-10

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_

PART 10

Index Number : 107913/2009

RAMNARINE, OMAR

INDEX NO. \_\_\_\_\_

vs

COZY SOUP & BURGER

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. 001

SUMMARY JUDGMENT

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion


MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

SEP 01 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: AUG 29 2011

  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 10**

-----X  
Omar Ramnarine,

Plaintiff (s),

**-against-**

Cozy Soup and Burger, Inc.

Defendant (s).

-----X  
Cozy Soup and Burger, Inc.

3<sup>rd</sup> Party Plaintiff,

**-against-**

Cory Williams,

3<sup>rd</sup> Party Defendant.

-----X

**DECISION/ ORDER**

Index No.: 107913-10

Seq. No.: 001

**PRESENT:**

Hon. Judith J. Gische

Third Party Index No.  
590629-10

**FILED**

**SEP 01 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Def's n/m (3212) w/TJO affirm, DB, DHG affid, exhs . . . . .	1
Pltf opp w/BMB affirm, exhs . . . . .	2
Def's reply w/TOH affirm . . . . .	3
RSS affirm Rule 202.7[f] . . . . .	2

*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This is a negligence action involving claims of negligent security and premises liability. Issue has been joined and plaintiff filed his note of issue. Defendant's motion for summary judgment is timely and will be decided on the merits (CPLR 3212; Brill v. City of New York, 2 N.Y.3d at 652 [2004]).

## Facts and Arguments

On February 16, 2009, plaintiff Omar Ramnarine was a customer of the Cozy Soup and Burger, Inc. diner ("diner") which is located in Greenwich Village on Broadway near Astor Place. The diner is open 24 hours a day, 7 days a week. At approximately 5:00 a.m. that day, plaintiff left the diner and walked onto Broadway. When he exited the diner and was on the sidewalk in front of or near the diner, shots were fired at him. One bullet struck him in the neck, rendering him a quadriplegic. Plaintiff alleges that this occurrence was due to and caused by the defendant's negligence in failing to provide adequate security. He claims there was an altercation which started inside the diner and spilled out onto the street. According to plaintiff, defendant had a duty to intervene on his behalf and, at a minimum, call the police before the incident escalated. He contends defendant's employees, which included a cashier and a security guard, watched the events unfold but did nothing to help him although the incident involved patrons of the diner. Thus, plaintiff opposes defendant's motion for summary judgment on the basis that there are triable issues of fact whether the events which injured him were foreseeable.

Plaintiff, the cashier, defendant's principal, and a New York City police officer were deposed in connection with this action. At his deposition, plaintiff testified that he was at the diner with his friends "Taekwon" (real name, "Ruben Petion") and that while seated inside, Taekwon got into an argument with customers seated other tables. One of those men who was later identified as Cory Williams ("Williams"), is the third party defendant in this action. According to plaintiff, when the argument between Taekwon and the other men escalated, the men at the other tables were told to leave. Taekwon

left shortly afterwards because, according to plaintiff, Taekwon wanted to confront the men. Plaintiff testified at his EBT that he also got up "right away" and went outside to check on his friend. He testified that the last thing he remembers is leaving the diner and then "it's like a blank out." Before the shooting, neither plaintiff nor any one else at his table, complained to anyone in charge at the diner that he (they) felt unsafe or needed help.

In the criminal trial that ensued, Taekwon and Olivo testified as witnesses but plaintiff did not testify. Plaintiff has provided the court with excerpts of the trial testimony hoping to establish his claim that defendant owed him a duty of care which it breached by failing to de-escalate a dangerous situation.

In support of its motion for summary judgment, defendant provides a copy of the surveillance video which was also turned over to plaintiff during discovery. Plaintiff relies on the same video but makes markedly different claims about what it shows. While both sides agree the video shows the inside of the diner and part of the sidewalk directly in front of defendant's diner, plaintiff argues that it shows diner personnel coolly watching the incident from inside. Defendant, on the other hand, emphasizes that there is no evidence of an argument inside the restaurant and nothing unusual that morning.

On the morning of the shooting, a cashier (Julio Pagan), security guard and waiter were inside the diner. Pagan was deposed and testified that he saw a group of men come in and sit down at two tables (tables 7 and 8). They asked for water, "pretended" to examine the menu and then went to use the bathroom. A few minutes later the men who had just come in left without ordering any food. The men at table 19

(where plaintiff had been seated) got up and left as well. Shortly afterwards, Pagan heard shots ("pop pop pop") and he shouted to the other diner patrons that they had to get down. At that point "everybody" called the police. Pagan denied there was any argument among the men at tables 7, 8 and 19 while they were still inside the diner and that when the men left, they left quietly. Pagan testified that there is a "panic" button in the diner linked to the police which can be used to summon help in an emergency.

The owner of the diner, George Stratidis, was also deposed. Stratidis testified that he hired Detective Castellanos, a police officer, as his "head of security." When Castellanos could not come to do security work for him, Castellanos would recommend people he knew. Stratidis did not know if the other people sent to him were police officers or otherwise registered as security guards. "Ira" who was sent by Castellanos, was doing security that day for the diner. Generally, the owner had someone standing by the register from midnight to 6:00 a.m. and only on the weekends. Although patrons would try to leave without paying their check at random times during the day and week, Stratidis had a security person present those hours when he was not personally at the diner so that there was a watchful eye. When asked what a security officer is expected to do in case of an emergency, Stratidis answered "call the police."

Stratidis denied there had been any prior incidents of violence at the restaurant or that any patron had ever been thrown out. He acknowledged that sometimes a patron would not be let into the diner, but would be given food and told to go away. He did not recall a shooting outside the diner in June 2008 or know if it involved a customer. He testified he had the security arrangement in place before then.

Stratidis was present on the day of the shooting and arrived at 5:00 a.m., which

was at or about the time of the incident. As he walked through the diner he did not notice anything unusual and he went upstairs to his office. The diner has surveillance cameras on the premises and the video monitors are in his office. Some time later, when he glanced at the monitors he noticed six men outside the diner, on the street. They were some 20 - 30 feet away, closer towards the liquor store next door. One man had a gun and he was following another man into the middle of the street. When Stratidis saw this, he immediately ran downstairs. By then people in the diner, including the security guard and someone else, had already called 911.

Castellanos was also deposed and asked questions about his arrangement with the diner and how he came to be involved. He testified that he used to go to the diner in high school and liked the place. He also liked how the owner was respectful to cops and he started doing security for defendant when the owner told him about problems he had with patrons skipping out on bills. When Castellanos could not come to work at the diner, he would recommend people who were willing to do security. He did not personally check to see whether these individuals were licensed or bonded. He was also not paid for these referrals which he testified were done as a courtesy.

Defendant has retained the President of Strategic Security Consultants, Inc. ("Greene") as its expert. He opines that although the person who worked at the diner was referred to as "security," all that person did was make sure no one left without paying their bill. The person did not wear a uniform nor was he expected to perform the functions of a guard.

Plaintiff alleges that the diner's use of unlicensed and untrained security personnel is a violation of General Business Law article 7-A and NYC Administrative

Code §§ 27-525.1 (e) & (f) setting for the requirements for security officers and that the violation of this statute and administrative code is a proximate cause of his injuries. He provides the sworn affidavit of Sgt. John Fiordaliso, a retired officer and the President of Gold Shield Security, a security firm, who opines that the defendant should have, but failed to, determine whether the guards used were licensed or properly trained in security.

Fiordaliso also opines that defendant had a practice of serving food and beverages to "highly intoxicated and unruly patrons" when the diner was crowded and that "[h]ad additional security been employed on the night of the shooting they would have been in a better position to detect the earlier confrontations between the patrons and prevent any escalation." Fiordaliso opines further that Pagan and Ira suspected that something was wrong because the men (at tables 7 and 8) only ordered water. He opines further that it was improper protocol to have allowed the feuding men to all walk out of the restaurant at the same time.

Defendant argues that the testimony in the criminal trial is inadmissible hearsay but, even if the court does deem it admissible or decides to consider it in connection with this motion, the testimony is actually helpful to its defense because it shows that the shooting took place on the sidewalk, not inside the diner, there was no altercation inside the diner, no notice of a dangerous situation and no duty to intervene. Defendant denies that there were any prior incidents of violence inside the diner and, even if someone was shot outside, there is no evidence the woman was a patron or that the shooting was anything other than a random act of violence.

## Law Applicable to Motions for Summary Judgment

A movant seeking summary judgment in its favor 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 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

### Discussion

An owner or possessor of land has a common-law duty to maintain the public areas of the property in a reasonably safe condition for those who use it ( Nallan v. Helmsley-Spear, Inc., 50 NY2d 507 [1998]; Basso v. Miller, 40 NY2d 233, 241 [1976]) That duty includes the obligation to maintain minimal security precautions to protect users of the premises against injury caused by the reasonably foreseeable criminal acts of third persons (Nallan v. Helmsley-Spear, Inc., 50 NY2d at 519; Evans v 141 Condominium Corp., 258 AD2d 293 [1<sup>st</sup> Dept 1999]), and controlling the conduct of persons on his or her premises when s/he has the opportunity to do so and the owner is reasonably aware of the need for such control (see Nelson v Neng, 297 AD2d 313 [2<sup>nd</sup> Dept. 2002]). That duty includes taking minimal precautions to protect members of the public from reasonably foreseeable criminal acts of third parties.

The material elements of a negligence claims are: (1) the existence of a duty on

defendant's part as to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof (see Akins v Glens Falls City School Dist., 53 NY2d 325 [1981]).

Although a jury determines whether and to what extent a particular duty was breached, it is for the court first to determine whether any duty exists (Maheshwari v. City of New York, 2 NY3d 288 [2004]; Tagle v. Jakob, 97 N.Y.2d 165 [2001]). The scope of the possessor's duty is defined by past experience and the "likelihood of conduct on the part of third persons ... which is likely to endanger the safety of the visitor" (Maheshwari v. City of New York, 2 NY3d at 294 *internal citations omitted*). The possessor of land has no duty to protect persons against unforeseeable and unexpected assaults, unless there was a foreseeable risk of harm from criminal activities of third persons on the premises (Camacho v. Edelman, 176 A.D.2d 453 [1<sup>st</sup> Dept 1991]). For the reasons that follow, defendant has proved it had no duty to plaintiff, but even if it did, that duty was not breached.

Defendant has established that the shooting did not take place while the men were inside the diner. The gun was drawn by the assailant outside the diner on a public street. It is unrefuted that plaintiff, of his own free will, decided to go outside and see how his friend was doing. He did this knowing his friend and the other men were having some kind of disagreement and although he was not personally involved. At no time while inside the diner did plaintiff approach the cashier, the waiter or anyone else to report that he or anyone at his table felt unsafe or was any kind of trouble.

The man standing the near the cashier (Ira) was not wearing any kind of uniform or badge identifying him as a security guard. Plaintiff has never stated that he was

aware the place had anyone doing security work.

Notwithstanding these undisputed facts, plaintiff contends that the diner, by hiring someone as a security guard who had no training, was not bonded or registered, violated Article 7-A of the General Business Law, known as the Security Guard Act (GBL § 89-g). He claims the violation of this statute and of NYC Admin Code § 27-525.1 (e) and (f) is negligence *per se* and a proximate cause of his injuries. GBL § 89-g applies to security guard companies and it requires that a security guard company only employ persons who are registered and trained to perform the following security functions:

- (1) protection of individuals and/or property from harm, theft or other unlawful activity;
- (2) deterrence, observation, detection and/or reporting of incidents in order to prevent any unlawful or unauthorized activity including but not limited to unlawful or unauthorized intrusion or entry, larceny, vandalism, abuse, arson or trespass on property;
- (3) street patrol service;
- (4) response to, but not installation or service, of a security system alarm installed and/or used to prevent or detect unauthorized intrusion, robbery, burglary, theft, pilferage and other losses and/or to maintain security of a protected premises.

While a defendant's unexcused violation of a statute constitutes negligence *per se*, and violation of a regulation is evidence of negligence, negligence and proximate cause are separate elements of liability (Koziol v. Wright, 26 A.D.3d 793 [4<sup>th</sup> Dept 2006]), meaning the plaintiff has to prove that the negligence was the cause of the event which produced the harm he claims to have sustained (Sheehan v. City of New

York, 40 N.Y.2d 496 [1976]).

Plaintiff's allegation, that Ira was improperly, unregistered or otherwise unqualified to do security work, is pure conjecture. Ira was not deposed and there is no information one way or another about Ira's qualifications or lack thereof. Furthermore, plaintiff's claims that the security guard poorly handled the situation, assumes that the guard was hired to protect customers when the owner has testified he was hired to protect the owner's interests. Defendant has proved the statute does not apply to the facts at bar, but even if they do, defendant has also proved that the security guard's qualifications or lack thereof were not the proximate cause of plaintiff's injuries. None of the men who were deposed, including plaintiff, even realized there was a guard on duty. The guard did not identify himself or conduct himself in a guard like manner. Therefore, plaintiff's argument that the guard should have done "more" to protect him indicates plaintiff was relying on him in the first place.

The mere fact that defendant's owner hired men to stand or sit near the cashier to make sure patrons did not walk out without paying their bill did not impose any special duty on the defendant to protect plaintiff from an assault by someone on the public sidewalk in front of defendant's diner. Defendant has established that the guard was hired to protect the owner's interests, not to protect patrons from an assault (Blanc v. City of New York, 223 A.D.2d 522 [2<sup>nd</sup> Dept 1996]).

It is well established law that the intervening act of a party other than defendant will not break the causal chain where the intervening act was a natural and foreseeable consequence of defendant's negligence (Derdiarian v. Felix Contracting Corp., 51

N.Y.2d 308 [1980]). Only an extraordinary and unanticipated act may serve as a basis for ruling as a matter of law that the chain has been broken (Monell v. City of New York, 84 A.D.2d 717 [1<sup>st</sup> Dept 1981]). An intervening act may not serve as a superseding cause if the risk of the intervening act occurring is the very same risk that renders the defendant negligent (Derdiarian, *supra* at 316).

Here, plaintiff claims that the risk of the argument inside the diner turning violent was foreseeable and that summary judgment should be denied. In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key to summary judgment (Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). Liberally construing the evidence in the light most favorable to plaintiff (Kesselman v. Lever House Restaurant, 29 AD3d 302 [1<sup>st</sup> Dept. 2006]), he has failed to establish the defendant had any duty to him. The shooting took place on a public street, after the plaintiff left the premises and there was no interaction, let alone, confrontation, between plaintiff and any of the men at tables 7 and/or 8 while he was inside the diner, which would leave the issue of foreseeability unresolved for the trier of fact to decide. There is no triable issue of fact as to foreseeability of harm by third parties and, therefore, no duty.

A separate issue is whether the transcripts of the criminal trial, placed before the court by plaintiff, can and should be considered by the court. The testimony is by Taekwon and his friends; plaintiff did not testify. In sum and substance, the witnesses recount the events of that morning, testifying that one of the men had a gun which he fired, striking plaintiff. Plaintiff offers these transcripts to prove that Taekwon went

outside with two younger men that he knew from work and that he did this because the younger men told him they were scared of the men at tables 7 and 8. The younger men had been threatened and they thought the men who threatened them had a gun. Taekwon volunteered to walk them outside and drive them home. According to plaintiff, these events were set in motion at the diner, escalated and brimmed over the moment he reached the door to the diner.

A witness' former testimony is hearsay when used to prove the truth of the matters to which the witness testified but if used in other ways, it is not hearsay (Zimmerman v. Board of Regents of University of State of N. Y., 31 A.D.2d 560, 561 [3<sup>rd</sup> Dept 1968] *internal citations omitted*). The testimony is not by the plaintiff, nor was the diner a party to the criminal action. Therefore, if the transcript of the testimony by the witnesses to the shooting is being offered for the truth of the matter, it is inadmissible (CPLR 4517; Alva v. Hurley, Fox, Selig, Caprari & Kelleher, 162 Misc.2d 402 [Sup Ct N.Y. Co 1994]).

Assuming, however, the transcripts of the criminal trial could be properly considered by this court in deciding this motion (which is what the defendant urges, in the alternative, and in reply), the minutes not only provide a contextual basis for what the surveillance videos show, they severely undercut plaintiff's claims that his shooting was foreseeable and proximately caused by defendant's negligence.

Taekwon testified at the criminal trial that he did not know the "large black man" he saw near the cashier by the door was a security guard. He thought he man (Ira) was just another patron waiting for his order. The surveillance video shows a tall, bulky man

wearing a heavy winter coat standing by the register at the door. There is no visible sign he is a guard, such as badge or uniform. Once or twice the man is seen reaching over to hold the door open for a customer, but he is not otherwise interacting with anyone at the diner, not even the staff. This blunts any argument by plaintiff, that by having an inexperienced, unregistered security guard present, the diner set events in motion which culminated in his being shot. None of the men involved in this incident testified that he knew Ira was a security guard and they did not regard or relate to him in that manner. None of them testified that they expected him to get involved in their dispute. Taekwon testified that once outside, plaintiff started to argue with one of the men and then, at one point, plaintiff put his hand behind his lower back although he did not have a gun. Taekwon was no longer on the sidewalk but across Broadway on the other side of the street. These events support defendant's defense, that it had no duty to plaintiff and the shooting took place in an area outside defendant's control.

Although each side has retained a security expert, neither expert opinion is particularly useful because the opinions rendered by them are not on issues involving professional or scientific knowledge or skill not within range of ordinary training or intelligence (Dufel v. Green, 84 N.Y.2d 795 [1995]). The opinion of plaintiff's expert is particularly unhelpful because he cites facts not in the record, such as defendant had a practice of serving food and beverages to "highly intoxicated and unruly patrons" and that "[h]ad additional security been employed on the night of the shooting they would have been in a better position to detect the earlier confrontations between the patrons and prevent any escalation." His conclusion, that the defendant should not have

allowed feuding men to all walk out of the diner together, is unsupported by the facts. There is no evidence that the men were visibly arguing at all, but even if they were, plaintiff admitted he walked out "after" the others had left and that he went outside the diner of his own volition. No one told plaintiff he had to leave the diner. Finally, the matter opined upon is within the ken of jury. A juror of average intelligence can decide whether additional security at the diner would have made a difference (Selkowitz v. Nassau County, 45 N.Y.2d 97 [1978]).

Other claims by plaintiff, i.e. that defendant had prior notice of criminal conduct at or near the diner because a woman was shot on Broadway near the diner in 2008, fail to raise a triable issues of fact that the criminal conduct at issue was "reasonably predictable," based on the prior occurrence of the same or similar criminal activity at the diner (Ishmail v. ATM Three, LLC, 77 A.D.3d 790 [2<sup>nd</sup> Dept 2010] *internal citations omitted*). Despite discovery having been completed, no one knows exactly where the woman was shot in 2008 or if she was a patron of the diner. No factual issue is raised that the same shooter was involved in both shootings. Thus, in opposition to defendant's motion, plaintiff has failed to come forward with triable issues of fact that there were a significant number of recent crimes at the diner which made the present assault on him foreseeable (see, Williams v. Citibank, 247 A.D.2d 49 [1st Dept. 1998]).

The test for determining whether facts pose a question for the jury to decide is "whether there is valid line of reasoning and whether there are permissible inferences which could possibly lead..." the jury to conclude the defendant was negligent, "if no such valid line of reasoning exists, it is proper for trial court to make legal determination

without resorting to fact-finding function of jury" (Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 517 [1980]).

Although the surveillance video does not show anything out of the ordinary preceding the shooting, such as shouting among the patrons at table 7, 8 and 19, plaintiff nonetheless contends that escalating tensions between the men was foreseeable. Even if there are triable issues of fact whether the dispute among Taekwon, Taekwon's younger friends and the men at tables 7 and 8 was foreseeable, to withstand summary judgment, plaintiff must raise an issue of fact that the attack on plaintiff *himself* was foreseeable (McKinnon v. Bell Security, 268 AD2d 230 [1<sup>st</sup> Dept 2000] *citing* Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 316 [1980]). Plaintiff was not involved in the dispute at the diner and he barely knew Taekwon's younger friends. The men at tables 7 and 8 did not speak to, let alone threaten, plaintiff while he was seated in the diner. It was not until later when plaintiff left the diner that he and the men who had been seated at the other tables confronted on another. Defendant has established that the attack on plaintiff was an extraordinary, unanticipated and unexpected act. Liberally construing the evidence in the light most favorable to plaintiff, there is no triable issue of fact that plaintiff's shooting was foreseeable and, therefore, no reasonable jury could reach that conclusion (see also, Silver v. Sheraton-Smithtown Inn, 121 A.D.2d 711 [2<sup>nd</sup> Dept 1986]).

Since defendant has proved its defenses and there are no material triable issues of fact, defendant's motion for summary judgment is granted and the complaint is dismissed.

**Conclusion**

It is hereby

**ORDERED** that defendant's motion for summary judgment is granted; and it is further

**ORDERED** that the Clerk shall enter judgment in favor of defendant Cozy Soup and Burger, Inc. against plaintiff Omar Ramnarine dismissing the complaint and this action; and it is further

**ORDERED** that the third party action is hereby severed and dismissed since the claims against Cory Williams arise from the main action; and it is further

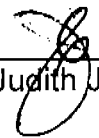
**ORDERED** that any relief requested but not expressly addressed is hereby denied; and it is further

**ORDERED** that this constitutes the decision and order of the court.

Dated: New York, New York  
August 29, 2011

So Ordered:

**FILED**  
**SEP 01 2011**  
NEW YORK  
COUNTY CLERK'S OFFICE

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC