Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PETER J. O'DONOGHUE IA Part 5
Justice

ANA-LUCIA GARTU, et al.	Index Number 14276 1998
- against -	Motion Date November 9, 2004
SYLVEEN REALTY, L.L.C.	Motion Cal. Number 10

The following papers numbered 1 to 9 were read on this motion by the defendant, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-7
Reply Affidavits	8-9

Upon the foregoing papers it is ordered that the motion is determined as follows:

I. The Relevant Facts

The plaintiff Ana-Lucia Gartu (Gartu), and her husband, derivatively, commenced this action seeking to recover damages for personal injuries Gartu sustained on February 17, 1998, at 3:30 p.m., when she was assaulted by an unknown assailant in the basement of the residential building where she lived (premises). The premises was owned by the defendant Sylveen Realty, LLC (Sylveen). Gartu seeks damages based upon Sylveen's negligent failure to maintain the premises in a safe and guarded condition, and its actual or constructive notice of a dangerous condition.

During her examination before trial (EBT), Gartu stated that the premises had six floors, one automatic elevator, and a basement where a laundry room and space for recycling materials were located. The automatic elevator provided access to the basement during the day, but not at night. She lived on the second floor of the premises.

The premises had a main entrance consisting of an outer door which was open, and an inner door which could be opened only by key or through the intercom system. To access the basement from the outside, one had to go through a metal gate on 41st Street which was usually chained shut. From that gate was a path to a metal door which opened to a basement hall. The metal door leading to the basement hall was usually open or ajar. On 47th Avenue, there was another metal gate with bars which was also kept locked, and a path to a concrete yard with steps leading down to the same metal door. She had never entered the basement from outside. On more than 10 prior occasions, she observed that the metal door in the basement was kept open or ajar, but she never complained to the superintendent.

On the day of the assault, she had just returned from grocery shopping and, after entering the premises through the front door, she pressed the elevator button. Once inside the elevator, she pushed the button for the second floor, but the elevator descended to the basement. When the second elevator door opened there was a man wearing a mask who demanded her money and hit her in the left and right eyes and her face. After she fell to the ground, the man jumped on her but then got up and left. She believed that about a month or two prior to her assault, a neighbor on the second floor, Mrs. Corn, was assaulted in or near the elevator in the lobby.

During his EBT, the superintendent of the premises stated that since 1987 he resided and worked at the premises. He also had another job during the daytime. He was responsible for maintenance, not security. A property management company hired people to fix door locks, the intercom or entrances to the premises. About once a week, the property manager inspected the premises.

One had to use the elevator to access the basement from inside the premises, but the elevator did not provide basement access between the hours of 10:00 p.m. to 6:00 or 7:00 a.m. Locks to the front door were changed whenever they were in disrepair. The intercom system was fixed about five times prior to Gartu’s incident. He was only aware of the incident involving Mrs. Corn through the tenants, as Mrs. Corn never reported it to him; as a result, he did not report it to Sylveen. He was unaware of any other incidents. He did report Gartu’s incident to the property manager.

On the day of Gartu’s assault, he accompanied the police to the basement and saw the basement door ajar and open, but the gate leading to the street was closed. Only he had a key to open the basement door from the outside. Prior to Gartu’s assault, the basement door was always kept open or ajar during the daytime.

Whenever he saw that door ajar, he locked it, and he also locked it before shutting off elevator access to the basement at 10:00 p.m. Prior to Gartu's assault, he did not receive complaints about the basement door, someone getting into or out of the building through that door, or about other break-ins at the premises.

During his EBT, a representative of the property management company stated that he received and responded to tenant complaints for repairs and other items. He did not recall receiving complaints concerning a robbery or break-in at the premises prior to Gartu's incident; however, he had not searched the records to determine whether such complaints existed. Generally, he visited the premises once a week to meet with tenants who had complaints, with the superintendent, and to inspect the premises.

The property management company was responsible for securing locks on doors, windows and gates and for maintaining the intercom system at the premises. He was unaware of any incident concerning Mrs. Corn or other tenants.

II. Motion

Sylveen moves for summary judgment dismissing the complaint, contending that there is no evidence that it was negligent or proximately caused the criminal assault.

Gartu opposes the motion, contending that: (1) this action is stayed as a result of the liquidation of Legion Insurance Company (Legion) which insured Sylveen; (2) it never received a signed substitution of attorney form or order substituting the law firm of O'Leary & O'Leary as attorneys for Sylveen; and, (3) there are issues of fact for trial relating to the security measures provided by Sylveen, and its constructive notice of a dangerous condition as a result of the basement door remaining open during the daytime, and the prior assault on Mrs. Corn.

Sylveen responds that the testimony concerning Mrs. Corn is inadmissible hearsay, and the metal gates securing the courtyard leading to the basement door were locked.

III. Decision

A letter dated September 2, 2004, from the New York Liquidation Bureau to the law firm of O'Leary & O'Leary (law firm), was filed with this court on September 24, 2004. That letter advised the law firm that it had been retained as counsel to defend this action. Thus, any stay of this action due to Legion's receivership has been lifted, and the Superintendent of Insurance has consented to the law firm's defense of Sylveen.

Contrary to Gartu's claim, this court can consider Sylveen's motion and direct the law firm to formally comply with CPLR 321[b], as Gartu has failed to demonstrate any prejudice (see EIFS, Inc. v Morie Co., Inc., 298 AD3d 548 [2002]; Diamandopolis v Balfour, 152 AD2d 532 [1989]; cf. Cippitelli v County of Schenectady, 284 AD2d 823 [2001], lv denied 97 NY2d 606 [2001]).

Sylveen has a duty to take minimal precautions to protect its tenants from foreseeable danger from criminal acts when past experience alerts it to the likelihood of criminal conduct on the part of third persons (see Mason v U.E.S.S. Leasing Corp., 96 NY2d 875 [2001]; Johnson v City of New York, 7 AD3d 577 [2004], lv denied __ NY3d __, 2004 NY LEXIS 3879 [12/21/04]). Where a plaintiff relies on prior criminal acts to establish the element of foreseeability, the plaintiff must present proof that the criminal conduct at issue was reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location (see Mason v U.E.S.S. Leasing Corp., supra; Johnson v City of New York, supra).

In a negligent security case, a plaintiff must raise triable issues of fact concerning whether it was more likely or more reasonable than not that the assailant was an intruder who gained access to the premises through a negligently maintained entrance (see Torres v New York City Hous. Auth., 93 NY2d 828 [1999]; Burgos v Aqueduct Realty Corp., 92 NY2d 544, 551 [1998]; Raghu v 24 Realty Co., 7 AD3d 455 [2004]).

Here, there was no admissible evidence of prior similar criminal activity which made the crime at issue reasonably predictable (see Johnson v City of New York, supra). Nonetheless, in view of the evidence that the basement door was regularly left unlocked and ajar during the daytime hours, that the superintendent had another job during daytime hours, and that Gartu was assaulted at 3:30 p.m., there are triable issues of fact concerning whether it was more likely or more reasonable than not that Gartu's assailant was an intruder who gained access to the premises through a negligently maintained basement entrance (cf. Raghu v 24 Realty Co., supra).

Accordingly, Sylveen's motion for summary judgment is denied.

The law firm is directed to comply with CPLR 321(b)(1).

Dated: January 27, 2005

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J.S.C.