

Beadell v Eros Mgt. Realty, LLC
2022 NY Slip Op 32237(U)
July 12, 2022
Supreme Court, New York County
Docket Number: Index No. 159152/2017
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X

VIRGINIA BEADELL and KAYLA GREENINGER,
Individually and as Co-Administratrix(es) of the Estate of
NOAH C. BEADELL, Deceased, and KAYLA
GREENINGER, Individually,

Plaintiffs,

- v -

EROS MANAGEMENT REALTY, LLC, WYNDHAM HOTEL
MANAGEMENT, INC., CHRISTIAN ALDOY, TRYP
MANAGEMENT, INC., HCS HOSPITALITY, INC., RONICA
SHARMA, "JOHN DOE 1-10", and "JANE DOE 1-10,"

Defendants.

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INDEX NO. 159152/2017
MOTION DATE 04/07/2022
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages for negligence and wrongful death, the defendants Eros Management Realty, LLC (Eros), Wyndham Hotel Management, Inc. (Wyndham), Christian Aldoy, and Tryp Management, Inc. (collectively the movants), move pursuant to CPLR 3212 for summary judgement dismissing the complaint insofar as asserted against them. The plaintiff opposes the motion. The motion is granted to the extent that the movants are awarded summary judgment dismissing the complaint insofar as asserted against Wyndham and Aldoy. The motion is otherwise denied.

In 2010, Wyndham purchased the Tryp hotel brand name, and all Tryp-affiliated hotels began operating under the name "Tryp by Wyndham," but remained independently owned and operated. On May 26, 2017, the plaintiffs' decedent, Noah C. Beadell, was a guest of the Tryp by Wyndham Hotel in Manhattan, where he was attending a medical convention. At the time, that hotel was managed and operated by the defendant Tryp Management, Inc. (Tryp), in a

building owned by Eros. On that date, the decedent's sister, Gabrielle Anderson, received a message from the plaintiff Kayla Greeninger, the decedent's wife, informing Anderson that the decedent was in a crisis condition. Anderson texted the decedent, who texted her back, informing her that he was contemplating suicide. Shortly thereafter, at approximately 6:40 p.m. Eastern Daylight Time (EDT), Anderson, who had obtained the decedent's location from her mother, the plaintiff Virginia Beadell, called the hotel from her home in St. Paul, Minnesota, and spoke with the front desk agent, Kelsey Garcia. Anderson advised Garcia that her brother was suicidal and asked the hotel to monitor his behavior, whereupon Garcia and bellman Roman Marte went up to the decedent's room to check on him.

Garcia and Marte reported back to Anderson six minutes later that the decedent told them that he was okay, and did not want to be disturbed. At approximately 7:12 p.m. EDT, Anderson called the hotel again, stating that she had just received a "goodbye" text message from the decedent, and asked the hotel to call the police. At approximately 7:37 p.m. EDT, or 25 minutes later, the hotel's assistant front office manager, Leslie Tapia, called the police, then proceeded to walk over to the police station located next door to the hotel. Several police officers returned with Tapia to the hotel and went to the decedent's room. Upon their arrival, the door was locked and the hotel's engineer had to break it open, taking approximately 10 to 15 minutes to do so. Once inside, the officers found the decedent on the window ledge and attempted to talk him down, but with no success, as he then leapt from the ledge to his death.

On October 13, 2017, the plaintiffs commenced this action against Eros, Wyndham, and Aldoy. On May 25, 2020, the plaintiffs commenced a second action, naming Tryp, HCS Hospitality, Inc. (HCS), and Ronica Sharma as defendants. On March 9, 2021, this court granted the plaintiffs' motion to consolidate the two actions, and ordered the consolidated action to proceed under the 2017 index number. On September 21, 2021, the plaintiffs discontinued the action against HCS and Ronica Sharma. On November 9, 2021, the plaintiffs filed the Note

of Issue and Certificate of Readiness. On January 4, 2022, the movants timely made the instant motion.

In their complaint, the plaintiffs alleged that the movants were negligent in failing to prevent the suicide of the decedent, despite having knowledge of his unusual behavior and evidence that a suicide attempt was foreseeable and imminent. The plaintiffs also alleged that the movants' negligence caused the decedent's injuries and death because the movants failed timely to notify law enforcement authorities located near the hotel, and failed to maintain the necessary superior knowledge and skill required of hotel management in addressing guests or visitors threatening suicide. They asserted that the movants' negligence was the proximate cause of the decedent's conscious pain and suffering, grave physical injuries, and untimely death. Finally, they asserted claims for loss of consortium and funeral expenses resulting from the decedent's death.

In their bill of particulars, the plaintiffs asserted that the movants failed to take proper security measures that would have prevented the decedent's death, failed to avail themselves of an opportunity to control the decedent and prevent his suicide, did not act in accordance with recognized industry standards, including promptly calling the police, taking security precautions that would not have left the decedent isolated, and providing assistance to a guest suffering from an impaired physical condition due to mental illness. The plaintiffs further alleged that the movants failed to provide their employees with the proper training and expertise to rescue or intervene with a suicidal guest.

In support of their motion, the movants submitted the plaintiffs' verified bill of particulars dated December 17, 2020, deposition transcripts of the plaintiffs, Anderson, Tapia, Marte, Monica Sharma (an Eros employee and Ronica Sharma's sister; hereinafter Sharma), responding New York City Police Department (NYPD) officer Bryan Kim, and detective Travis Duke. The movants also submitted copies of incident reports generated by hotel staff present at the time of the incident, cell phone records of the decedent and Anderson, the decedent's

autopsy report, the expert affidavit of Donald Greene, a security management consultant and President of Strategic Security Concepts, Inc., and a copy of the property deed for the Tryp Hotel by Wyndham.

At her deposition, Sharma described the relationship between Wyndham, Eros, and Tryp, explaining that Wyndham only purchased the Tryp brand, that Eros owned the building in which the hotel operated, and that Tryp operated the hotel itself. She further asserted that the defendant Aldoy did not begin to work for Tryp until one month after the decedent's suicide. Greene opined that the hotel acted reasonably under the circumstances. He concluded that there was no special relationship created between the hotel and the decedent and, thus, there was no duty to "ensure his safety against a suicidal act." He further noted that there was no way for the hotel staff to pre-screen guests for suicidal tendencies or take guests into protective custody if or when they were identified as emotionally disturbed.

In opposition, the plaintiffs submitted an NYPD event chronology report for May 26, 2017, copies of text messages between the decedent and his sister, an expert affidavit from David Sherwyn, a professor of Hospitality Human Resources and Law at Cornell's School of Hotel Administration and Cornell's S.C. Johnson College of Business, an expert affidavit from Hugh McGowan, a former NYPD police officer with expertise in police intervention practices, and the expert affirmation of Steven Fayer, M.D., a board-certified psychologist and neurologist.

Sherwyn opined, within a reasonable degree of professional certainty, that not only does a hotel have a duty to protect guests whom they know are suicidal but, as an industry standard, hotel owners and operators have a higher duty of care to their patrons than other property owners. He explained that the industry standard requires hotels to exercise reasonable care with respect to their guests' safety, and that, in his opinion, Tryp violated this standard when dealing with the decedent. Sherwyn also concluded that it is unequivocally the industry standard to have security personnel on hotel premises who are either hotel employees or contractors. He explained that, by failing to maintain a security department, Tryp needed to

contact the police to intervene and prevent the decedent's suicide. He further noted that Tryp had sufficient notice that the situation involved an emergency and that the police were needed immediately. Finally, Sherwyn opined that it was a deviation from hotel industry standards to have a hotel room lock that took the hotel engineer 10 to 15 minutes to unlock. As he explained it, hotels should be prepared to enter rooms in the event of an emergency, and should have the ability to do so within a reasonable time with regular tools that generally would be employed by hotels to open an interior lock quickly.

McGowan opined, within a reasonable degree of law enforcement certainty, that had the police been notified in a timely fashion, they would have found the decedent in his room, and not on the window ledge. He explained that Tryp's delay in contacting the police greatly diminished the opportunity to prevent the decedent's suicide. He also explained that the hotel failed to exercise any degree of due diligence when it simply accepted the reassurance from the decedent that "all was well." Finally, he opined that the 25-minute delay in calling the police after being requested to do so was inexcusable, unconscionable, and unreasonable.

Dr. Fayer opined, within a reasonable degree of medical certainty, that Tryp's delay in contacting the police was negligent, and deprived both hotel staff and police of the opportunity to prevent the decedent's suicide. He explained that, with time being of the essence, a delay of almost an hour from Anderson's first call until police were summoned was a significant amount of time that led to a critical loss of a chance for intervention, and ultimately the prevention of the suicide itself. He also explained that, because the decedent was communicating with his sister for more than one hour regarding his feelings about suicide, there was significant evidence that he was ambivalent about his intentions. Dr. Fayer noted the importance of this behavior, and opined that if suicide had in fact been a *fait accompli*, the decedent would have taken his life without texting his sister and wife several times beforehand. He also noted that, even the fact that the decedent was found on the window ledge was not a *fait accompli* for suicide and, from

his experience, suicides committed by jumping from heights may be prevented with timely intervention by experienced police, mental health professionals, and relatives.

Dr. Fayer opined that the decedent's suicide was not foreordained, but that his emergency mental health condition was merely escalating during the evening of May 26, 2017, and that although it was understandable that hotel personnel may not have been fully trained to handle suicide threats, they should have involved the police immediately, and a delay of almost an hour was not reasonable. He also explained that the 25-minute gap between the call from the decedent's sister, in which she told hotel staff that her brother had texted "goodbye," and the time when the hotel finally did call the police, was a lag time that allowed the situation to escalate. Finally, Dr. Fayer opined that the decedent's underlying condition could have been effectively treated had the hotel staff responded "quickly, reasonably, and decisively."

It is well settled that the movant on 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]). The motion must be supported by evidence in admissible form (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (see CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

“The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even ‘arguable’” (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; see *Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet his or her burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. He or she must affirmatively demonstrate the merit of his or her defense (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism*, 135 AD3d 458, 462 [1st Dept 2016]).

To establish common-law negligence, a plaintiff must prove that the defendant owed him or her a duty of care and breached that duty, and that the breach proximately caused his or her injuries (see *Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 303 [1st Dept 2001] [duty of care to protect against foreseeable criminal acts by third parties]). New York courts have long held that “landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition” (*Maheshwari v City of NY*, 2 NY3d 288, 294 [2004] quoting (*Tagle v Jakob*, 97 NY2d 165, 168 [2001])). Nonetheless, while landlords and permittees such as long-term lessees have a common-law duty to minimize foreseeable dangers on their property, they are not insurers of a visitor's safety (see *id.*).

With respect to Wyndham, the movants have demonstrated that it does not own or operate the Tryp by Wyndham Hotel in Manhattan, and that the plaintiffs based their claim against Wyndham solely by virtue of the fact that the hotel has “Wyndham” in its name and is somehow affiliated with the Tryp brand. To the extent that the plaintiffs allege that Wyndham is Tryp's parent corporation, Wyndham may not be held liable for Tryp's negligence solely on that basis even if such an allegation were true. As a general rule, a parent corporation is not liable for the acts of a subsidiary (see *McCloud v Bettcher Indus., Inc.*, 90 AD3d 1680, 1681 [4th Dept

2011])). “[T]he existence of an agency upon which a finding of jurisdiction may be predicated may not be inferred from the mere existence of a parent-subsidary relationship” (*Insurance Co. of N. Am. v EMCOR Group, Inc.*, 9 AD3d 319, 320 [1st Dept 2004]; see *Frummer v Hilton Hotels Intl.*, 19 NY2d 533, 538 [1967]). Indeed, liability can never be predicated solely upon the fact that a parent corporation owns a controlling interest in the shares of its subsidiary (see *Billy v Consolidated Mach. Tool Corp.*, 51 NY2d 152, 163 [1980]; *McCloud v Bettcher Indus., Inc.*, 90 AD3d at 1681; *Lowendahl v Baltimore & O.R.C.*, 247 App Div 144, 155 [1st Dept 1936], *affd* 272 NY 360 [1936]). Even complete ownership of a subsidiary’s stock is insufficient, by itself, to pierce the corporate veil (see *Oxbow Calcining USA, Inc. v American Indus. Partners*, 96 AD3d 646, 649 [1st Dept 2014]).

To the extent that the plaintiffs allege that Wyndham is a franchisor, and Tryp is its franchisee, “the mere existence of a franchise relationship would not provide a basis for the imposition of vicarious liability against [Wyndham] for the negligence of the franchisee” (*Stern v Starwood Hotels & Resorts Worldwide, Inc.*, 149 AD3d 496, 497 [1st Dept 2017]). Nor have the plaintiffs raised a triable issue of fact in this regard by adducing evidence that, in choosing to book a room at the hotel, the decedent relied on representations made on Tryp by Wyndham’s website suggesting that Tryp by Wyndham was owned or operated by Wyndham (see *id.*), rather than having a simple commercial and branding affiliation, as Wyndham has with numerous other hotel brands such as La Quinta, Days Inn, or Travelodge.

In any event, liability for occurrences on private property must be predicated upon occupancy, ownership, control, or special use of the premises (see *Boehm v Barnaba*, 7 AD3d 911, 912 [3d Dept 2004]; *Balsam v Delma Eng’g Corp.*, 139 AD2d 292, 296 [1st Dept 1988]). The existence of one or more of these elements is necessary to give rise to a duty of care (see *Boehm v Barnaba*, 7 AD3d at 912). Inasmuch as the movants established, with Sharma’s deposition testimony, that Wyndham did not occupy, own, control, or have a special use of the

Tryp Hotel at any time relevant to this action, and the plaintiffs failed to raise a triable issue of fact in opposition to that showing, summary judgment must be awarded to Wyndham.

The movants also established, prima facie, through Sharma's deposition testimony, that Aldoy was not employed by Tryp until after the May 26, 2017 incident. In fact, although Aldoy received an employment offer from Tryp in May 2017, he did not begin his employment with Tryp until June 2017. In opposition to that showing, the plaintiffs failed to raise a triable issue of fact. Hence, he did not owe a duty of care to the plaintiffs or their decedent, and summary judgment as to Aldoy must be granted as well.

The movants also established, prima facie, that Tryp and Eros fulfilled their duty to the decedent. They demonstrated that hotel staff checked in on the decedent after the initial phone calls by the decedent's sister. After additional phone calls from the decedent's sister, members of the hotel staff called the police and physically went to the nearby police precinct station house to summon an officer to assist them. Furthermore, the movants' expert explained that the hotel staff acted reasonably under the circumstances by going to the decedent's room to speak to him. The plaintiffs, however, raised triable issues of fact as to whether Tryp and Eros breached their duty to the decedent. One who assumes a duty to act, even gratuitously, may become subject to the duty of acting carefully (*see Miglino v Bally Total Fitness of Greater NY, Inc.*, 92 AD3d 148, 159 [2d Dept 2011]; *Mirza v Metro. Life Ins. Co.*, 2 AD3d 808, 809 [2d Dept 2003]). Moreover, where a defendant voluntarily assumes a duty to care for or control a potentially suicidal person, but negligently carries out that duty by failing to monitor that person in a proper fashion, triable issues of fact are presented (*see Ferrer v Riverbay Corp.*, 214 AD2d 312, 312 [1st Dept 1995]). Additionally, even if a "defendant could not anticipate the precise manner of the accident or the exact extent of the injuries, [that] does not preclude liability as a matter of law where the general risk and character of injuries are foreseeable" (*id.*; *see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 316-317 [1980]).

In *Ferrer*, private security guards employed by a large cooperative apartment complex learned that a 12-year-old girl had just been sexually assaulted at the complex by a group of older boys. The guards isolated her from the rest of her friends, and placed her in a friend's 26th-floor apartment, but refused to allow her to call her mother, and verbally abused her until she agreed to press charges against her assailants. Shortly thereafter, the girl was left unattended, and she then climbed over a window balcony, let go, and fell to her death. The Appellate Division, First Department, concluded that there were triable issues of fact as to whether the cooperative corporation voluntarily assumed a duty to care for or control the decedent, but negligently carried out that duty. The Court further held that, under the circumstances presented, it was for the jury to decide whether it was foreseeable that the girl would harm herself or commit suicide.

Here, there is no dispute that Tryp was placed on notice of the decedent's suicidal tendencies, and assumed a duty to monitor the decedent's behavior and take all reasonable steps to prevent him from harming himself, including calling the police. Moreover, all three of the plaintiffs' experts opined that the delay in contacting the police was not only unreasonable, but diminished the opportunity to prevent the decedent's suicide. The plaintiffs have thus raised a triable issue of fact as to whether Tryp did not act with due care when it assumed the duty to check in on the decedent, and later to call the police. The court notes that, while Tryp's employees in fact did call the police, the plaintiffs raised triable issues of fact as to whether the police were called within a reasonable period of time. The plaintiffs' experts explained that the police were not called for 25 minutes after the 7:12 p.m. call to the hotel expressing concern over a "goodbye" text, and, as such, it is for a jury to determine whether this delay constituted negligence that significantly contributed to the decedent's suicide. Summary judgment must thus be denied to Tryp.

An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a “duty imposed by statute or assumed by contract or a course of conduct” (*Crosby v Southport, LLC*, 169 AD3d 637, 639 [2d Dept 2019]; see *Casson v McConnell*, 148 AD3d 863, 864 [2d Dept 2017]; *Pozarski v Brooklyn Bridge Park Corp.*, 2019 NY Slip Op 51191[U], 64 Misc 3d 1217[A] [Sup Ct, Kings County, Jul. 16, 2019]). Despite Eros’s contention that it was an out-of-possession landlord, it failed to establish its prima facie entitlement to judgment as a matter of law on that ground.

In support of its argument, Eros provided the court with a copy of a 2008 deed tendered to it in its capacity as grantee/buyer by Pioneer Management and Realty, LLC, as grantor/seller. Eros also provided the transcript of the deposition testimony of its employee, Sharma, in which she testified that she was a quasi-employee and a partner of Eros. She further averred that Eros did not have any employees, and that it did not manage or operate the hotel. This alone, however, does not establish that Eros relinquished possession and control over the premises (*Mehl v Fleisher*, 234 AD2d 274, 274 [2d Dept 1996]). Eros did not submit a copy of a lease or the management agreement that it claims to have entered into with Tryp so as definitively to establish that it, in fact, was an out-of-possession landlord or did not assume any contractual duty. Moreover, Sharma testified that Eros met quarterly with her to discuss physical improvements in the hotel, and to go through an analysis of the management company and its performance. This testimony undercuts Eros’s contention that it did not have a presence at or control of the premises, or assume a duty to exercise control over the operation of the hotel by virtue of a course of conduct (*cf. Zhang v ABC Corp.*, 2018 NY Slip Op 50598[U], 59 Misc 3d 1217[A] [Sup Ct, Queens County, Apr. 20, 2018] [unrebutted documentary evidence and deposition testimony established that defendant was out-of-possession landlord]). The testimony reflects the existence of triable issues of fact in this regard. Thus, summary judgment must be denied to Eros, regardless of the sufficiency of the plaintiffs’ opposition papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

Accordingly, it is

ORDERED that the motion of the defendants Eros Management Realty, LLC, Wyndham Hotel Management, Inc., Christian Aldoy, and Tryp Management, Inc., is granted to the extent that summary judgment is awarded to the defendants Wyndham Hotel Management, Inc., and Christian Aldoy dismissing the complaint insofar as asserted against them, the complaint is dismissed insofar as asserted against the defendants Wyndham Hotel Management, Inc., and Christian Aldoy, and the motion is otherwise denied; and it is further,

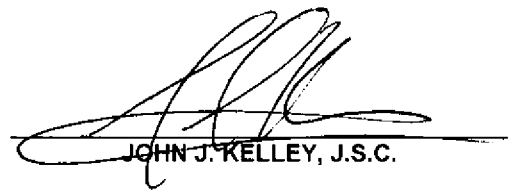
ORDERED that the action is severed as against the defendants Wyndham Hotel Management, Inc., and Christian Aldoy; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendants Wyndham Hotel Management, Inc., and Christian Aldoy.

This constitutes the Decision and Order of the court.

7/12/2022

DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: