Beato v Covenant House
2020 NY Slip Op 30169(U)
January 23, 2020
Supreme Court, New York County
Docket Number: 161675/2015
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 161675/2015

EMMANUEL BEATO,

MOTION SEQ. NO. 001

Plaintiff,

- v -

COVENANT HOUSE, THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this negligence action, defendant Covenant House moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint of plaintiff Emmanuel Beato ("Beato") and for such other relief as this Court deems just (Doc. 27).[1] Beato opposes the motion (Docs. 45-51). After oral argument and a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL HISTORY:

In November 2015, Beato ("Beato") commenced the instant action against defendants by filing a summons and complaint (Doc. 1). In the complaint, Beato alleged that, on or about

[1] Although this motion was brought by all named defendants, Beato discontinued all claims as against defendants the City of New York and the New York City Department of Homeless Services (Doc. 52). Therefore, all arguments raised regarding dismissal of the complaint concern only Covenant House (Doc. 45 at 12).

August 17, 2014, he was in the care and custody of Covenant House, a homeless shelter for men located at 460 West 41st Street, New York, New York, when he was assaulted and battered by a fellow occupant and/or roommate (Doc. 1, Doc. 35 at 83). Beato asserted three separate causes of action against defendants based on negligence, negligent hiring and training, and lack of supervision (Doc. 1).[2]

After joinder of issue (Doc. 7), Covenant House filed the instant motion seeking dismissal of the complaint on the basis that, *inter alia*, Beato cannot assert a negligence claim against it since the alleged incident occurred while Covenant House was "acting in [its] governmental capacity by providing temporary housing assistance [to Beato], an activity which is not traditionally supplied by the private sector" (Doc. 28 at 11). Under that premise, it contends that Beato was not owed a special duty of care and, thus, that Covenant House cannot be held liable for his injuries (Doc. 28). It further argues that, even if common-law negligence standards apply, "[Covenant House] did not owe [Beato] a duty, let alone breach[ed] any duty, with respect to the security at the building" given the unforeseeable nature of the criminal act perpetrated against Beato (Doc. 28 at 13). Covenant House claims that Beato also fails to establish how it failed to hire, train, supervise, manage and/or control its employees (Doc. 28 at 15).

In support of its motion, Covenant House submits, *inter alia*, Beato's verified bill of particulars (Doc. 34). In the bill of particulars, Beato asserted, in pertinent part, that Covenant House breached its duty of care by failing to provide adequate protection against the vicious propensities of third persons, that "[it] knew or should have known of the dangers existing

[2] During oral argument, Beato agreed to withdraw his claim that defendants' actions were committed with malice (Doc. 1).

thereabouts" and that Covenant failed to "adequately patrol and supervise the premises and the occupants with vicious propensities for violent acts" (Doc. 34). Covenant House also submits the transcripts of Beato's hearing pursuant to General Municipal § 50-h dated January 21, 2015 as well as his deposition from March 12, 2018 (Docs. 35-36).

Recounting the events of the alleged incident, Beato testified, quite consistently at both his deposition and his hearing pursuant to General Municipal § 50-h, that he was involved in an altercation with another roommate, "O" for using his phone, which prompted the incident in question (Docs. 35 at 82, 87-88; 36 at 19-23).[3] Beato's roommate, T.R., was in another room at the time of the incident between Beato and "O" but, minutes later, he learned about the fight and returned to the room, accompanied by five to six other individuals, and confronted Beato (Doc. 35 at 69; Doc. 36 at 22). Beato was on his phone, which he had retrieved from "O" when T.R. approached him and challenged him to a fight, stating "I want to fight, square up" (Docs. 35 at 66; 36 at 19-23). When he declined, T.R. punched him in the face two or three times (Docs. 35 at 66; 36 at 19-24). The punches were "fast," consecutive, and lasted less than a minute (Docs. 35 at 69-70; 36 at 24). Beato did not fight back and the altercation was over after the attack (Doc. 36 at 24; Doc. 35 at 72-73). Approximately three to five minutes elapsed between the time Beato retrieved his phone from "O" and T.R.'s instruction to "square up" (Doc. 36 at 22). Beato's testimony also established that the incident took place during curfew hours, which started at 9:30 p.m. (Doc. 35 at 62). Beato and T.R. had an altercation several weeks prior to the alleged incident, although that incident was never reported to anyone at Covenant House (Doc. 35 at 51-52).

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[3] Real names were redacted to protect the identities of Covenant House's residents (Doc. 28 at 8).

Covenant House also submitted the deposition testimony of Tinuke Wilson, one of its resident advisors ("RA") (Doc. 37). When describing the responsibilities of an RA, Wilson stated that RAs walked the halls to ensure, *inter alia*, that the residents were in their assigned rooms during curfew (Doc. 37 at 32-33). From 9:30 p.m. to 10:00 p.m., the RAs who were getting off of their shift attended a night meeting, and then there was a transitional meeting from 10:00 p.m. to 10:30 p.m. to allow the outgoing shift to update the incoming shift of what occurred that day (Doc. 37 at 28-29, 34-35). However, the office was glass, allowing the RAs to see the hallways and the lounge area from inside the office (Doc. 37 at 35).

Wilson also testified that, although there were no security guards permanently stationed on the third and fourth floors, where residents lived, security guards were summoned to those floors if an issue arose (Doc. 37 at 16-25). Additionally, the security office on the first floor conducted surveillance of the common areas and the hallways (Doc. 37 at 26-27). According to the testimony of Lakeisha Quarles, the deputy director of Covenant House, security guards routinely inspected the floors every hour and escorted residents into and out of the premises, as well as to their respective floors (Doc. 38 at 24-25, 102-103). Quarles also testified that the staff received training to resolve conflicts and were instructed to follow certain protocols to deescalate violent situations (Doc. 38 at 73-74).

In opposition to Covenant House's motion for summary judgment, Beato argues, *inter alia*, that Covenant House owed a contractual duty of care to Beato as well as a duty by virtue of its position as landlord/owner to secure the facility and prevent against foreseeable dangers and that Covenant House was negligent in securing the premises (Doc. 45 at 6-10). He maintains that violence was a common occurrence at Covenant House and, thus, that a triable issue of fact exists as to whether the subject assault against Beato was a foreseeable event (Doc. 45 at 10).

Additionally, he argues that a triable issue of fact exists as to the hiring and retention of the employees of Covenant House given the frequency of the assaults there, the lack of an explanation for why five to six youth residents were permitted in Beato's room after curfew hours or why they allowed the assault to take place over a 3 to 5 minute period without any intervention from Covenant House despite its main office being a few feet away from Beato's room (Doc. 45 at 10-11).

Beato submits, *inter alia*, the deposition testimony of Wilson and Quarles, suggesting that they raise an issue of fact as to whether the incident was foreseeable (Docs. 36, 37). Wilson and Quarles testified that fights were common at Covenant House back in 2014, occurring at times as frequently as once a week; however, Wilson qualified that fights after curfew hours were seldom (Docs. 37 at 41-42; 38 at 83). Beato also submits proof that there were several criminal complaints filed in the two years prior to the alleged incident and one assault after the incident in question (Doc. 50). Beato also testified that the individuals who accompanied T.R. were cheering inside the subject room at the time of the assault (Doc. 35 at 71).

LEGAL CONCLUSIONS:

It is well-established that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]; *see* CPLR 3212 (b); *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden then shifts to the party opposing the motion to present evidentiary facts in admissible form which raise a genuine, triable issue of fact (*see Mazurek v*

Metro. Museum of Art, 27 AD3d 227, 228 [1st Dept 2006]). If, after viewing the facts in the light most favorable to the non-moving party, the court concludes that a genuine issue of material fact exists, then summary judgment will be denied (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

As an initial matter, this Court rejects Covenant House's argument that it cannot be sued for negligence because it acted in a governmental capacity and owed Beato no special duty of care (Doc. 28 at 9-13). Although a municipality cannot be held negligent for acts performed during its governmental function absent a special duty owed to the injured party (*see Coleson v City of New York*, 24 NY3d 476, 481 [2014]; *Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]), this standard does not apply to Covenant House because it is a privately funded not-for-profit company and not a municipality (Doc. 28 at 9) *(compare Stora v City of New York*, 117 AD3d 557, 558 [1st Dept 2014]; *Clark v City of New York*, 130 AD3d 964, 964-995 [2d Dept 2015]*Akinwande v City of New York*, 260 AD2d 586, 587 [2d Dept 1999], *lv dismissed in part and denied in part*, 93 NY2d 1030 [1999]).

This Court nevertheless finds that Covenant House has met its prima facie entitlement to summary judgment by establishing that reasonable security measures were provided at the facility and that Beato's injuries were caused by the unforeseeable and superseding actions of a third party. Landowners have a duty to minimize foreseeable dangers on their property, including the foreseeable criminal acts of third parties (*see Maheswari v City of New York*, 2 NY3d 288, 294 [2004]; *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548 [1998]; *Miller v State of New York*, 62 NY2d 506, 513 [1984]). "[T]his duty arises only when such party knows or has reason to know that there is a likelihood that third persons may endanger the safety of those lawfully on the premises, as where the landlord or permittee is aware of prior criminal

activity on the premises" (*Florman v City of New York*, 293 AD2d 120, 124 [1st Dept 2002] [internal quotation marks, brackets and citations omitted]).

Here, T.R.'s attack on Beato was spontaneous and occurred within a few minutes; it was during curfew hours when criminal activity was unlikely and, more importantly, it was perpetrated by Beato's own roommate who was required to be in his room at the time of the alleged incident. There is no proof that Covenant House had any knowledge of any prior conflict between Beato and T.R., since no report was even made to Covenant House regarding the prior incident involving them (*see Estate of Faughey v New 56-79 IG Assoc., L.P.*, 149 AD3d 418, 418-419 [1st Dept 2017]; *Musano v City of New York*, 63 Misc. 3d 1211(A), 2019 WL 1475057, *8 [Sup Ct, NY County 2019]; *compare Mason v U.E.S.S. Leasing Corp.*, 96 NY2d 875, 878 [2001]; *Corporan v Barrier Free Living Inc.*, 133 AD3d 497, 498 [1st Dept 2015]). Wilson also testified that employees at Covenant House are not allowed to ask prospective residents about their criminal history during their initial intakes, thereby supporting Covenant House's argument that it did not have notice of T.R.'s violent propensities. Covenant House's proof also establishes that at least minimal security measures were in place to deter criminal activity.

Beato fails to raise a triable issue of fact with respect to the cause of action for negligent security. He contends that his injuries were foreseeable given the frequent fights in Covenant House and the testimony of Covenant House employees that Beato was the subject of several complaints for bullying and disorderly conduct (Doc. 45 at 7-10). However, this testimony fails to establish that Covenant House had notice of any prior altercation between Beato and T.R. that would make this specific incident foreseeable (*see Piazza v Regeis Care Center, L.L.C.*, 47 AD3d 551, 553 [1st Dept 2008]; *Estate of Faughey v New 56-79 IG Assoc., L.P.*, 149 AD3d at 418-419). Moreover, given the spontaneity and location of T.R.'s attack, it is unlikely that any

reasonable security measure would have prevented the assault (*see Waldon v Little Flower Children's Serv.*, 1 NY3d 612, 614 [2004]; *Estate of Faughey v New 56-79 IG Assoc., L.P.*, 149 AD3d at 418-419).

Further, this Court's determination reinforces the longstanding principle that landlords and owners of property are not insurers of a tenant's safety and, absent a reasonable danger, are required to take only minimal safety precautions (*see Jacqueline S. by Ludovina S. v City of New York,* 81 NY2d 288, 292-293 [1993]*; Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 303 [1st Dept 2001]), which this Court finds existed here. The law does not impose on Convent House the obligation to monitor its residents every second of every day, as this requirement would be unduly burdensome (*see Piazza v Regeis Care Center, L.L.C.*, 47 AD3d at 553; *Maheshwari v City of New York*, 778 NY3d 288, 295 [2004]). Beato concedes, through his attorney's affirmation, that several security measures were implemented by Covenant House to prevent foreseeable criminal acts (Doc. 45), and that it "employed several security guards to secure the premises and had numerous guards in place, including a curfew, in accordance with their duty to prevent foreseeable criminal intrusion" (Doc. 45 at 6).

Turning next to the cause of action regarding negligent hiring and retention of the employees of Covenant House, it is well-established that "recovery on a negligent hiring and retention theory requires a showing that the employer was on notice of the relevant tortious propensities of the wrongdoing employee" (*Gomez v City of New York*, 304 AD2d 374, 374-475 [1st Dept 2003]; *see Sugarman v Equinox Holdings, Inc.*, 21 Misc. 3d 1147(A), *10 [Sup Ct, NY County 2008], *affd* 73 AD3d 654 [2010]). Since Beato fails to submit any proof even suggesting that Covenant House had knowledge of any tortious propensities of its employees, Covenant

House's motion for summary judgment dismissing the claim for negligent hiring, training and retention is granted.

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that defendant Covenant House's motion for summary judgment seeking dismissal of all claims against it is granted, and the complaint is dismissed; and it is further

ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that defendant Covenant House is to serve a copy of this order with notice of entry upon plaintiff within 30 days; and it is further

ORDERED that this constitutes the decision and order of this Court.

1/23/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE