

Karim v 89th Jamaica Realty Co., L.P.
2012 NY Slip Op 31735(U)
June 5, 2012
Sup Ct, Queens County
Docket Number: 29293/10
Judge: Janice A. Taylor
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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MOHAMMED A. KARIM, Index No.:29293/10
Plaintiff(s), Motion Date:4/3/12
- against - Motion Cal. No.: 18
Motion Seq. No: 3

89TH JAMAICA REALTY COMPANY, L.P.,
CAMBRIDGE SECURITY SERVICES CORP.
and MILTON BURNS,
Defendant(s).

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89TH JAMAICA REALTY COMPANY, L.P., Index No.:350142/11
Third-Party Plaintiff(s), Third-Party

- against -

FANCY CHOICE CORP.,

Third-Party Defendant(s).

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The following papers numbered 1 - 15 read on this motion by defendants Cambridge Security Services Corp and Milton Burke s/h/a Milton Burns for summary judgment; and a cross-motion by defendant/third-party plaintiff 89th Jamaica Realty Company, L.P. for an order granting summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Memorandum of Law.....	5
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Affirmation in Opposition-Exhibits-Service.....	9 - 11
Reply Affirmation-Service.....	12 - 13
Reply Affirmation-Service.....	14 - 15

Upon the foregoing papers it is **ORDERED** that the motion and cross-motion are considered together and decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff on January 22, 2009 when he was allegedly assaulted at the premises located at 89-09 165th Street, Jamaica, New York. This action was commenced on November 22, 2010 by the filing of a summons and complaint. On or about March 18, 2011, 89th Jamaica Realty Company, L.P. ("89th Jamaica") commenced a third-party action against Fancy Choice Corp. ("Fancy Choice"). Plaintiff filed his Note of Issue on November 9, 2011.

Defendants Cambridge Security Services Corp. ("Cambridge") and Milton Burke s/h/a Milton Burns ("Burke") now move, pursuant to CPLR §3212, for an order granting summary judgment and dismissal of the complaint against them. It is well-settled that the 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 (See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]). Failure to make such a showing requires denial of the motion.

CPLR §3212(b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law that the cause of action or defense has no merit. The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant (see, *Grivas v. Grivas*, 113 A.D.2d 264, 269 [2d Dept. 1985]; *Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68 [4th Dept. 1980]; *Parvi v. Kingston*, 41 N.Y.2d 553, 557 [1977]).

In support of the instant motion, defendants Cambridge and Burke submit, *inter alia*, the pleadings, the third-party pleadings, the Verified Bill of Particulars, the filed Note of Issue and the deposition transcripts of plaintiff, defendant Burke and defendant/third-party plaintiff 89th Jamaica by its Managing Member Lawrence Kramer and an unexecuted copy of the agreement between it and defendant/third-party plaintiff 89th Jamaica.

According to the complaint, plaintiff and defendant/third-party plaintiff 89th Jamaica are both owners of stores located at the subject premises and defendant Burke was employed as a security guard by defendant Cambridge. It is undisputed that plaintiff was injured inside of his store by a non-party assailant. Defendant Cambridge asserts that it was hired by defendant/third-party plaintiff 89th Jamaica to provide security services only for the waiting areas outside of the respective stores and was directed not to enter plaintiff's actual store. Thus, the movants assert that they owed no duty to protect the plaintiff. Defendants also assert that even if they had such a duty, summary judgment is still warranted because their alleged negligence was not the proximate cause of plaintiff's injuries.

It is well-settled that a security company owes no common-law duty to protect the public from a third-party. Moreover, an injured party, who is not a party to a contract, may not recover as a third-party beneficiary for failure to perform a duty imposed by a private security company absent a contractual provision clearly indicating that the parties intended to confer a direct benefit on the third-party to protect him/her from injury (*Buckley v. I.B.I. Security Service Inc. et al.*, 157 AD2d 645 [2nd Dept. 1990]; *Murshed v. New York Hotel Trades Council*, 71 AD3d 578 [1st Dept. 2010]; *Anokye v. 240 East 175th Street Housing Development Fund Corporation*, 16 AD3d 287 [1st Dept. 2005]). The fact that a non-party would benefit from the enforcement of a contract does not mean that the non-party is an intended third-party beneficiary. (See, generally, *Board of Managers of Riverview Condominiums, et al v. Schorr Brothers Development Corp., et al*, 182 AD2d 664 [2d Dept. 1992]; *Amin Realty v. K & R Construction Corp., et al*, 306 AD2d 230 [2d Dept. 2003]).

Defendants Cambridge and Burke assert that, as plaintiff is not an intended third-party beneficiary to the contract between it and defendant/third-party plaintiff 89th Jamaica, they had no contractual duty to the plaintiff. However, as the copy of the contract submitted by the movants is not executed and does not contain the signature of a representative of either defendant Cambridge or defendant/third-party plaintiff 89th Jamaica, it is a legal nullity and cannot be used to demonstrate the contractual obligations of the parties. Accordingly, that portion of the instant motion which seeks summary judgment and dismissal of the complaint due to the movant's assertion that it does not have a duty to protect the plaintiff is denied with leave to renew upon submission of a copy of the fully executed contract.

Defendants also assert that summary judgment is warranted because any alleged negligence on their part was not the proximate cause of plaintiff's injuries. In his deposition, plaintiff testified that, on the date of the accident, he first heard a disturbance occurring outside of his store, that his son went outside to investigate and got into an altercation with a man outside in the waiting area. Plaintiff also testified that the man entered the store and assaulted the plaintiff with his fists and a hammer. Plaintiff further testified that, once the police arrived, he realized that the front door to the store had been locked. Finally, plaintiff admitted that, although he did not see his son lock the door, it could only be locked with keys and that his son had the door keys.

The moving defendants assert that the fact that plaintiff's son locked the door to their store with the assailant inside, prevented emergency assistance from reaching the plaintiff. Thus, the movants assert that, even if they had a duty to protect plaintiff, they would have been prevented from entering the store.

To establish proximate cause, it must be demonstrated that defendants' negligent conduct was a substantial factor in causing plaintiff's injury (See, *Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308 [1980]). In the context of a motion for summary judgment, defendants are entitled to summary judgment based upon the absence of proximate causation only when it is sufficiently demonstrated that the plaintiff cannot establish the cause of his injuries or when the defendants prove that their conduct, even if negligent, did not cause plaintiff's injuries (See, *Cangro v. Noah Builders. Inc.*, 52 A.D.3d 758 [2d Dept. 2008]; *Pluhar v. Town of Southampton*, 29 A.D.3d 975[2d Dept. 2006]).

In the instant action, defendants assert the lack of proximate cause due to the act of locking the door to plaintiff's store, an intervening act by plaintiff's son which broke the chain of causation for plaintiff's injuries. In *Derdiarian*, the New York Court of Appeals held that if the intervening act "is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus" (*Derdiarian, supra* at 314). The court also held that a determination of the issues of proximate cause and foreseeability are generally a task for the finder of fact (*Derdiarian, supra*).

In opposition to the motion, plaintiff asserts that, the fact that the door was locked was not an intervening act because defendants Cambridge and Burke's duty to protect him began in the waiting area at the beginning of the altercation. Thus, plaintiff avers, if the defendants had not acted negligently and stopped the altercation in the waiting area, the assailant would not have entered plaintiff's store and assaulted him.

The court's function, when presented with a summary judgment motion, is not to determine credibility or engage in issue determination, but rather to determine whether there are material issues of fact for the court to determine (See, *Quinn v. Krumland*, 179 AD2d 448 [1st Dept. 1992]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant, as a matter of law (See, *Friends of Animals, Inc., v. Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Orwell Bldg. Corp. v. Bessaha*, 5 A.D.3d 573 [2d Dept. 2003]). In the instant action, the movants have failed to prove that no material issues exist as to whether their alleged negligence was a proximate cause of the plaintiff's injuries. Accordingly, that portion of the instant motion which seeks summary judgment on the grounds that any alleged negligence on their part was not the proximate cause of plaintiff's injuries is denied.

The cross-motion submitted by defendant/third-party defendant 89th Jamaica Realty Corp. is denied. Pursuant to CPLR §2215, a

cross-motion can only be made against a moving party. The instant cross-motion seeks dismissal of the plaintiff's complaint. However, it is defendants Cambridge and Burke who are the movants. Accordingly, the cross-motion is denied in its entirety.

Dated: June 5, 2012

JANICE A. TAYLOR, J.S.C.

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