

Buckvar v MCR Prop. Mgt. LLC
2021 NY Slip Op 32974(U)
April 5, 2021
Supreme Court, Nassau County
Docket Number: Index No. 608873/2016
Judge: Helen Voutsinas
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 19
Present: Hon. Helen Voutsinas, J.S.C.

EMANUEL BUCKVAR,

Plaintiff,

Index No.: 608873/2016

-against-

Motion Seq. Nos.: 003, 004,
005 & 006

MCR PROPERTY MANAGEMENT LLC
and MARRIOT INTERNATIONAL,

Short Form Order

Defendants.

The following motions are consolidated by this Court for a single determination, sua sponte, as an exercise of discretion and in order to make "such other orders concerning proceedings therein, as may tend to avoid unnecessary costs or delay." (See, CPLR §602[a]). Their determination is made upon consideration and careful review of the following papers:

Motion Seq. No. 003

Notice of Motion, Affirmation and Affidavit in Support, Exhibits..... 1
Affirmation in Opposition, Exhibits..... 2
Reply Affirmation, Affidavits, Exhibits..... 3
Supplemental Affirmation in Support..... 4
Affirmation in Opposition to Sur-Reply, Exhibit..... 5

Motion Seq. No. 004

Notice of Cross Motion, Affirmation, Exhibit..... 1
Affirmation and Affidavits in Opposition..... 2
Reply Affirmation

Motion Seq, Nos. 005 and 006

Notice of Motion, Affirmation in Support, Exhibits..... 1
Notice of Cross Motion, Affirmation..... 2
Affirmation in Opposition to Cross Motion and in
Further Support of Motion..... 3
Reply Affirmation on Cross Motion..... 4

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Plaintiff Emanuel Buckvar moves for an Order pursuant to CPLR 3212 granting him summary judgment against defendants MCR Property Management LLC ("MCR") and Marriot International, Inc. ("Marriot"). Defendants cross move for an Order pursuant to CPLR 3212

granting summary judgment dismissing the complaint. Plaintiff separately moves for an Order imposing monetary sanctions upon defendant's counsel and censuring counsel for violating a Preclusion Order previously issued by the Court.

Factual and Procedural Background

This is an action to recover for personal injuries alleged to have been suffered by plaintiff on January 24, 2016 as a result of an assault on plaintiff at the Springhill Suites by Marriot, a hotel in Bellport, New York owned and operated by defendants.

Plaintiff moves for summary judgment arguing that the assault was entirely foreseeable based on prior criminal activity at the premises, and insufficient safeguards were put in place at the hotel by defendants. Plaintiff contends that the assault was entirely foreseeable as there had been significant criminal activity at the hotel premises, including a prior assault with a deadly weapon a year prior to the assault on Mr. Buckvar, and no safeguards were put in place at the hotel by defendants. Plaintiff asserts that the assault took place because the hotel failed to employ security guards, was under-staffed on the night in question, employed untrained staff, failed to follow the nominal and inadequate security standards that they did have, had video cameras that were not monitored, and allowed roughly a dozen underage trespassers to roam the hotel at their leisure harassing guests without being challenged. Plaintiff also cites an Order previously issued by the Court finding that defendants intentionally spoliated videotape evidence and precluding defendants from offering certain evidence.

At his deposition, Mr. Buckvar testified that on the day of his assault, he was a guest at the Springhill Suites where his partner, Lisette Ruch, was staying, and he would join her on the weekends. During the period before his assault, Mr. Buckvar had dinner in his room and stayed in the room together with Ms. Ruch. He testified that approximately 2:00 a.m., he heard someone knocking on all the doors in the hallway, and everyone started opening the doors. They had also knocked on the door of his room. He opened his door and stepped out to see what was going on, as did other guests. Mr. Buckvar testified that he went to look in the stairwell just down the hall next to his room to see if anyone was going up and down the stairs and that is when he got punched by one of the assailants who he had not seen prior to the punch. The assailant pulled him into the stairwell and hit him just below the right eye. Then he saw the other assailants come running up and down the stairs. The other assailants joined in in punching him throughout his head and back. One of the assailants had a knife, which he used to try and stab Mr. Buckvar, but Buckvar grabbed it and threw it down the stairs, getting some cuts from it in the process. Mr. Buckvar described fighting back as best as possible. He described the assailants as in their late teens to early 20s, with at least one of them shouting "Just kill the mother*cker." He further stated that the assailants only stopped hitting them when two girls ran up the stairs and said "It's taking way too long. We have to get out of here." His partner Ms. Ruch called the police

Defendants oppose the motion and cross move for summary judgment. They argue that the assault on plaintiff was an unforeseeable and unexpected occurrence for which defendants cannot be liable. Defendants assert that the criminal conduct at issue was not foreseeable based upon any prior occurrence of the same or similar conduct at the premises.

Shannon Gumin, the former general manager of the Sprinhill Suites in Brookhaven testified on behalf of defendants. She stated that there were eight or nine security cameras at the premises, including at each side entrance, the back entrance, the lobby, the back office, and the laundry room. There were cameras at the base of the stairwells. There were initially security guards that worked from 11 p.m. to 7 a.m. when the hotel opened in 2010. The hotel stopped having security guards in spring of 2011. After that time, the manager on duty or the night auditor was in charge of security at the hotel. There was one night auditor on the weekdays and two night auditors on the weekends. The additional night auditor on the weekends was due to higher volume; it ensured that one auditor could run the audit while the other could be available for guests. The night auditors were responsible for walking the hallways every half hour to hour to ensure all of the entrances/doors were closed. The night auditors worked from 11:00 p.m. until 7:00 a.m. There was only one night auditor on the night of the incident due to a snowstorm. The side doors do not have an alarm because they are only accessible with a key. Guests would sometimes block the side door with a rock or pebble to smoke outside. The hotel would check the doorways and also ask guests to refrain from doing so when they observed such activity. Hotel staff were instructed to call the police if there was any type of violence or they thought there would be violence. They were instructed not to get involved directly in any physical dispute. Staff were instructed to call Ms. Gumin any time they felt necessary, including if it was a situation they could not handle or didn't know what to do. If a staff member saw someone that they thought looked suspicious or felt was not a guest, they would ask the person to see their room key. If the room key number and name did not match, the person would be asked to leave the property. If the person refused to leave, the staff member was instructed to call the police. There were never any incidents at the hotel that required security or hotel staff to detain someone or remove someone before plaintiff's incident. Although the police and EMS had previously been called to the premises, it was due to domestic disputes and medical emergencies. Ms. Gumin did not recall any assaults other at the hotel other than domestic incidents prior to January of 2016.

Defendants also submits the police report regarding the subject incident. According to the report, plaintiff stated to the police that "an unknown subject knocked on his door. When he went to check he noticed [redacted] males running down the hallway. [Plaintiff] chased the subjects and asked them why they were knocking on his door."

Plaintiff had requested relevant surveillance video during discovery. The video footage produced by defendants only consisted of footage from the cameras at the base of the stairwell on the side of the hotel where the assault took place, which showed that a rock had been wedged so as to keep the side entrance door open for a period of time. The video also showed approximately a dozen individuals walking in and out of the hotel freely over a three hour period, and others were shown walking into the stairwell from the hallway which leads to the lobby. Defendants did not produce any footage from the lobby.

Plaintiff previously moved for an Order striking defendants' answer on the grounds of spoliation of key evidence, based upon defendants' failure to produce surveillance footage from the lobby. Plaintiff argued that the missing video would have shown the plaintiff's condition after the incident when he went to the lobby to speak with the front desk clerk, whether the night auditor fell asleep, or whether she ever got up from her desk to check the hallways and whether the assailants had walked through the lobby at any point prior to the assault on the plaintiff. Plaintiff

requested, alternatively, an Order precluding defendants from producing evidence as to those issues, and/or directing that an adverse inference charge be given at trial against the defendants with regard to those same issues.

By Order dated August 19, 2019, the Court (Parga, J.) ruled:

The plaintiff's motion is granted to the extent that the defendants are precluded from testifying or offering any evidence as to the issues of (i) whether or not they complied with their own security protocol; (ii) whether the assailants entered through the lobby prior to the incident, and, if so, whether the night auditors stopped them or called the police; and (iii) the plaintiff's condition subsequent to his attack as well as any conversation he may have had with hotel personnel at that time.

Judge Parga did not grant plaintiff's request for an adverse inference charge at trial, holding that "[w]hether a negative inference charge should also be issued is referred to the trial judge."

Discussion and Ruling

"A possessor of real property is under a duty to maintain reasonable security measures to protect those lawfully on the premises from reasonably foreseeable criminal acts of third parties" (*Bryan v. Crobar*, 65 AD3d 997, 999 [2d Dept 2009]; see *Hartman v. Milbel Enters., Inc.*, 130 AD3d 978, 982 [2d Dept 2015]). This includes the common-law duty to take "minimal precautions" to protect tenants and visitors from foreseeable harm, including foreseeable criminal conduct by a third person (*Mason v. U.E.S.S. Leasing Corp.*, 96 NY2d 875, 878 [2001]; *Durham v. Beaufort*, 300 AD2d 435, 436 [2d Dept 2001]).

"To establish that criminal acts were foreseeable, 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" (*Gentile v Town and Vil. of Harrison*, 137 AD3d 971, 972 [2d Dept 2016]) (see *Jacqueline S. v City of New York*, 81 NY2d 288, 295 [1993]; *Tambriz v P.G.K. Luncheonette, Inc.*, 124 AD3d at 628; *Haire v Bonelli*, 107 AD3d 1204, 1205 [2013]).

It is well established that a proponent of a summary judgment motion must make a prima facie case of entitlement to judgment as a matter of law when there are no material issues of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists. (*Id.* at 325; *Andre v. Pomeroy*, 35 NY2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Thus, the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (see, *Whelen v. G.T.E. Sylvania Inc.*, 182 AD2d 446 [1st Dept 1992]). The court's role is issue finding rather than issue determination (see, e.g., *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Gervasio v. Di Napoli*, 134 AD2d 235, 236 [2d Dept 1987]; *Assing v. United Rubber Supply Co.*, 126 AD2d 590 [2d Dept 1987]).

In deciding a summary judgment motion the court must draw all reasonable inferences in favor of the nonmoving party (*Nicklas v. Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]), and the evidence must be construed in a light most favorable to the party opposing the motion (*Benincasa v. Garrubbo*, 141 AD2d 618 [2d Dept 1988]). "[E]ven the color of a triable issue forecloses the remedy". (*Rudnitsky v. Rabbins*, 191 AD2d 488, 489 [2d Dept 1993]). Furthermore, the credibility of the parties is not an appropriate consideration for the Court. (*See S.J. Capelin Assoc., Inc. v. Globe Mfg. Corp.*, 34 NY2d 338 [1974]).

After a careful reading and analysis of the submissions herein, the Court finds that neither plaintiff nor defendants have established their right to summary judgment. Rather, the Court finds that issues of fact exist as to foreseeability and whether adequate security measures were provided at the subject premises. There is also a question as to what actions plaintiff took after opening the door to his room and whether his actions were a proximate cause of the incident.

Accordingly, plaintiff's motion for summary judgment (**Motion Seq. 003**) and defendant's cross motion for summary judgment (**Motion Seq. 004**) are each **DENIED**.

The Court shall now address plaintiff's motion for sanctions and defendants' cross motion for sanctions.

Plaintiff argues that defendants' counsel has blatantly violated the Court's August 19, 2019 Order (Parga, J.) ("the Preclusion Order") in making certain arguments and statements. For example, defendant's counsel stated in an affirmation that "[n]either plaintiff nor defendants ever saw the unknown assailants prior to the alleged incident" and that [t]he night auditor was not stuck behind the desk; even as the sole night auditor on duty that night the person still walked the halls".

In opposition, and in support of their cross motion for sanctions, defendants argue that the plaintiff's motion is frivolous because defendants have not violated the Preclusion Order. They assert that the Preclusion Order which was limited to clearly delineated subject areas. Defendants contend that the statements at issue, on their face, did not violate the terms of the Preclusion Order, and were made by counsel to counter unfounded statements made by plaintiff in its submissions. Defendants argue further that the Preclusion Order does not prevent them from challenging plaintiff's evidence or unsubstantiated allegations.

Defendants contend that plaintiff's counsel should be sanctioned for making several accusations that defendant spoliated additional evidence, and for making attacks on Ms. Gumin's character. Counsel for defendant also accuses plaintiff's counsel of calling her names during a conference with the Court.

The Court finds that the statements made by defendants' counsel which are the subject of plaintiff's sanctions motion, as worded, can be criticized for appearing to make factual assertions for which counsel has no personal knowledge. However, the Court does not find that the statements "blatantly violate" the Preclusion Order.

The Court finds that the statements made by plaintiff's counsel which are the subject of the cross motion for sanctions are within the bounds of zealous representation.

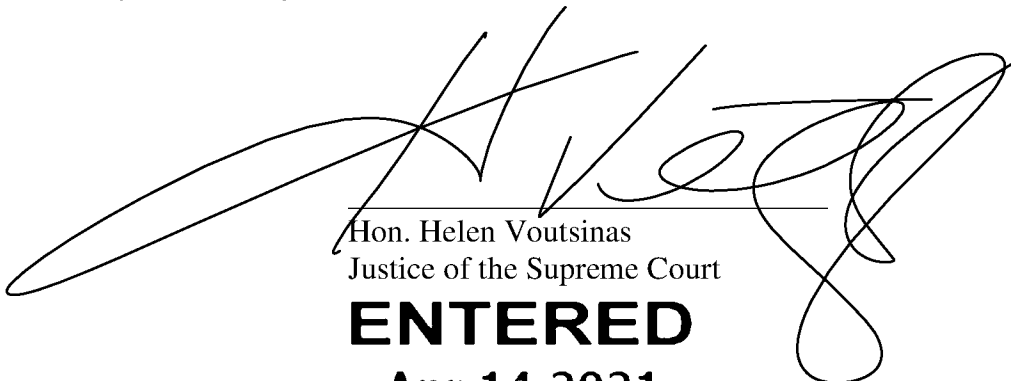
However, the Court urges counsel to be careful to not allow overzealous advocacy or mutual antipathy between them to affect their professionalism.

Accordingly, after review of the respective submissions the Court finds that the alleged acts do not rise to the level for the imposition of sanctions pursuant to 22 NYCRR 130.1.1. As such, the respective motions (**Motion Seq. 005 and Motion Seq. 006**) are both **DENIED**.

Any relief requested and not specifically granted is denied.

This constitutes the Decision and Order of the Court.

Dated: April 5, 2021
Mineola, NY



Hon. Helen Voutsinas
Justice of the Supreme Court

ENTERED

Apr 14 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE