

CB v Howard Sec.

2016 NY Slip Op 32813(U)

November 21, 2016

Supreme Court, Bronx County

Docket Number: 350345/2010

Judge: Julia I. Rodriguez

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

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CB by his Mother and Natural Guardian Lateaqua Suarez
and Lateaqua Suarez, individually,

Index No. 350345/2010

Plaintiffs,

DECISION and ORDER

-against-

Howard Security, Sammon-Build Center Housing
Development Fund Corporation, and Tolentine
Zeiser Community Life Center,

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in review of plaintiff's motion for summary judgment and the respective summary judgment motions of defendants Howard Security and Sammon-Build Center and Tolentine Zieser ("Sammon").

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In the instant action plaintiffs seek to recover damages for injuries sustained by the infant plaintiff as a result of being shot during an altercation between his father ("Balthazar") and another individual ("Acosta") in front of a Tier II shelter, where the infant plaintiff resided with his mother. The shelter is owned by defendants Sammon-Build Center Housing Development Fund Corporation and Tolentine Zeiser Community Life Center ("Sammon"). Defendant Howard Security provided security services to the shelter under a contract with Sammon. Men are not allowed inside the premises but are permitted to pick up and drop off their children at the security booth at the

entrance of the premises. The entrance is secured by a metal gate which is kept closed and locked at all times. In order for a resident to enter or leave the premises, a security guard must push a button from inside the security booth which controls the gate. The security booth has a door which locks and bulletproof glass windows, one of which opens to allow residents to sign in and out when they enter and exit the building. Children aged approximately ten and under must be escorted in and out of the premises by their mothers. When such children return to the shelter, a security guard buzzes the mother's unit to inform her that her child has arrived at the premises and that she must come to the security booth to escort the child inside the building. Older children may go inside the premises by themselves after the mother is called on the intercom. In the instant case, the four-year-old plaintiff, a boy, was being returned to the shelter by his father after a visit with his grandmother. The two had been walking on the sidewalk near the shelter and, at some point, Acosta began to follow them. At some point after plaintiff and his father arrived at the entrance to the shelter, while the gate was in a closed and locked position, Acosta approached Balthazar displaying a gun and asked Balthazar to give him the jacket that Balthazar was wearing. Instead of giving Acosta his jacket, and with his son by his side, Balthazar engaged Acosta physically in an attempt to grab the gun away from him. During this altercation, plaintiff was shot in the chest and seriously injured. While the parties dispute the amount of time that had transpired over the course of these events, they do not dispute that, prior to plaintiff being shot, one of the security guards buzzed plaintiff's mother twice in her unit. The first time she was buzzed, a security guard told her that her son had arrived and that she needed to come and get him. She responded that she was taking care of a crying baby and said that she would be down soon. The same security guard buzzed her again a few minutes later as she had not yet appeared at the security booth and, once again, told her to come pick up her son. She was not informed that her son may have been in any danger. Her unit was on the third floor of the building and windows to her unit faced the entrance to the building. While she was walking down the stairs to meet her son, she heard gunshots and ran outside into the courtyard towards the gate. She screamed and saw her son, bleeding profusely, lying on the sidewalk outside the closed gate. She yelled for a security guard to open the gate and, when her request was ignored, she opened the door to the security booth, reached in, pushed the button and opened the gate. She ran to her son who was taken by ambulance to a nearby hospital.

Plaintiff was treated as an inpatient at various hospitals over the next six months and is currently paralyzed from the belly button down.

Defendant Sammon now seeks summary judgment, dismissing the complaint and Howard Security's cross-claim, on the grounds that: (1) it did not owe the child outside the gate a duty, (2) Sammon provided excellent security and the attack was not foreseeable, (3) there is no causal connection between the alleged failure to provide security and the incident, and (4) the conduct of Acosta and Balthazar constituted a superseding, intervening cause of injury to the child.

Defendant Howard Security now seeks summary judgment, dismissing the complaint and co-defendant Sammon's cross-claim, on the grounds that: (1) the security guards did not breach their contractual duty to Sammon, (2) the infant plaintiff was not a third-party beneficiary to its contract with Sammon, (3) it had no common-law duty to the infant plaintiff, and (4) even if it did owe a duty to the infant plaintiff, Howard Security is not liable for the unforeseeable acts by third persons. Howard Security also seeks an Order, pursuant to CPLR 3126, precluding plaintiff from supporting his claims or producing in evidence the affidavit of Esumail Konneh because, as an employee of Howard Security, he is a party and all party statements were requested in discovery, and his affidavit was not disclosed prior to the filing of the instant summary judgment motion notwithstanding that it is dated six months prior to his deposition. Howard Security also contends that the court should not consider the affidavit of Balthazar because he failed to appear for a non-party deposition on February 23, 2015.

Plaintiff now seeks summary judgment, as to liability, on the grounds that: (1) Sammon had a duty to provide at least minimal protection to shelter residents, (2) the security guards' repeated refusal to open the gate for the infant plaintiff and to advise his mother of the danger to her son fell below the standard of care required under the circumstances, (3) the negligence of the security guards was a proximate cause of the shooting of the infant plaintiff, (4) the failure to station one of the security guards in the room with the security monitors or place a monitor in the security booth constitutes negligence and was a legal cause of the infant plaintiff's injuries, (5) the infant plaintiff was an intended third-party beneficiary of the contract between Sammon and Howard Security because the contract by its terms requires Howard Security to protect persons and not just property, (6) Howard Security's employees' refusal to unlock the gate for the infant plaintiff, their failure to

advise plaintiff's mother of the danger to her son, their failure to call the police, and their failure to advise Acosta that he was being videoed and that the police were on their way created or exacerbated the dangerous condition confronting the infant plaintiff. Plaintiff also seeks relief, generally, under CPLR 3126, based upon the alleged unavailability of the security camera video which captured at least some of the incident and the security logbook for the night in question.

In support of their respective motions, all parties submitted, *inter alia*, : (1) the deposition testimony of Lateaqua Suarez, Crystal Standish, Esumail Konneh, Mauricio Acosta, Cheryl Howard-Tyler, (2) the affidavits of Esumail Konneh and Bobby Balthazar, (3) the contract between Sammon and Howard Security and (4) Howard Security Incident Reports. In addition, Howard Security and Sammon submitted Sammon's Security Post Orders; Plaintiff and Sammon submitted photos of the subject premises; Plaintiff submitted the affidavit of Francis Dolor of DHS; Sammon submitted, *inter alia*, the affidavits of Crystal Standish and Paul O'Connell, Ph.D.

In opposition to Sammon and/or Howard Security's motions, plaintiff submitted, *inter alia*, the affidavit of Donald Decker, Sammon's Security Post Orders, a deed for the subject premises, insurance documentation and certain tax filings.¹

In pertinent part, at her deposition, Lateaqua Suarez, the infant plaintiff's mother, testified as follows: On November 8, 2011 at about 9:30 p.m., she received a call on the intercom from a security guard letting her know that Balthazar and her son were downstairs. She told the security guard that she will be down "in a few" as she was taking care of the baby. After the first time that she was buzzed on the intercom, she looked out of the window and saw Balthazar and her son in front of the gate. She was buzzed again about five minutes later and she told the guard that she was taking care of a crying baby. Up until the shooting, she had no other conversations with the security guard. From the first time that she was buzzed until she went outside was ten to twelve minutes. When she got outside she saw Balthazar fighting and her son against the gate. As she was making her way to the gate, the gun went off and she saw her son fall to the ground.

¹In opposition to plaintiff's motion, Sammon and Howard Security submitted essentially the same evidence as they submitted in support of their respective motions.

At his deposition, Esumail Konneh testified, *inter alia*, as follows: He and Fofie were inside the security booth working as security guards at the time of the subject incident. He did not see anything because he was on the phone with another resident of the shelter but he heard Balthazar ask Fofie to ring the bell for the infant plaintiff's mother to come down and get their son. After he heard a gunshot, Konneh ran out of the security booth to the infant plaintiff. After the shooting, he called Standish and told her what had happened. Standish came to the site that night. Fofie used his cell phone to call 911 after the shooting. He wrote what happened in an incident report which he signed. At the time of the incident, it was a set practice and procedure that when anyone brought a child back to his/her mother who resided inside the shelter, the child was buzzed inside the gate to wait for the mother. The person who brought the child to the shelter would wait outside the gate for the mother to arrive to pick up the child.

The incident report prepared and signed by Konneh states, in pertinent part:

At approximately 10:19 p.m. on November 8, 2011, Balthazar asked to "ring his son mother bell to come down stair and get child" [sic]. Officer Fofie "rang the bell twice and the mother scream at him, while the father was stay waiting on her in front the gate [sic]. Less then [sic] half or an hours I heard shooting sound and I rang out of the booth [sic]. We went outside of the gate. The kid was on ground shout [sic]." Officer Fofie "immediately called for ambulance, while I . . . rung [sic] outside to help the kid."

In his affidavit, Konneh states, *inter alia*, as follows: On the date of the incident, he was employed by Howard Security as a security guard at the shelter. His job was to "sit in the booth, watch the entrance and check people who came in and out of the building and have them sign in." They were "also required to protect the residents, particularly the children because this is a woman's shelter with a lot of kids living there." Their "major responsibility was to control who came in and who came out of the premises because [they] controlled the gate which was locked in front of the building." When children are brought back to the facility after a visit "we generally let the children inside the gate after calling their moms to come down stairs to get them." On the evening that the infant plaintiff was shot, he was "on the phone taking information from another client." Joshua Fofie was in the booth and "he was the one responsible to open the gate and call the

mother on the intercom.” He was on the phone during the entire incident. Fofie “saw the problem that the boy’s father was having.” He did not know why Fofie did not let the boy in before the shooting. The boy was still on the other side of the gate when he was shot. He “would have let him in, because we generally do that but in that situation [he] would definitely have let the boy in because [he] was there to protect life and property.”

The incident report prepared and signed by Joshua Fofie states, in pertinent part:

Bobby Kenneth Balthazar came to drop [his son] to his mother Lateaqua Suarez and as they were waiting for Lateaqua, a guy came to Bobby and they were exchanging words and after that the guy started shooting and the kid . . . end[ed] up getting shot. I duck at that point. Ms. Standish was called. I called 911 and Esumail my partner went out there and try to help but the mother runned [sic] off with the kid.

In his affidavit², Bobby Balthazar states, *inter alia*, the following: On the evening of November 8, 2011, he was taking his son, who was then four years-old, home to his mother, Lateaqua Suarez, to the shelter where they were living at the time. As he and his son walked along Evelyn Place he saw that “we were being followed by three or four guys.” He “could also see that these guys had followed us all the way back to the entrance to the [s]helter.” The entrance to the shelter was enclosed by a large metal gate. There was also a manned security booth located at the entrance to the shelter. “We had walked along Evelyn Place towards Grand Avenue [the street where the shelter was located], and made a right turn onto Grand Avenue to get to the entrance to the [s]helter.” When he and his son reached the entrance to the shelter, he “right away went to the security booth and told the guards that [he] was concerned that [they] were being followed. Fearing trouble, [he] asked them to open the gate and let [his son] go inside.” The guards didn’t open the gate, but “the older of the two guards called Ms. Suarez.” Approximately 4 or 5 minutes later, one of the four men came up to him while he and his son were waiting in front of the security booth. He

²Sammon attempted to serve a judicial subpoena with notice to take deposition of non-party witness upon Balthazar at 340 Alexandra Avenue, Bronx, NY 10454 but the process server was not permitted to enter the apartment complex and the supervisor in the management office refused to accept service on Balthazar’s behalf. On February 11, 2015, the documents were mailed to Bobby Balthazar c/o Latisha Alvarez at 340 Alexandra Avenue, Bronx, NY 10454. Balthazar has not appeared for a deposition.

later learned that this man was Acosta. In an “aggressive manner, [Acosta] tried to get [him] into a conversation asking [him] about [his] jacket, asking [him] if [he] was from the neighborhood, and saying that he had never seen [him] around there before.” He chose to ignore him and did not respond. Acosta then walked back over to the corner of Grand and Evelyn, and Balthazar could see that one or two of the other guys was standing across the street. He “could tell that this was a dangerous situation, and again asked the guards to let [his son] inside the gate, and call Ms. Suarez again.” He told the guys that he was “about to have a real problem here because of the threatening way these guys were acting and that they had followed [them].” One of the guards called Ms. Suarez a second time, but “they still wouldn’t open the gate for [his son] and let him in where he could be safe.” Approximately “five minutes or so, after the second call to Ms. Suarez by the guard, [he] saw Acosta, who was on the corner, put out his hood up over his head and start to walk towards [them].” He then put his son against the gate behind him and put himself between his son and Acosta. Acosta “came over to [them] and got up very close on [him], telling [him] that he wants [his] jacket.” At first he was speaking in a “low intimidating voice, then he started getting louder and more threatening.” He told Acosta that the jacket was his and that Acosta “should just leave [them] alone.” At that point, Acosta pulled out a gun and put the gun “right up against” his chest. Feeling this was a life and death situation, he “grabbed the gun” to try to protect them. He and Acosta “fought for control of the gun and during the course of the struggle the gun went off and [his son] was struck by the bullet.”

At her deposition, Lateaqua Suarez testified, *inter alia*, as follows: On each of the more than twenty times that Balthazar brought their son back to the shelter after a visit, the child was inside the gate when she arrived to get him. On more than three occasions, Balthazar was inside the gate with their son waiting for her to come outside to get him. At about 9:30 p.m on the night of the incident, she received a call from a security guard who told her that her “son is here.” He said nothing else. She looked out the window for a “second” and saw Balthazar and her son standing outside of the gate. She responded that she would “be down in a few [she’s] taking care of the baby.” The same security guard buzzed her again “at least five minutes later” and he again said that her “son is here.” He said nothing else. In response, she said “give me a few, I’m taking care of the baby. The baby was crying.” She then made the baby a bottle and gave it to him. She first became

aware that something had happened when she got outside. Ten to twelve minutes had passed from the time she received the first intercom call to when she went outside of the building. When she got outside to the top stair of the staircase leading down to the security booth she saw Balthazar “fighting a guy and [her son] against the gate.” Her son was standing and holding the gate because he was scared. While she was on the stairs, she heard a gunshot. At that time, she saw the older security guard run inside the daycare center in the building and the other “dropped down in the booth.” She saw her son fall to the ground as she ran to the booth and said “buzz the gate, buzz the gate” to the younger security guard in the booth. Because he did not “press the buzzer” to open the gate, she “had to stick [her] hand in and press it [herself].” She went to her son and saw that he was “bleeding from his face” and “still looking at her.” She then screamed for someone to call an ambulance.

At his deposition, Mauricio Acosta testified, in pertinent part, as follows: He pled guilty and was sentenced to 15 years for shooting the child. He is responsible for the child’s injuries. He first saw Balthazar walking along Evelyn Place halfway down the block from Davidson towards Grand. He saw a boy and a woman walking with Balthazar. Before he approached Balthazar, he saw the gate open, the woman walk inside and the gate close. Before the shot went off, Balthazar “tried to get the kid inside the gate. But, the security guard didn’t hear or nothing, he stood there, he didn’t open the gate.” His only intention was to get the jacket that Balthazar was wearing. He did not intend to shoot anyone. As soon as the shot went off, he ran. The gun slid under the gate. The shooting of the child was an accident and only happened because Balthazar “start[ed] running for the gun.” Had there been no gate and Balthazar started to walk inside he would not have followed him because “there is cameras around there.”

At her deposition, Crystal Standish testified, *inter alia*, as follows: She was employed as the Shelter Director for Sammon on the date of the shooting incident. The shelter is comprised of units/apartments for mothers and their children and women in their third trimester of pregnancy. Sammon had a security plan which consisted of “Post Orders” Standish drafted to serve as rules to be followed by the Howard Security guards. The security guards were given copies of the “Post Orders,” which she reviewed with them. She interacted with the security guards “all the time” regarding such things as client complaints, violation of rules, signing in and out, monitoring the

children, curfew violations and emergencies. There were six security cameras at the shelter on the night of the shooting - one facing the front street-level courtyard, one facing the upper front courtyard, two on the roof, one facing the corner of Evelyn Place which depicts the corner of the building to the end of the block, and one facing the backyard. She interviewed all the security guards and provided instructions to them as to how to perform their job. The guards were instructed not to get “physically involved” if they observed residents fighting but to call the police if they did not stop fighting when told by the guard to stop. If a guard saw a weapon the guards “call the police.” She was called by Konneh on the night of the shooting who told her that “there was gunplay out here and the baby was hit.” She prepared an incident report about the shooting based upon information provided to her by at least one of the security guards on duty that night. During her initial meeting with security guards she told them that they should make a “judgment call” as to what to do to secure child residents of the building who may be presented with any kind of danger outside of the premises. The police downloaded copies of the video surveillance which depicted the shooting incident. She had two copies of the video surveillance. She does not have a copy of the video.³ She sent one copy to DHS and she doesn’t know where she sent the other copy. After 30 days, the security camera footage “in the machine” starts recording over itself. She viewed the video on two separate occasions. In the video, she saw “the father coming down the street with the little boy, down the side of the building.” She then saw “three men, one, two, three, four men coming in the same direction behind him.” One of the men, the “point man,” went across the street. The other two “hung back and then the fourth one was walking behind him..” The “father and the little boy turned the corner, which would put them right at the security gate.” The fourth man “stopped long enough to put his hood on and then he put his hands in his pockets and he went around the corner.” He “comes up to [Balthazar],” they “exchange words” and “[t]he shot rings out.” In the video from the camera on the upper level courtyard, she saw “the boy fall.” Sammon’s

³In an affidavit dated July 21, 2015, Crystal Standish, states, *inter alia*, as follows: “[W]e did a capture of the video by downloading it onto a disc. We sent the original captured video that was on the disc to DHS. The night of the incident the police came and took their own capture of the video. When the surveillance camera comes to the end of the tape it rewinds and then erases itself. My office is not in possession of the tape recording of the incident, the original downloaded copy or any other surveillance of the incident in question.”

copy of the surveillance footage/video she viewed was sent to DHS.⁴ About five minutes had passed from when she “first saw the men to when the fourth gentleman put the hoodie over his head and turned the corner.” She prepared Security Post Orders for Howard Security to follow.

In her affidavit dated April 27, 2016, Standish states, *inter alia*, as follows: She was the Director of the shelter on the night of the incident. In the video she viewed, Acosta did not approach Balthazar, leave him at the gate, and return later on. Acosta only followed Balthazar and his son to the gate once. The incident was “quick.” Even though there is a video monitor in the security booth, it is not possible for the guard to watch it at all times as “the guard in the booth has to sign people in and out, which includes recording names and dates and initializing the entry.” The guard in the booth may also be handling telephone calls from residents. Even if the guard had watched the video, “he would likely not have seen anything until the incident occurred.” She developed the Post-Orders for the shelter. They were security guidelines which she wanted the guards to follow. She does not believe that these guidelines were violated. The guards were not allowed to “accept a four year old child” after curfew without the mother being present.

Of note, the Security Post Orders include the following:

There ARE TWO (2) FIXED STATIONS OF SECURITY [the guard booth and indoors on the social service side of the building.]
PERSONNEL SHOULD TRADE PLACES EVERY HOUR.

...

*****IMPORTANT: USE OF SURVEILLANCE MIRROR AND
MONITOR SCANNING EVELYN PLACE, REAR OF
BUILDING AND ROOF MUST BE FREQUENT.**

...

⁴In her affidavit, Francis Dolor, an attorney employed by DHS, states: “Despite my diligent efforts, DHS is unable to obtain a copy of a video taken on the evening of November 8, 2011 in front of 2284 Grand Avenue, Bronx, NY and involving [the infant plaintiff].”

ROUNDS: ROUNDS ARE CONDUCTED AT 1 HOUR INTERVALS.

TYPE:

Vertical Rounds . . .

Perimeter Rounds: The perimeter of the site is defined as follows:

- The front of the facility on Grand Avenue from Evelyn Place to the beginning of the next building in the direction of 184th Street.
- From the Corner of Evelyn Place to the end of the facility gate in the direction of Jerome Avenue.

. . .

***FIGHTING: PLEASE BE ADVISED THAT IF YOU WITNESS A FIGHT AND SEE A CHILD IN CLOSE PROXIMITY TO THE FIGHT, YOU MAY MAKE A JUDGEMENT CALL AND ATTEMPT TO MOVE THE CHILD OUT OF HARMS [sic] WAY.**

At her deposition, Cheryl Howard-Tyler testified, *inter alia*, as follows: She formed Howard Security, an unarmed security guard corporation, in 2003. The security guards at Sammon were required to monitor the security cameras. One guard would “normally be up front” in the security booth and the other guard would be “in the back” inside the building watching the cameras, moving around.” The security guard at the security booth was required to enter into a logbook the date and time that anyone entered or exited the premises. Under Howard Security’s contract, Sammon maintained possession of the logbook. She first became aware of the instant lawsuit when she “received some paperwork.” At that time, she was aware of the incident and “knew whatever documentation [Howard was] required to have, incident reports, logbook entries and the logbook at Sammon-Build” were already with Ms. Standish at Sammon. Once security guards were hired, they were provided with an orientation book, the policies and procedures of Howard Security and “site specifics” for a specific location. Crystal Standish interviewed all prospective guards for the shelter. Under normal circumstances, in order for a child such as the infant plaintiff to be permitted to enter the premises upon appearing at the gate with his father, the child’s mother would have to “come downstairs and receive the child.” Based upon her knowledge of the shooting incident, the guards followed proper

procedure and could not have done anything else under the circumstances. The guards had no obligation or responsibility to go outside the gate and protect either Balthazar or his son nor to open the gate to let Balthazar's son inside the premises. With regard to criminal activity outside of premises where Howard Security guards work, "most of the sidewalks you will see three squares, long as you are not in that first square we can't say anything to you. Cause technically, we can't that's not the property we are securing" [sic].

The contract between Howard Security and Sammon states, in pertinent part, the following:

WHEREAS, Owner is . . . desirous of obtaining the services of the Contractor for the protection of persons and real and personal property at the aforesaid Premises [2294-96 Grand Avenue, Bronx, NY 10468].

1. Contractor shall be responsible for providing unarmed uniformed security guard services to Owner at the premises in accordance with the schedule of hours and tours of duty as set forth in Schedule "B" annexed hereto and made a part hereof.

7. Contractor shall provide unarmed uniformed guards to perform the services set forth in this paragraph and Schedule "A" hereto, as Owner shall require, and such guards shall be employees of Contractor. Contractor is an independent contractor and, as such, the hiring, training, equipping, supervising, directing and discharging of all guards shall be the sole and exclusive responsibility of Contractor.

12. Contractor does hereby agree to hold the Owner . . . harmless from and against any liability with respect to any loss, claim or damage which Owner may incur in connection with or on account of the negligent acts or omissions of Contractor or Contractor's officers, agents, servants, and/or employees in the performance of or in connection with the services covered by the Agreement or by reason of the failure of Contractor to carry out any of the material terms of this Agreement.

16. Contractor shall fully educate and inform its personnel as to the rules and regulations of Owner before assigning any personnel to Owner.

19. This agreement shall inure to the benefit of and shall be binding upon the parties hereto, their successors and assignees.

The affidavits of Donald Decker and Paul O’Connell were offered as expert evidence concerning the adequacy of both the security measures in place and the implementation of those security measures on the night of the instant incident. To the extent that both affidavits are based upon disputed facts and are largely conclusory, the Court finds that the affidavits lack probative value.

* * * * *

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court; the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted, and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *See Aasaf v. Ropog Cab Corp.*, 153 A.D.2d 520, 544 N.Y.S.2d 834 (1st Dept. 1989). Summary judgment will be granted only if there are no material, triable issues of fact. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957).

At the outset and contrary to defendants’ contentions, the Court finds that the infant plaintiff was a third-party beneficiary of the contract between Howard Security and Sammon. Notably, the contract states that Sammon is “desirous of obtaining the services of the Contractor for the protection of persons and real and personal property.” Unlike the cases cited by defendants, the instant contract includes no language expressly disavowing any benefits, rights, duties or obligations to third-parties. The testimony of both Standish and Howard-Tyler is consistent with this conclusion. Also, the Security Post Orders drafted by Standish expressly indicate that children, in particular, are to be protected from danger whenever possible. It is illogical to conclude that a resident of the shelter was not intended to benefit from the services of security guards who were hired to protect “persons and real and personal property at the shelter.”

In addition, the Court will consider the affidavits of Balthazar and Konneh. With respect to Balthazar, it is unclear whether Balthazar was served with the judicial subpoena and notice to take his deposition. The Court disagrees with the contention that the allegations in his affidavit

are nothing more than “feigned” facts. Notably, since Balthazar has not been deposed, his factual allegations are not inconsistent with his deposition testimony. With respect to Konneh, the factual allegations in his affidavit are not inconsistent with his deposition testimony or his incident report. As plaintiff notes, Konneh was not an employee of Howard Security on the date of his affidavit and he is not a named party in this action. Finally, the court finds that defendants are not prejudiced by not having Konneh’s affidavit prior to his deposition.

The owner and/or possessor of land is under a common-law duty to maintain his or her property in a reasonably safe condition. *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868 (1976). This duty includes the obligation to take minimal precautions to protect tenants and guests from the reasonably foreseeable criminal acts of third persons. *Miller v. State of New York*, 62 N.Y.2d 506, 467 N.E.2d 493 (1983). The fact that the instrumentality which produces injury is the criminal conduct of a third person does not preclude a finding that the possessor’s conduct is the proximate cause of the injury if the intervening agency is a foreseeable hazard. *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 520-521, 407 N.E.2d 451 (1980). One who assumes a duty to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if his conduct in undertaking the services somehow placed the injured party in a more vulnerable position than he would have been in had the actor done nothing. *Id.* at 521-522.

Here, based upon the deposition testimony of Standish and Howard-Tyler, and the contract between Howard Security and Sammon and the Post Orders, a triable issue of fact exists as to whether either defendant owed a duty to the infant plaintiff under the circumstances of this case. Also, the varying accounts of eyewitnesses Suarez, Balthazar, Konneh and Acosta of the facts surrounding the incident, including its duration, raise triable issues of fact, at a minimum, as to whether adequate security was provided, whether the shooting of the infant plaintiff was foreseeable, whether the security guards perceived a dangerous situation within a sufficient amount of time to prevent the shooting, whether the failure to open the gate to allow the infant plaintiff to enter the premises fell below the standard of care required under the circumstances, whether either or both security guards were negligent in failing to adequately monitor the security cameras, and whether any of the above was a proximate cause of the infant plaintiff’s injuries.

Based upon the foregoing, plaintiff's motion for summary judgment as to liability is denied; Sammon's motion for summary judgment dismissing the complaint and cross-claim is denied⁵. Howard Security's motion for summary judgment dismissing the complaint and Sammon's cross-claim is denied.

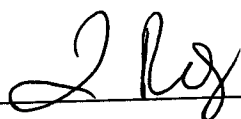
Plaintiffs contend that they are entitled to a "charge" of spoliation of evidence as to the videos of the incident and the security logbook because they are allegedly missing. However, in a letter dated November 12, 2013, referencing the instant lawsuit and addressed to defendants' respective attorneys, plaintiff's counsel stated:

Enclosed herewith you will find copies of three (3) CD's which contains the surveillance video footage for the incident of 11/8/11 with regards to the above mentioned matter.

Also, in a Preliminary Conference Order dated September 13, 2013, the parties stipulated that the video surveillance was in the possession of the "criminal defense attorney in the related criminal matter." As such, sanctions against either defendant for spoliation of evidence as to the video are inappropriate. If necessary, a determination concerning the security logbook will be made at trial.

Dated: Bronx, New York

November 21, 2016



Hon. Julia I. Rodriguez, J.S.C.

⁵Howard Security did not assert a cross-claim against Sammon.