

<b>Ramirez v Genovese</b>
2012 NY Slip Op 33607(U)
May 18, 2012
Sup Ct, Westchester County
Docket Number: 26231/08
Judge: Lester B. Adler
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SUPREME COURT: STATE OF NEW YORK  
COUNTY OF WESTCHESTER

FILED  
AND ENTERED  
ON 5-18 2012  
WESTCHESTER  
COUNTY CLERK

ERNESTO R. RAMIREZ and MARIA LUZ  
RAMIREZ,

Plaintiffs,

-against-

DANIEL GENOVESE, MANHATTANVILLE  
COLLEGE, SECURITAS SECURITY SERVICES  
USA, INCORPORATED and DAMON JARETT,

Defendants.

DECISION & ORDER

**FILED**

Index No.: 26231/08

**MAY 18 2012**

**TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER**

ADLER, J.

The following papers numbered 1 to 33 were read on defendant Manhattanville College's motion for summary judgment, and defendants Securitas Security Services USA, Inc. and Damon Jarett's motion for summary judgment (see CPLR §3212):

PAPERS

NUMBERED

Notice of Motion; Affirmation of Paul L. Neugebauer, Esq.; Exhibits	1-9
Affirmation of Jeffrey I. Klein, Esq.; Exhibit	10-11
Plaintiff's Memorandum of Law in Opposition	12
Notice of Motion	13
Affirmation of Rodrigo Armand, Jr., Esq.; Exhibits	14-28
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Plaintiff Ernesto R. Ramirez and his wife, derivatively, commenced this action, *inter alia*, to recover damages from both Manhattanville College ("Manhattanville") and

Securitas Security Services, USA, Inc. ("Securitas") alleging that the security measures at the campus were inadequate.

### FACTUAL BACKGROUND

On September 24, 2004, defendant Securitas entered into an agreement with defendant Manhattanville to provide on-premises security at its campus location in Purchase, New York (the "Contract"). Section 4 of the Contract contains the "Description of Duties" for the site manager, shift supervisor, desk sergeant, roving patrols security officers, and the main gate security officer.

The description of the "shift supervisor" requires, *inter alia*, that the individual occupying the position "possess good interpersonal skills to be able to resolve issues" with Manhattanville's faculty, staff, students and visitors. The description further states that the shift supervisor must respond to emergency conditions. Although the Contract refers to a standard operating procedures manual for a description of further duties, in the affidavit of Eugene Moscardi, Securitas' project manager, he avers that no such manual exists.

In referring to the roving patrol security officers, the Contract states that these officers are "the visual insight deterrent to crime and violence" and are the "first line of defense in cases of disorder." The only duties and responsibilities described in this section are the additional duties of security officers in opening and closing buildings, but it does refer to other responsibilities of security officers as set forth in the "general orders." As with the standard operating procedures manual, Mr. Moscardi avers in his affidavit that no such general orders exist.

The Contract further provides for the indemnification of Manhattanville by Securitas under certain circumstances. Specifically, Section 5 provides, in pertinent part, that:

“The Contractor indemnifies and holds The College harmless from any and all claims, actions, liabilities, damages, costs and expenses (including settlements, attorneys’ fees and court costs), regardless of the outcome of such claim or action, caused by or resulting from any act or omission of the Contractor, or any person(s) acting on behalf of The Contractor, or its successors or assigns in accordance with the laws of the State of New York.”

On December 2, 2007, at approximately 3:30 a.m., plaintiff Ernesto R. Ramirez allegedly sustained physical injuries when he was assaulted by defendant Daniel Genovese (“Genovese”) and other unknown assailants near Founder’s Hall at the Purchase campus. Defendant Damon Jarrett (“Jarrett”), a security guard and employee of defendant Securitas, was present at the time of the alleged assault.

At his examination before trial, Mr. Ramirez testified that he was transporting four individuals (two males and two females) from a taxi stand located on Mamaroneck Avenue and East Post Road in the City of White Plains, New York to the Purchase campus of Manhattanville. Shortly after the individuals entered his taxi, a dispute arose as to the amount of the fare. He then stopped the taxi and told the individuals to get out if they were not going to pay the quoted fare. One of the passengers, a tall, thin, blond male, agreed to pay the fare and so Mr. Ramirez proceeded to the guard booth seeking to enter the Manhattanville campus. When one of the passengers produced student identification, Mr. Ramirez was permitted entry.

After going through the guard booth, Mr. Ramirez then proceeded to the front entrance of Founder's Hall, at which time three of the four passengers exited the taxi and ran into the building. The remaining passenger stated that he would not pay Mr. Ramirez and that he should leave. When the male passenger attempted to open the driver's side door of the taxi, Mr. Ramirez got out of the vehicle, at which time the male grabbed his neck and insulted him. Another male approached the taxi and offered to pay the fare with a credit card, but the male who had been a passenger said "No, no. Let him go. Let him leave." Mr. Ramirez then got into his taxi and started to drive away from the dorm.

At the end of the circular drive in front of the dorm, a security guard pulled up along side his taxi and signaled with his hand that he wanted Mr. Ramirez to stop. The security guard, who was later identified as defendant Jarrett, then got out of his vehicle and asked Mr. Ramirez to come over to where he was standing in front of the dorm. There were still "many people" in front of the door to the dorm at the time. Jarrett asked Mr. Ramirez what happened, and he told Jarrett that someone did not want to pay him. Jarrett asked him "Who is it?" Mr. Ramirez then identified the male who had been in his taxi, and while he was doing so, he was hit from behind. He could not see who was attacking him, but felt "many hands," and he could hear people yelling at him to get out of there and also yelling insults. Defendant Jarrett was approximately three to four feet from him at the time the attack occurred.

Mr. Ramirez eventually fell to the ground, at which time he felt like he was being kicked and punched by "many people," and then he lost consciousness. According to Mr. Ramirez, defendant Jarrett was just standing there and did nothing to stop the

assault except to say "hey, hey." When he regained consciousness, Mr. Ramirez asked defendant Jarrett why he did not help him, to which defendant Jarrett allegedly responded that Mr. Ramirez should leave. Mr. Ramirez further testified that the entire encounter in front of the dorm in the presence of defendant Jarrett lasted approximately four to five minutes. At the conclusion of the assault, Mr. Ramirez testified that he returned to his taxi, and called the police on his cellular phone.

Defendant Jarrett testified at his examination before trial that on December 2, 2007 he was working the midnight to 8:00 a.m. shift when he received a radio call from his desk sergeant to respond to Founder's Hall on a report of a large group of students and loud noises/loud voices. As he pulled into the circular drive in front of Founder's Hall, he observed a group of students in front of the building and he could hear loud voices arguing. He then got out of his vehicle and approached the group. When questioned about the taxi driver, defendant Jarrett responded that he saw the taxi driver, but he did not see the taxi itself and he did not know where it was. He testified that Mr. Ramirez was out of the taxi at the time he arrived on the scene, and he overheard an argument regarding cab fare. Jarrett testified that some of the students "may have approached him," and were telling him "He paid. He paid."

A fight then broke out between Mr. Ramirez and one of the students who was later identified as defendant Genovese. Jarrett testified that he was on the opposite side of the circular driveway when the fight broke out, and he told the students to "get back." He then radioed his desk sergeant for assistance and then focused his attention on controlling the crowd of students. He testified that the fight broke out within minutes of his arrival at the scene, and that the desk sergeant responded to his call within a

matter of seconds. Jarrett testified that he did not attempt to intervene in the fight between Genovese and Mr. Ramirez, but rather focused his attention on crowd control.

Defendants Manhattanville, Securitas and Jarrett now move for summary judgment dismissing the complaint. Defendant Manhattanville further moves for summary judgment on its cross-claim against defendant Securitas for contractual indemnification.

### LEGAL ANALYSIS

In order to prevail on a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [citations omitted]). Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. New York University Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *St. Luke's-Roosevelt Hosp. v. American Tr. Ins. Co.*, 274 A.D.2d 511, 712 N.Y.S.2d 372). However, once this showing has been made, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he [or she] rests his [or her] claim or must demonstrate an acceptable excuse" for his or her failure to do so (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595, 404 N.E.2d 718; see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324; *Tillem v. Cablevision Sys. Corp.*, 38 A.D.3d 878, 832 N.Y.S.2d 296).

It is well settled that the owner or possessor of property has a general duty to take reasonable measures to maintain his or her property in a safe condition (see *Maheshwari v. City of New York*, 2 N.Y.3d 288, 294, 778 N.Y.S.2d 442, 810 N.E.2d 894; *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 429 N.Y.S.2d 606, 407 N.E.2d 868; *Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564, 352 N.E.2d 868). A “natural corollary” of this common-law duty is the obligation to maintain minimal security precautions to protect users of premises against injury caused by the reasonably foreseeable criminal acts of third parties (*Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d at 519-520; *Donohue v. Seaman’s Furniture Corp.*, 270 A.D.2d 451, 705 N.Y.S.2d 291). However, landowners are not the insurer’s of a visitor’s safety (*Maheshwari v. City of New York*, 2 N.Y.3d at 294; *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d at 519), and a landowner 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, 454, 574 N.Y.S.2d 356).

While it is for the trier of fact to determine whether and to what extent a particular duty was breached, it is for the court in the first instance to determine whether any duty exists (*Maheshwari v. City of New York*, 2 N.Y.3d 288). The scope of the duty to minimize foreseeable danger arising from the criminal acts of third parties is defined according to the likelihood that such behavior will occur (*O’Connor v. Syracuse Univ.*, 66 A.D.3d 1187, 1189, 887 N.Y.S.2d 353). In order to establish foreseeability, “the criminal conduct at issue must be shown to be reasonably predictable based on the

prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location” (*Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 153, 694 N.Y.S.2d 445).

Here, defendant Manhattanville has established that it took minimal security precautions to protect members of the public from foreseeable criminal acts of third parties (see *Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 548, 684 N.Y.S.2d 139, 706 N.E.2d 1163), and that the attack here was unforeseeable. Additionally, the assault on plaintiff was a spontaneous and unexpected criminal act of a third party for which Manhattanville may not be held liable (see *Scalice v. Kullen*, 274 A.D.2d 426, 710 N.Y.S.2d 632, *lv. denied* 95 N.Y.2d 767, 717 N.Y.S.2d 547, 740 N.E.2d 653). To the extent plaintiffs seek to hold Manhattanville vicariously liable for Jarrett’s conduct, Manhattanville has established that it cannot be held liable since Securitas was an independent contractor (see *McCann v. Varrick Group, LLC*, 84 A.D.3d 591, 923 N.Y.S.2d 471, *cf. Urena v. Pace Univ.*, 1 A.D.3d 208, 767 N.Y.S.2d 220).

Liberally construing the evidence in the light most favorable to plaintiffs (see *Pearson v. Dix McBride*, 63 A.D.3d 895, 883 N.Y.S.2d 53, 53; *Dykeman v. Heht*, 52 A.D.3d 767, 769, 861 N.Y.S.2d 732), they have failed to raise an issue of fact as to whether the assault was foreseeable (see *Cameron Plocas v. Best Western Hotel & Convention Ctr.*, 300 A.D.2d 556, 751 N.Y.S.2d 878). Plaintiffs have not submitted any documentary evidence establishing prior reports and/or records of any similar type of criminal activity at the campus, and the fact that Manhattanville was aware that students were not paying for cab fare is insufficient to establish that the assault on Mr. Ramirez

was foreseeable (see *Pascarelli v. LaGuardia Elmhurst Hotel Corp.*, 294 A.D.2d 343, 742 N.Y.S.2d 98; *Durham v. Beaufort*, 300 A.D.2d 435, 752 N.Y.S.2d 88; *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149).

Defendant Manhattanville further moves for summary judgment with respect to its cross-claim against defendant Securitas for contractual indemnification. “The right to contractual indemnification depends on the specific language of the contract” (*George v. Marshalls of MA, Inc.*, 61 A.D.3d 925, 931, 878 N.Y.S.2d 143). A promise to indemnify “should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances” (*Id.*). “[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Rodriguez v. Tribeca 105, LLC*, 93 A.D.3d 655, 657, 939 N.Y.S.2d 546, quoting *Cava Constr. Co., Inc. v. Gealtec Remodeling Corp.*, 58 A.D.3d 660, 662, 871 N.Y.S.2d 654 [internal quotations omitted]). Here, Manhattanville has made a prima facie showing that it is free from negligence (see *Gernandez v. Abalene Oil Co., Inc.*, 91 A.D.3d 906, 938 N.Y.S.2d 119; *Hopes v. New Amsterdam Restoration Group, Inc.*, 83 A.D.3d 784, 921 N.Y.S.2d 143). In opposition, Securitas has failed to raise a triable issue of fact.

Defendants Securitas and Jarett have also moved for summary judgment, arguing that the Contract contains no expression of intent to confer a mutual benefit on members of the general public (see *Duff v. Grenadier Realty Corp.*, 247 A.D.2d 577, 668 N.Y.S.2d 504; *Hering v. New York Yankees*, 166 A.D.2d 253, 560 N.Y.S.2d 455, *lv. denied* 87 N.Y.2d 807, 641 N.Y.S.2d 598, 664 N.E.2d 509; *Bernal v. Pinkerton’s, Inc.*,

52 A.D.2d 760, 382 N.Y.S.2d 769, *affd.* 41 N.Y.2d 938, 394 N.Y.S.2d 638, 363 N.E.2d 362).

Generally, the existence of a contractual obligation, standing alone, does not give rise to tort liability in favor of a third party (*Espinal v. Melville Snow Constrs.*, 98 N.Y.2d 136, 138, 746 N.Y.S.2d 120, 773 N.E.2d 485; *Martinez v. National Amusements, Inc.*, 50 A.D.3d 302, 302, 855 N.Y.S.2d 82). "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" (*Kotchina v. Luna Park Hous. Corp.*, 27 A.D.3d 696, 697, 815 N.Y.S.2d 594, quoting *Bernal v. Pinkerton's*, 52 A.D.2d 760 [internal quotations omitted]). Here, the evidence submitted in support of the motion for summary judgment establishes that there was no express provision in the Contract with Manhattanville that extended the security benefits thereunder to third parties such as plaintiffs (see *Murshed v. New York Hotel Trades Counsel*, 71 A.D.3d 578, 898 N.Y.S.2d 25).

Since plaintiff was neither a party to the Contract nor was an intended third-party beneficiary thereof, the Court must look beyond the Contract to determine whether there is any evidence to support plaintiffs' alternative argument that Securitas owed Mr. Ramirez a common-law duty of care (see *Rahim v. Sottile Sec. Co.*, 32 A.D.3d 77, 817 N.Y.S.2d 33). In *Espinal*, the Court of Appeals identified three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care to third parties which include: "(1) where the contracting party, in failing to

exercise reasonable care in the performance of [its] duties, launch[e]s a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d at 140).

While plaintiff and Jarrett have different versions as to the events of the evening, as stated above, on this motion for summary judgment the Court is required to liberally construe the evidence in the light most favorable to plaintiffs (see *Pearson v. Dix McBride*, 63 A.D.3d 895). At his deposition, Mr. Ramirez testified that on the night of the alleged assault, Jarrett was driving a security vehicle, was wearing a security uniform, and stopped his taxi from leaving the campus. Further, Jarrett asked plaintiff to step out of his taxi and return to the front of the dorm where the incident took place. Jarrett also inquired of plaintiff as to what had previously occurred.

Clearly, the deposition testimony presents a question of fact as to whether Jarrett's action in allegedly having Mr. Ramirez return to Founder's Hall placed him in a more vulnerable position than if Jarrett had taken no action and plaintiff had driven away (see *Mirza v. Metropolitan Life Ins. Co.*, 2 A.D.3d 808, 809, 770 N.Y.S.2d 384; *Bloom v. City of New York*, 123 A.D.2d 594, 507 N.Y.S.2d 13). One who voluntarily assumes a duty to act with reasonable care toward others may be held liable for breach of that duty if the plaintiff relied on that undertaking and the act or failure to act placed the plaintiff in a more vulnerable position than if the obligation had not been assumed (*Heard v. City of New York*, 82 N.Y.2d 66, 72, 603 N.Y.S.2d 414, 623 N.E.2d 541,

*rearg. denied* 82 N.Y.2d 889, 610 N.Y.S.2d 155, 632 N.E.2d 465). Here, there is a triable issue of fact whether the alleged conduct of Jarrett “enhanced the risk [that plaintiff] faced, created a new risk [or] induced [plaintiff] to forego some opportunity to avoid risk” (*Id.* at 73).

Accordingly, it is hereby

ORDERED, that defendant Manhattanville’s motion for summary judgment dismissing the complaint insofar as asserted against it is GRANTED; and it is further

ORDERED, that defendant Manhattanville’s motion for summary judgment on its cross-claim against defendant Securitas is GRANTED; and it is further

ORDERED, that defendants Securitas and Jarrett’s motion for summary judgment dismissing the complaint insofar as asserted against them is DENIED;

ORDERED, that the matter is referred to the Settlement Conference Part for a conference to be held on June 22, 2012 at 9:30 a.m. in Courtroom 1600, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
May 18, 2012

  
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HON. LESTER B. ADLER  
SUPREME COURT JUSTICE

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