

Ballo v P.J.'s Cocktail Lounge & Rest., Inc.
2016 NY Slip Op 30985(U)
May 26, 2016
Supreme Court, New York County
Docket Number: 152263/2012
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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TARELL BALLO,

Plaintiff,

-against-

Index No. 152263/2012

DECISION/ORDER

P.J.'S COCKTAIL LOUNGE & RESTAURANT, INC.,
AIMCO 2252-2258 ACP, LLC, ELIZABETH P. GOODWIN,
CIRCUMSPECT SECURITY SERVICES, INC., ELITE
PLUS SECURITY LLC, ELITE PLUS MMA, ELITE
PLUS FITNESS LLC, MARK YEHIA d/b/a CIRCUMSPECT
SECURITY and MARK YEHIA d/b/a ELITE PLUS MMA,

Defendants.
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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this
motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affidavits in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Tarell Ballo commenced the instant action to recover damages for personal injuries he allegedly sustained when he was shot in the foot outside of a bar located at 2256 7th Avenue, New York, New York (the “premises”). Defendant AIMCO 2252-2258 ACP, LLC (“AIMCO”) now moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff’s complaint. For the reasons set forth below, AIMCO’s motion is granted.

The relevant facts are as follows. On May 1, 2011, plaintiff visited P.J.’s Cocktail Lounge & Restaurant, Inc. (“P.J.’s”) at around 10:00 p.m. or 10:30 p.m. and had a drink. Approximately an hour and a half later, plaintiff went outside P.J.’s to smoke a cigarette. While

he was standing outside on the sidewalk in front of P.J.'s, he heard men yelling from inside P.J.'s. After extinguishing his cigarette, plaintiff turned to reenter P.J.'s when some men came outside. Plaintiff heard shots fired and began running away from P.J.'s when he was shot in his right foot (the "incident"). According to plaintiff's deposition testimony, he was a "couple of steps" away from P.J.'s when he was shot. Specifically, plaintiff testified as follows:

Q. So you're outside standing on the sidewalk, right? You put out your cigarette. Did you move your arms or legs in any direction?

A. Yes.

Q. What did you do?

A. I just turned towards my left to enter back into P.J.'s.

Q. And you're still on the sidewalk in front of P.J.'s, right?

A. Yes.

Q. And then what happened?

A. I'm by the front. As soon as I turned towards my left, some guys just came out fidgeting in their sweaters, and that's when the shots were fired.

...

Q. Was it one shooter or multiple shooters?

A. I believe it was one shooter.

Q. Can you describe him?

A. No, ma'am.

Q. Did you see him shooting?

A. Yes.

Q. And who was he shooting at?

A. I believe some other guy. I don't...

...

Q. And then what did you do?

A. I was in shock of the shooting. As I was – and then I tried to take off. After that panic and a shock, that lasted about five seconds. I tried to take off. Then I realized as I was running that I was hit.

The police report of the incident states that plaintiff stated that he was standing in front of P.J.'s when he heard shots fired. He ran south on 7th Avenue when he felt a gunshot wound to his right foot and fell down. The shooter was later identified as Jerrar Johnson ("Johnson"), who entered a guilty plea after being indicted and was sentenced to seven years in prison. When he pleaded guilty, Johnson provided a statement wherein he testified that he was in P.J.'s for about 45 minutes when an altercation began between two groups of men. After the other group left P.J.'s, Johnson's group also left. Someone called a man named Saquan, who brought a gun by cab to P.J.'s. Johnson met Saquan outside P.J.'s and was given the gun. While the two groups were huddled outside P.J.'s, a man in the other group walked "off the line." Johnson shot once at the man and walked away.

P.J.'s was located at premises owned by AIMCO. There had been various violent incidents in P.J.'s before the incident at issue, including an assault and a slashing with a broken wine glass. Before the incident at issue, P.J.'s and AIMCO entered into a settlement agreement with the City of New York after the City of New York commenced an action to enjoin P.J.'s from operating as a public nuisance. P.J.'s was closed for one year and, upon reopening, agreed to employ two licensed security guards to protect the premises, to electronically verify patrons' ages, to maintain a video surveillance system to monitor the premises and the surrounding area and to create an employee handbook, among other obligations. P.J.'s and AIMCO were permanently enjoined from violating the New York State Alcoholic Beverage Control ("ABC")

Laws, the New York State Penal Laws and Title 7 of the New York Administrative Code. The stipulation of settlement was effective for two years from its execution on April 3, 2009.

AIMCO's motion for summary judgment dismissing plaintiff's complaint is granted on the ground that it owed no duty to plaintiff. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, 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 rests his claim." *Id.*

"It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff." *Pulka v. Edelman*, 40 N.Y.2d 781, 782 (1976). A duty to control the actions of third parties arises only where there is a relationship between the defendant and the person who causes the harm "such as to require the defendant to attempt to control the other's conduct" or a relationship between the defendant and the plaintiff "which requires the defendant to afford protection from certain dangers." *Id.* at 783 (listing a master-servant relationship as an example of a relationship requiring the defendant to control the third party's conduct).

A landlord has a duty to exercise reasonable care to maintain his property in a safe condition, including by taking "minimal precautions to protect those upon the premises from the criminal acts of third parties." *Todorovich v. Columbia Univ.*, 245 A.D.2d 45, 45-46 (1st Dept

1997). However, a landlord generally has no duty to protect persons outside of the premises from the criminal acts of third parties. See *Pulka*, 40 N.Y.2d at 783 (holding that the defendant garage owed no duty to control the conduct of its patron drivers “for the protection of off-premises pedestrians”); *Muniz v. Flohern, Inc.*, 77 N.Y.2d 869, 870 (holding that the defendants who owned a building owed no duty to the infant plaintiff where a robber inside the building shot the plaintiff, who was outside the building, as there was no relationship between the defendants and the gunman or between the defendants and the plaintiff); *James v. Terrace Tavern, LLC*, 46 Misc.3d 470, 474 (Sup Ct, Orange County 2014) (“Whether plaintiff briefly stepped into the Tavern or not, his own statements establish that he was shot not there, but on the public street. Such admissions effectively take him out of court. Even assuming, arguendo, that the common law imposes some broad, general duty upon a bar owner to control or maintain the behavior of its patrons within its facility...such duty would clearly stop at the barroom door”).

In the present case, AIMCO’s motion for summary judgment dismissing plaintiff’s complaint is granted on the ground that it owed no duty to plaintiff as plaintiff and Johnson were both outside the premises when plaintiff was shot. There was no relationship between AIMCO and Johnson such as to require AIMCO to attempt to control Johnson’s conduct as he shot plaintiff after he exited the premises. Further, there was no relationship between AIMCO and plaintiff such as to require AIMCO to afford protection to plaintiff as he was shot outside the premises.

Plaintiff’s argument that AIMCO’s motion for summary judgment should be denied on the ground that AIMCO affirmatively assumed a duty to provide a reasonably safe premises

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based on the settlement agreement and its lease with P.J.'s, which gave AIMCO a right of reentry to the premises, is without merit. As an initial matter, the settlement agreement required P.J.'s, not AIMCO, to implement certain security measures in the premises. Further, the settlement agreement had expired before the incident. Moreover, the mere fact that AIMCO's lease with P.J.'s gave AIMCO the right to reenter the premises does not show that AIMCO assumed a duty to implement security measures so as to regulate the conduct of or to protect persons outside the premises. *Cf. Flynn v. Niagara Univ.*, 198 A.D.2d 262, 264 (2nd Dept 1993) (holding that security guards assumed a legal duty to act where they "took affirmative actions to halt the snowball fight which eventually led to the plaintiff's injury").

Plaintiff's argument that AIMCO's motion for summary judgment should be denied on the ground that the incident was reasonably foreseeable due to the ongoing violence at the premises is also without merit. "Foreseeability should not be confused with duty." *Pulka*, 40 N.Y.2d at 785. In the absence of a relationship between the defendant and either the person causing the harm or the plaintiff sufficient to require the defendant to act, the foreseeability of an incident is not enough to impose a duty on the defendant. *See id.*

Plaintiff's argument that AIMCO's motion for summary judgment should be denied on the ground that the statement of Johnson wherein he claims that he never brought a gun inside P.J.'s, and thus that the entire incident occurred outside the premises, is inadmissible hearsay is also without merit. Even if Johnson's statement is inadmissible hearsay, plaintiff testified in his deposition that "some guys just came out fidgeting in their sweaters, and that's when the shots were fired." Thus, according to plaintiff's testimony, the incident occurred outside the premises. Moreover, plaintiff has failed to cite any case law indicating that, even if Johnson had

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brought the gun inside P.J.'s before leaving and shooting plaintiff, AIMCO would have had a duty to regulate the conduct of Johnson, as by confiscating his gun or calling the police, or to protect plaintiff, who was outside the premises.

Finally, plaintiff's argument that it is irrelevant that the incident occurred outside the entrance to P.J.'s rather than inside P.J.'s is without merit. As discussed above and contrary to plaintiff's contention, whether the incident occurred inside or outside the premises is relevant to the determination of whether AIMCO owed a duty to plaintiff.

Accordingly, AIMCO's motion for summary judgment dismissing plaintiff's complaint as against it is granted. This constitutes the decision and order of the court.

Dated: 5/26/16

Enter: _____


J.S.C.

CYNTHIA S. KERN
J.S.C.