

Karim v 89th Jamaica Realty Co., L.P.

2014 NY Slip Op 32070(U)

January 31, 2014

Sup Ct, Queens County

Docket Number: 29293/10

Judge: Janice A. Taylor

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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MOHAMMED A. KARIM,

Plaintiff(s),

Index No.:29293/10

Motion Date:9/4/13

- against -

Motion Cal. No.:80
&81

Motion Seq. No:9&10

89TH JAMAICA REALTY COMPANY, L.P.,
CAMBRIDGE SECURITY SERVICES CORP.,
and MILTON BURNS,

Defendant(s).

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The following papers numbered 1 to 25 read on this (1) motion by 89th Jamaica Realty Company, L.P. (JRC), for renewal of a prior motion for summary judgment and, upon renewal, to dismiss the complaint and all cross-claims against JRC; (2) Order to Show Cause by defendants Cambridge Security Services Corp., and Milton Burke i/s/h/a Milton Burns (collectively referred to herein as "the Cambridge defendants"), to resettle the court's order dated November 9, 2012, whereby the court granted these defendants' motion for summary judgment but did not address that portion of the motion which also sought to dismiss the co-defendants' cross-claims against the Cambridge defendants for common-law and contractual indemnification; and (3) cross-motion by the Cambridge defendants in support of leave to renew by JRC, and upon renewal, for dismissal of the complaint pursuant to CPLR §3212, on the ground that JRC owed no duty of care to plaintiff.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
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Upon the foregoing papers it is **ORDERED** that the motion, Order to Show Cause and the cross-motion are determined as follows:

It is first noted that the Order to Show Cause submitted by defendants Cambridge Security Services Corp. and Milton Burke i/s/h/a Milton Burns was not considered by this court as it was not served on any parties.

Plaintiff in this negligence action seeks damages for personal injuries sustained on January 22, 2009, when he was assaulted inside premises located at 89-09 165th Street, in Jamaica, New York (premises). The premises are owned by JRC, which hired the security company of Cambridge Security Services, Corp., to patrol the premises. Milton Burns is the security guard who was on duty at the time of plaintiff's assault.

Motion to Renew

The motion for leave to renew by JRC is denied.

A motion for leave to renew shall be based upon new facts not offered on the prior motion *that would change the prior determination*, and shall contain reasonable justification for the failure to present such facts on the prior motion (see CPLR 2221[e]; *Williams v Nassau County Med. Ctr.*, 37 AD3d 594 [2007] [Emphasis Added]). Here JRC offered, *inter alia*, the deposition transcript of Mohammed Salahuddin, plaintiff's son and co-worker. Salahuddin testified on March 22, 2013. JRC submits that the transcript was forwarded to plaintiff for signature on April 17, 2013, and was not returned, as the reason the transcript was not available for submission previously. Under CPLR §3116[a], a copy of the transcript may therefore be used as though signed.

In any event, Salahuddin testified on the issue of notice, to wit, that there were no prior similar criminal incidents at the premises. A landlord has a common-law duty to take minimal security precautions to protect tenants and members of the public from the foreseeable criminal acts of third parties (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548 [1998]; *Jacqueline S. v City of New York*, 81 NY2d 288, 292, 293, *rearg denied* 82 NY2d 749 [1993]). While this legal obligation does not require a landlord to become an insurer of a tenant's safety (*Jacqueline S.*, *supra*, at 293), it imposes a minimum level of care on landlords and managing agents who know, or have reason to know, that there is a likelihood that third parties may endanger the safety of those lawfully on the premises (*Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519 [1980]). Moreover, the type of safety measures that building operators and managers are reasonably required to provide is almost always a question of fact for the jury (*id.* at 520, 522).

The evidence in the present record creates issues of fact regarding whether JRC complied with its duty to take reasonable security precautions to protect tenants and members of the public from foreseeable criminal acts of third parties. JRC argues that plaintiff failed to establish a history of violent criminal activity in the store, and that therefore the attack on plaintiff was unforeseeable as a matter of law, eliminating any legal duty on its part to take action to protect against such an attack. However, plaintiffs' inability to submit police reports or other documentation of prior violent crimes in the store does not warrant summary dismissal of plaintiff's claims.

Plaintiff has submitted evidence indicating that JRC was aware of crimes having been committed in the area before January 22, 2009, although such "crimes" amounted to scuffles between high school students and not direct assaults on patrons or shop keepers. While these incidents may not have been violent crimes like that to which plaintiff was subjected, to establish foreseeability plaintiff does not need to establish that the past crimes in the area were of the exact type to which he was subjected (*Jacqueline S. v City of New York, supra*, at 294). Rather, foreseeability rests on whether the prior criminal activity in the area put the defendant on notice that "there [was] a likelihood of conduct on the part of third persons ... which [was] likely to endanger the safety of the visitor" (*id.* at 294, quoting *Nallan v Helmsley-Spear, supra*, at 519). Given the testimony and the other evidence that there were prior incidents in the area, an issue of fact exists regarding the foreseeability of the incident that occurred.

JRC also submits that it retained the firm of Cambridge Security Services Corp., to provide security for the area and that its efforts were, therefore, reasonable under the circumstances. As to the reasonableness of the security measures themselves, factual issues are created by such evidence. The mere fact that JRC arranged for the presence of security guards in the area does not necessarily establish the fulfillment of its duty as a matter of law. Viewing the evidence as a whole, this Court cannot determine, as a matter of law, the question of whether JRC exceeded the required duty of care to tenants and visitors on the premises, as it claimed and, if so, whether plaintiff was placed in a more vulnerable position than he would have been in had defendants taken no such action (*see, Nallan, supra*). Therefore, since the "new" evidence would not change the prior determination, the motion for leave to renew is denied and the motion for summary judgment is denied.

In support of the motion for leave to renew JRC also submitted an affidavit from Laurence Kramer. Since JRC did not demonstrate a

reasonable justification for their failure to include the Kramer affidavit, which was then available to them, in their original motion (see *Development Strategies Co., LLC, Profit Sharing Plan v Astoria Equities, Inc.*, 71 AD3d 628, 629 [2010]), the court will not consider the affidavit.

Order to Show Cause

The Order to Show Cause seeking to resettle this Court's prior order, is denied. In an order dated April 3, 2013, this court denied movant's prior application for failure to submit proof of service as directed in the Order to Show Cause. Again, movant has failed to submit proof of service as directed by the Order to Show Cause. Accordingly, this application is denied.

Cross-motion

The cross-motion by the Cambridge defendants is denied. The Cambridge defendants do not have standing to cross move "in support of leave to renew by JRC" and, relatedly, for dismissal of the complaint, as against JRC.

Dated: January 31, 2014

JANICE A. TAYLOR, J. S. C.