

Claiborne v HHSC 13th St. Dev. Corp.

2016 NY Slip Op 32408(U)

December 6, 2016

Supreme Court, New York County

Docket Number: 157088/13

Judge: Geoffrey D. Wright

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

-----X
JOHN CLAIBORNE and JOHN CLAIBORNE, JR.,

Plaintiff,

-against-

Index No.: 157088/13

HHSC 13TH STREET DEVELOPMENT CORP.,
13TH STREET ASSOCIATES, L.P., GENESIS
FUNDING, INC., GENESIS RFK APARTMENTS,
H.E.L.P. USA, INC., H.E.L.P. USA LLC and "JOHN
DOE CORPORATION" Actual name of the security
company unknown,

DECISION AND ORDER

Defendants.

Present:

Hon. Geoffrey D. Wright

-----x Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the
review of this Motion/Order for summary judgment.

PAPERS

NUMBERED

Notice of Motion and Affidavits Annexed.....	___ 1, ___
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	___ 2 ___
Replying Affidavits.....	___ 3 ___
Exhibits.....	_____
Memorandum.....	_____
Cross-motion	_____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendants, HHSC 13th Street Development Corporation, ("HHSC") 13th Street Associates, L.P., ("13th Street") Genesis Funding Inc., ("Genesis Funding") Genesis RFK Apartments, ("Genesis RFK") H.E.L.P. USA, INC., ("HELP USA") and H.E.L.P. USA LLC., ("HELP LLC") (collectively "Defendants") move for an Order pursuant to CPLR 3212 granting summary judgment on the issue of liability and dismissing Plaintiff's complaint against them.

This is an action for personal injuries sustained by father and son Plaintiffs, John Claiborne, ("Claiborne") and John Claiborne Jr., ("Claiborne Jr.,") (Collectively "Plaintiffs")

during a physical altercation at the premises located at 113 East 13th Street, in the County of New York (“The Premises”). Plaintiff’s claim that the assault was the result of the negligence of Defendants ownership, control management and supervision of the property.

On August 7, 2010, Lydia Caraballo hosted a birthday party for her sister, Diane Claiborne in the community center located in the basement of the building. Diane Claiborne is the spouse of Claiborne and the mother of Claiborne, Jr. At some point during the festivities, a physical altercation ensued between Claiborne Jr., and several men resulting in Claiborne Jr., being punched in the face and knocked unconscious. As this was occurring, Claiborne was alerted that his son, Claiborne Jr., was in a physical altercation. When he went to investigate he saw Claiborne Jr., being beaten by several men. As he attempted to intervene he was cut with a box cutter by Marquis Underwood, a tenant of the premises. Once the altercation stopped, Claiborne attempted to go back into the lobby and was shot in the index finger by Terry Hoyle another tenant of the premises. In addition, Claiborne observed Felix Rivera also a tenant, with a gun. Both Underwood and Hoyle were arrested on the night of the assault.

During his EBT, Jose Valentin, (“Valentin”) the Director of Operations at the premises testified that he has been employed by Help USA since 1996 and had served in his current position since 2000. He testified that he was responsible for overseeing the maintenance and security department of the premises. In August 2010, security consisted of either a one-person or two-person crew which would monitor the front desk, do patrols and make sure that guests or delivery persons would sign-in and be announced. The security staff was not armed, was employed by HELP USA and was present at the premises on the date of the incident. He testified that the front entrance of the building has two main doors with a vestibule in the middle and security desk located within the vestibule. A security guard was posted at the front desk to monitor people entering and exiting the building and guests entering the building would have to sign in with the security guard. He further testified that if a two-person security crew was working, one guard would be stationed at the front desk and the second would patrol the building to ensure no one was loitering in the hallways or stairwells and report any damages or building problems. Security guards are directed to report any incidents to 911 and were not expected to deal with any incidents personally. Further, Valentin testified that prior to that incident, there

were no prior incidents involving either tenant, no prior incidents involving firearms, no prior incidents involving a knife or fights in the courtyard. There was one prior incident on a sidewalk of the same block at the building which a tenant was involved in an altercation with an individual who discharged a firearm.

In the motion the Defendants argue that on the date of the incident, the title owner of the premises was HHSC and that Genesis RFK Apartments is not a legal entity but the d/b/a name of the premises and further, Genesis Funding Inc., had no association with the premises and did not own, operate, control, manage or maintain the premises. Moreover they allege that HELP LLC had no connection to the property and did not own, operate, control, manage, maintain or provide any security services at the premises. The premises is operated by Defendant, 13th Street and HELP USA employed the security personnel which worked at the premises.

Further, Defendants argue that HHSC is an out of possession landlord and has no liability to Plaintiffs for the assault as it did not maintain control over the premises or contract to provide services. They further argue that 13th Street had no liability because they had no duty to prevent third-party tenants from injuring Plaintiffs as they did not have the authority, ability, or opportunity to control the conduct of such third-parties. They argue that Genesis Funding and Help LLC have no liability because they have no connection to the property and Genesis RFK is not a legal entity buy only the d/b/a name used by 13th Street for the name of the premises. With respect to HELP USA, the employer of the security guards, they argue that Plaintiffs fail to counter the argument that Plaintiff's were a third-party beneficiary under the security agreement and as such, HELP USA cannot be held liable for the assault. [The defendant security guard company did not assume a special duty of care to plaintiffs and the imposition of liability against it would contravene sound public policy governing the orbit of duty owed to non-contracting parties] (Eaves Brooks Costume Co. v Y.B.H. Realty Corp., 76 NY2d 220). The contend that the security personnel were not armed and were only required to call 911, which was done.

Plaintiffs oppose the motion on the grounds that the motion is premature as discovery is

not complete and on the grounds that triable issues of fact exists as to whether Defendants took minimal efforts to protect the Plaintiffs from the assaults. Specifically, Plaintiffs argue Ray Ocasio, (“Ocasio”) the security guard who was assigned to the security booth on the night of the incident, did not “immediately” call 911 upon learning about the incident. Instead, they argue that rather than observe the incident on the monitors in the security booth, he chose to leave the booth and proceed to the rear courtyard to observe the incident in the rear of the courtyard, then call 911. They argue that he should have immediately called 911 and that he failed to take measures to stop the assault.

DISCUSSION

Summary Judgment Standard

“Since summary judgment is the equivalent of a trial . . .” (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]), and is a “drastic remedy” (*Kebbeh v City of New York*, 113 AD3d 512, 512 [1st Dept 2014]), the proponent of a summary judgment motion

“is required to demonstrate that there are no material issues of fact in dispute and that he is entitled to judgment and dismissal as a matter of law. Only when this burden is met, is the opposing party required to submit proof in admissible form sufficient to create a question of fact requiring a trial [internal citations omitted]”

(*Pokoik v Pokoik*, 115 AD3d 428, 428 [1st Dept 2014]). “In deciding the motion, the court will draw all reasonable inferences in favor of the nonmoving party. If the moving party fails to make a prima facie showing of entitlement to summary judgment, [however,] its motion must be denied [internal citations omitted]” (*Fayolle v East W. Manhattan Portfolio L.P.*, 108 AD3d 476, 478-479 [1st Dept 2013]). However, “[o]nce this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact” (*Melendez v Parkchester Med. Servs., P.C.*, 76 AD3d 927, 927 [1st Dept 2010]). “The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues . . .” (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010]).

It has also been held uniformly that control is the test which measures generally the

responsibility in tort of the owner of real property. This principle recognizes that the person in possession and control of property is best able to identify and prevent any harm to others. *Butler v. Rafferty*, 100 N.Y.2d 265, 270 (N.Y. 2003) citing *Ritto v Goldberg* (27 N.Y.2d 887, 889, 317 N.Y.S.2d 361, 265 N.E.2d 772 [1970]).

In order to establish a prima facie case of negligence, a plaintiff is required to establish that the defendant as the landlord owed a duty to the plaintiff and that the defendant breached that duty causing the plaintiff to suffer injuries as a result. (*Solomon v City of New York*, 66 NY2d 1026, 1027). It is also well established that a landlord has a duty to exercise reasonable care to maintain his property in safe condition (*Kush v City of Buffalo*, 59 NY2d 26, 29-30; *Basso v Miller*, 40 NY2d 233) and that one aspect of this duty obligates a landlord to take minimal precautions to protect those upon the premises from the criminal acts of third parties (*Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507 (N.Y. 1980); *Miller v State of New York*, 62 NY2d 506, 513; *Iannelli v Powers*, 114 AD2d 157, 161, *lv denied* 68 NY2d 604).

It is equally well established that a landlord is not an insurer and, accordingly, that a landlord's duty to offer protection against criminality on his or her premises arises only when the risk of such criminality is foreseeable (*Nallan v Helmsley-Spear, Inc.*, supra, at 519). Foreseeability in this context has generally been equated with the degree to which a landlord has been apprised of the incidence of criminality within a particular building under his or her proprietorship (supra). Thus, where "there is little evidence of criminal activity in the building, there are insufficient facts to base a finding of foreseeability" (*Camacho v Edelman*, 176 AD2d 453, 454, citing *Iannelli v Powers*, supra). It is only insofar as ambient crime has demonstrably infiltrated a landlord's premises or insofar as the landlord is otherwise on notice of a serious risk of such infiltration that his duty to provide protection against the acts of criminal intruders may be said to arise. (*Todorovich v. Columbia Univ.*, 245 A.D.2d 45 (N.Y. App. Div. 1st Dep't 1997)).

At the time of the incident, 13th Street operated the premises and HELP USA provided the security personnel. The incident occurred between tenants and guests that were attending a birthday celebration. As previously discussed, Jose Valentin testified there was no history of criminal activity on the premises and Plaintiffs have not produced evidence to the contrary.

Hence, 13th Street did not have a duty to take protective measures. [Dismissal of the complaint alleging that defendants' failure to provide proper security in the building proximately caused the decedent's injuries was proper since "a landlord is under no duty to safeguard a tenant against attack by another tenant 'since it cannot be said that the landlord had the ability or a reasonable opportunity to control [the assailant]]' " (*Wright v New York City Hous. Auth.*, 208 AD2d 327, 331, 624 NYS2d 144 [1995], quoting *Blatt v New York City Hous. Auth.*, 123 AD2d 591, 592, 506 NYS2d 877 [1986], lv denied 69 NY2d 603, 504 NE2d 396, 512 NYS2d 1026 [1987]; *Britt v New York City Hous. Auth.*, 3 AD3d 514, 770 NYS2d 744 [2004], lv denied 2 NY3d 705, 812 NE2d 1261, 780 NYS2d 311 [2004]).

In the instant case, Plaintiffs have failed to rebut the specific arguments put forth by the Defendants. For an example, Plaintiff's fail to address the argument that HHSC is an out of possession landlord which did not maintain control over the premises, that HELP LLC and Genesis Funding have no liability because they have no connection to the premises or that Genesis RFK is not a legal entity but only the d/b/a name of the premises. Moreover, while it true that 13th Street held the equitable title and operated the premises, Plaintiffs have failed to refute the argument that 13th Street as operator of the premises owed no duty to safeguard the Plaintiffs or that there was no special relationship between 13th Street and the assailants other than landlord and tenant. In addition, Plaintiffs do little to rebut the claims that the premises were not the scene of recurrent criminal activity prior to the claimed assault.

With respect to HELP USA, the employer of the security guards, Plaintiffs have failed to counter the argument that Plaintiff's were a third-party beneficiary under the security agreement and as such, HELP USA cannot be held liable for the assault. [The defendant security guard company did not assume a special duty of care to plaintiffs and the imposition of liability against it would contravene sound public policy governing the orbit of duty owed to non-contracting parties] (*Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220 [N.Y. 1990]).

Accordingly, it is

ORDERED that Defendants motion which seeks summary judgment on the issue of liability is granted; and the complaint is dismissed in its entirety as against said defendants, and

the Clerk is directed to enter judgment accordingly in favor of said defendants;

This constitutes the Decision and Order of the Court.

Dated: December 6, 2016


GEOFFREY D. WRIGHT
AJSC

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court