Short Form Order

SUPREME COURT - STATE OF NEW YORK
**I.A.S. PART XXXVI SUFFOLK COUNTY**

**PRESENT:**
**HON. PAUL J. BAISLEY, JR., J.S.C.**

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MEGHAN E. MOLINA, as Administratrix of the Goods, Chattels and Credits of THOMAS P. GRAHAM, Deceased,

Plaintiff,

-against-

GARRISON PROTECTIVE SERVICES, INC., MARYANN LATTMAN, JOHN S. MILLER, and BAY SHORE MOBILE PARK, INC.,

Defendants.

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INDEX NO.: 20252/2010
CALENDAR NO.: 201800179OT
MOTION DATE: 9/6/18
MOTION SEQ. NO.: 004 MG; 005 MD

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Upon the following papers numbered 1 to 32 read on these motions for summary judgment ; Notice of Motion and supporting papers 1 - 15; 16 - 28 ; Answering Affidavits and supporting papers 29 - 30 ; Replying Affidavits and supporting papers 31 - 32 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion (motion sequence no. 004) of defendants Garrison Protective Services, Inc. and Maryann Lattman, and the motion (motion sequence no. 005) of defendant Bay Shore Mobile Park, Inc., are consolidated for purposes of this determination; and it is

***ORDERED*** that the motion sequence no. 004 of defendants Garrison Protective Services, Inc., and Maryann Lattman for summary judgment dismissing the complaint against them is granted; and it is further

***ORDERED*** that the motion sequence no. 005 of defendant Bay Shore Mobile Park, Inc., for summary judgment dismissing the complaint against it is denied.

This action was commenced by plaintiff Meghan E. Molina, as Administratrix of the Estate of Thomas P. Graham, deceased, to recover damages for injuries he allegedly sustained on August 2, 2008, when he was physically assaulted by defendant John S. Miller. By plaintiff's

bill of particulars, it is alleged that defendants Garrison Protective Services, Inc., Maryann Lattman, and Bay Shore Mobile Park, Inc., having knowledge of prior incidents involving Mr. Miller, were negligent in failing to prevent decedent's assault. The Court notes that Mr. Graham's subsequent death is not alleged to have been a result the incident in question.

Garrison Protective Services, Inc. ("Garrison") and its employee Maryann Lattman (collectively the "Garrison Defendants") now move for summary judgment in their favor arguing that they had no duty to decedent, who was not a party to the security contract between Garrison and Bay Shore Mobile Park, Inc. ("Bay Shore Mobile Park"), and that John Miller's acts were the sole proximate cause of decedent's alleged injuries. In support of their motion, they submit, among other things, copies of the pleadings, a transcript of John Miller's criminal plea allocution, transcripts of the parties' deposition testimony, a copy of an incident report, and a copy of a contract between Garrison and "Bayshore Trailer Park."

Bay Shore Mobile Park also moves for summary judgment in its favor arguing that it had no duty to prevent assaults of or to ensure the physical safety of the individuals leasing trailer locations on its lot. It further argues that plaintiff's testimony is inadmissible hearsay and that Mr. Miller's actions were the sole proximate cause of decedent's injuries. In support of its motion, Bay Shore Mobile Park submits materials largely identical to those submitted by the other moving defendants, save for a copy of the aforementioned contract.

Meghan Molina testified that her father, the decedent, lived with his girlfriend, Laura Cirella, at the Bay Shore Trailer Park in Bay Shore, New York. She indicated that she was in Greenport, New York, when she received a telephone call from decedent at approximately 8:00 p.m. on the date in question. It was her understanding that her father was presently being driven to Greenport by John Miller to meet her and her family. She stated that her father never made it to Greenport but that she received a second telephone call from him "a half hour or 45 minutes later", during which he told her that Mr. Miller was assaulting him. Ms. Molina testified that her father stated, "Please call the cops and send somebody to help me because nobody here will." Ms. Molina indicated that she attempted to call 911 on decedent's behalf but was unable to contact the appropriate Bay Shore-area authorities because her 911 calls were being directed to Greenport-area authorities. Upon questioning, Ms. Molina testified that she had not made any complaints regarding the security of the trailer park prior to her father's assault, was not aware of any prior incidents between her father and Mr. Miller, and had not heard any complaints from her father regarding the same.

Maryann Lattman testified that, as of the time of her deposition in 2017, she had been employed by Garrison for approximately 11 years. She stated that Bay Shore Mobile Park hired Garrison, a security company, to provide limited security services. Ms. Lattman indicated that

she was hired as a security guard to patrol the park from 8:00 p.m. to 3:00 a.m., Monday through Friday, and that another Garrison employee worked the same shift on weekends. Ms. Lattman testified that Garrison was hired to perform security patrols during the hours spanning 8:00 p.m. and 3:00 a.m., and at no other time. Questioned regarding her responsibilities as a security guard, she stated that her primary duty was to "see and report." Specifically, Ms. Lattman testified that she wore a security officer's uniform and drove a marked security vehicle through the 16 blocks of mobile homes that made up the park. She stated that she drove very slowly, "[g]oing up and down every block and making sure everything is safe, [that there were] no fights in the street, [and that there was] no yelling and screaming." She indicated that her security vehicle was constantly moving as requested by Mobile Park.

As to the date in question, Ms. Lattman indicated that she reported for her shift at her regularly-scheduled time and was informed by some park residents that an incident occurred earlier in the day. She testified she learned that one of Bay Shore Mobile Park's tenants, John Miller, had threatened Laura Cirella with a sword, that the police had responded to the scene, and that Ms. Cirella was taken to the police precinct to make a statement. Ms. Lattman stated that she commenced her standard patrols of the park, and that at approximately 11:00 p.m. she experienced a near-collision with Mr. Miller's vehicle, it "almost hit[*ting*] [her] head-on." She indicated that when she asked Mr. Miller why he was driving in such a fashion, he stated that he "just beated [sic] up" Thomas Graham, and "left him for dead." Ms. Lattman testified that she told Mr. Miller to stay there while she left to assist Mr. Graham. She indicated that she soon located the unconscious Mr. Graham, who was surrounded by concerned park residents. Ms. Lattman stated that she inquired of the bystanders whether 911 had been called. She testified that while she learned 911 had been called, she too made a 911 call to confirm that assistance was en route. Ms. Lattman further testified that she remained with Mr. Graham until an ambulance arrived, then informed police officers of Mr. Miller's likely location, where he was subsequently apprehended. Questioned as to Mr. Miller's history, Ms. Lattman testified that she had witnessed him involved in altercations with other Mobile Park residents, describing him as "the type [that] was always intoxicated" and that "he would just fly off the handle and fight with the people."

Joseph McCarthy testified that while he is currently the manager of the mobile park, he worked there as a maintenance person on the date of decedent's incident. He stated that the park is 13 acres in size and contains 195 mobile homes. Asked if anyone complained about Mr. Miller during his tenure at the mobile park, Mr. McCarthy indicated that he believes "there were a couple of tenants that complained" to the prior manager, Simmone, and that Mr. Miller was "somewhat of a partier, loud." However, Mr. McCarthy testified that he is unaware of how those complaints were resolved. Mr. McCarthy testified that he was aware of one altercation between Mr. Miller and a former male tenant of the park. Asked to clarify the Garrison defendants' role at the premises, he stated that Ms. Lattman was expected to "observe and report", meaning that she would submit reports of any unusual activity and call 911 if an emergency was in progress.

A party moving for summary judgment "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 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

Because "a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138, 746 NYS2d 120 [2002]). A landlord "is not the insurer of the safety of its tenants" (*Karim v 89th Jamaica Realty Co., L.P.*, 127 AD3d 1030, 1030, 7 NYS3d 488 [2d Dept 2015]). A landlord also "has no duty to prevent one tenant from attacking another tenant unless it has the authority, ability, and opportunity to control the actions of the assailant" (*Mills v Gardner*, 106 AD3d 885, 886, 965 NYS2d 580 [2d Dept 2013], quoting *Britt v New York City Hous. Auth.*, 3 AD3d 514, 514, 770 NYS2d 744 [2d Dept 2004]). However, landlords "have a common-law duty to take minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person" (*Martinez v City of New York*, 153 AD3d 803, 805, 61 NYS3d 562 [2d Dept 2017], quoting *Mason v U.E.S.S. Leasing Corp.*, 96 NY2d 875, 878, 730 NYS2d 770 [2001]; *see also Pink v Rome Youth Hockey Assn., Inc.*, 28 NY3d 994, 41 NYS3d 204 [2016]; *Deinzer v Middle Country Pub. Lib.*, 120 AD3d 1292, 1293, 992 NYS2d 557 [2d Dept 2014]). To establish foreseeability, "there is no requirement that the past experience of criminal activity be of the same type as that to which the plaintiff was subjected, [but] 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" (*George v 855 Ocean Ave., LLC*, 165 AD3d 1060, 1061, 86 NYS3d 564 [2d Dept 2018][internal quotations and citations omitted]). Yet, "[r]ecovery against a landlord for an assault committed by a third party requires a showing that the landlord's negligent failure to provide adequate security was a proximate cause of the injury" (*Martinez v City of New York*, *supra* at 805).

It is well established that "contractual obligations impose a duty only in favor of the promisee and intended third-party beneficiaries" (*CB v Howard Sec.*, 158 AD3d 157, 166, 69

NYS3d 587 [1st Dept 2018]), quoting *253 E. 62nd St., LLC v Moluka Enters., LLC*, 151 AD3d 489, 490, 56 NYS3d 314 [1st Dept 2017]). A contractual obligation, standing alone, "will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, *supra* at 138). There are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care– and thus be potentially liable in tort– to third persons: (1) Where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches 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" (*id.* at 140 [internal quotation marks and citations omitted]).

The Garrison defendants established a *prima facie* entitlement to summary judgment in their favor by adducing evidence that plaintiff's decedent was not a third-party beneficiary of the contract between Garrison and Bay Shore Mobile Park; and therefore, they owed him no duty (*see Espinal v Melville Snow Contrs.*, *supra*; *Solomon v National Amusements, Inc.*, 128 AD3d 947, 9 NYS3d 398 [2d Dept 2015]; *see generally Alvarez v Prospect Hosp.*, *supra*; *cf. Clark v City of New York*, 130 AD3d 964, 14 NYS3d 484 [2d Dept 2015]). The testimony of Ms. Lattman and Mr. McCarthy demonstrated that Bay Shore Mobile Park contracted with Garrison to provide limited security-related services on its premises. The contract in question, the authenticity and applicability of which plaintiff does not dispute, provides that Garrison shall "as an independent contractor . . . perform certain Security Services at residential locations on behalf of [Bay Shore Mobile Park]." In addition to the requirement that Garrison employees "wear a uniform and have a Garrison ID badge," they "will be expected to be professional, neat, polite, and helpful to the *site*, which they are assigned" (emphasis added). The contract further provides that "[a]ll Garrison personnel will carry out their function at [the mobile park] in the manner best suited depending on the circumstances, in the sole business judgment of Garrison . . . in conformity with practices, which are generally current in the security industry, [but] that Garrison does not represent and cannot warrant that the services provided will prevent or minimize the likelihood of loss." Significantly, the contract specifically limits the scope of Garrison's duties, stating Garrison "has not engaged as a consultant or otherwise to provide an assessment of security needs at the site," and that "Garrison's service shall not give rise to or confer any rights on any third party." Thus, the Garrison defendants set forth *prima facie* evidence that they owed no contractual duty to decedent, and that no common law duty of care existed (*see Espinal v Melville Snow Contrs.*, *supra*; *Mitchell v Long Acre Hotel*, 147 AD3d 567, 46 NYS3d 785 [1st Dept 2017]; *cf. Garda v Paramount Theatre, LLC*, 145 AD3d 964, 44 NYS3d 163 [2d Dept 2016]). The burden then shifts to plaintiff to raise a triable issue of material fact (*see generally Vega v Restani Constr. Corp.*, *supra*).

In opposition to the moving defendants' motions, plaintiff submits only her attorney's affirmation, which argues that the Garrison defendants provided insufficient and negligent

security. Plaintiff's arguments are unavailing. Plaintiff adduced no evidence establishing that Bay Shore Mobile Park's tenants were intended third-party beneficiaries of Garrison's services, or that the Garrison defendants had any duty, or authority, to take any action in favor of decedent or against Mr. Miller. In fact, the contract setting forth Garrison's duties focuses on the "site" and "losses," without a single mention of the Bay Shore Mobile Park's tenants or other persons present therein. Further, Ms. Lattman denied her ability to physically interject in any matter, and testified that her only responsibilities in cases such as decedent's assault were to call 911 and draft an incident report. Plaintiff also failed to submit any evidence that Ms. Lattman was negligent in any way or that any exception to the rule in *Espinal* applies. Assuming, *arguendo*, the Court admits decedent's statement, "Please call the cops and send somebody to help me, because nobody here will", as an excited utterance, such a statement is non-specific and does not implicate the Garrison defendants in any wrongdoing. Accordingly, the Garrison defendants' motion for summary judgment dismissing the complaint against them is granted.

Finally, Bay Shore Mobile Park's motion for summary judgment dismissing the complaint against it is denied as it failed to eliminate all triable issues (*see Mitchell v Long Acre Hotel, supra*; *Solomon v National Amusements, Inc., supra*; *Walfall v Bartini's Pierre, Inc.*, 128 AD3d 685, 9 NYS3d 108 [2d Dept 2015]). A defendant cannot satisfy its burden "by merely pointing out gaps in the plaintiff's case" (*Bronstein v Benderson Dev. Co., LLC*, 167 AD3d 837, 91 NYS3d 142 [2d Dept 2018]). Here, Bay Shore Mobile Park did not adduce evidence that it was unaware of the alleged incident involving Mr. Miller threatening Ms. Cirella with a sword earlier on the day of decedent's assault (*see Bisignano v Raabe*, 128 AD3d 751, 9 NYS3d 135 [2d Dept 2015]; *Karim v 89th Jamaica Realty Co., L.P., supra*; *cf. Golub v Louris*, 153 AD3d 903, 60 NYS3d 415 [2d Dept 2017] [defendant demonstrated that it lacked knowledge of prior criminal acts at the location]). Nor did Bay Shore Mobile Park demonstrate that it did not own the premises on which decedent's assault occurred, that it had no ability to exert control over the actions of its tenants, or that the incident was an unforeseeable event that could not have been anticipated (*see generally Tansey v Coscia*, 159 AD3d 850, 73 NYS3d 213 [2d Dept 2018]; *cf. Oddo v Queens Vil. Comm. for Mental Health for Jamaica Community Adolescent Program, Inc.*, 28 NY3d 731, 49 NYS3d 358 [2017]; *Muzafarov v Casallas-Gonzalez*, 164 AD3d 680, 83 NYS3d 301 [2d Dept 2018]). Therefore, it did not establish, *prima facie*, that it took reasonable steps to prevent decedent's attack after having knowledge of Mr. Miller's prior violent acts (*see Deinzer v Middle Country Pub. Lib., supra*; *cf. Davis v Rochdale Vil., Inc.*, 83 AD3d 991, 922 NYS2d 473 [2d Dept 2011]). The appropriateness of Bay Shore Mobile Park's actions, in light of Mr. Miller's prior violent acts, is a question for the trier of fact (*see Corporan v Barrier Free Living Inc.*, 133 AD3d 497, 19 NYS3d 160 [1st Dept 2015]).

Dated: March 20, 2019

HON. PAUL J. BAISLEY, JR.
J.S.C.