**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**
**IN AND FOR NEW CASTLE COUNTY**

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| JAMAL R. REESE, | ) | |
| Plaintiff, | ) | |
| v. | ) | C.A. No. N10C-12-111 ALR |
| CHERYL HOLLINGSWORTH, | ) | JURY TRIAL DEMANDED |
| HAFEEZ O. FATUNMBI and, | ) | |
| THUNDERGUARDS MOTOR CYCLE | ) | |
| CLUB, INC. a/k/a | ) | |
| WESTSIDE THUNDERGUARDS CLUB, | ) | |
| Defendants. | ) | |
| and | ) | |
| HAFEEZ O. FATUNMBI, | ) | |
| Defendant/Third-Party Plaintiff, | ) | |
| v. | ) | |
| JERMAINE GRANT and | ) | |
| KEVIN ALLEN, | ) | |
| Third-Party Defendants. | ) | |

Submitted: October 16, 2013
Decided: October 17, 2013

**On Defendant Hafeez O. Fatunmbi's Motion for Summary Judgment**
**DENIED WITHOUT PREJUDICE in part; DENIED WITH PREJUDICE in part**

**On Defendant Thunderguards Motor Cycle Club, Inc.'s Motion for Summary Judgment**
**DENIED**

**MEMORANDUM OPINION**

Gary S. Nitsche, Esquire, Nicholas M. Krayer, Esquire, Samuel D. Pratcher, III, Esquire (argued), WEIK, NITSCHE & DOUGHERTY, Attorneys for Plaintiff

George E. Evans, Esquire (argued), Attorney for Defendant Thunderguards Motor Cycle Club, Inc.

Josiah R. Wolcott, Esquire (argued), CONNOLLY GALLAGHER LLP, Robert L. Ciociola, Esquire LITCHFIELD CAVO LLP, Attorneys for Defendant/Third-Party Plaintiff Hafeez O. Fatunmbi

Theopalis K. Gregory, Esquire, THE LAW FIRM OF THEOPALIS K. GREGORY, SR., ESQUIRE, Attorney for Defendant Cheryl Hollingsworth and Third-Party Defendant Kevin Allen

**Rocanelli, J.**

This lawsuit arises out of an incident where Plaintiff Jamal R. Reese was shot in the eye while providing security for a party being held at Defendant Hafeez O. Fatunmbi's property. Defendant Jermaine Grant had signed a one-day "Commercial Rent/Lease Agreement" with Defendant Fatunmbi. When he was shot, Plaintiff Reese was providing security at the party. Plaintiff Reese alleges that his responsibilities for security at the party were assigned to him by his motorcycle club, Westside Thunderguards Club. Plaintiff Reese also alleges that Westside Thunderguards Club is a chapter of Defendant Thunderguards' Motor Cycle Club, Inc.

Defendant Fatunmbi has filed a motion for summary judgment, which is opposed by Plaintiff Reese. Defendant Thunderguards' Motor Cycle Club, Inc. has filed a motion for summary judgment, which is opposed by Plaintiff Reese. After written submission by the parties, the Court heard oral argument. This is the Court's decision on both pending motions for summary judgment.

**Standard of Review for Summary Judgment**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[1] Summary judgment can only be granted when there is no material issue of fact. The moving party bears the initial burden of showing that no material issue of fact is present.[2] If the moving party is able to meet this burden, it then shifts to the non-moving party to demonstrate a material issue of fact.[3] If the non-moving party can show that an issue of material fact is disputed, summary judgment will not

[1] Super. Ct. Civ. R. 56(c).
[2] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[3] *Id.* at 681.

be granted.[4] In considering a motion for summary judgment, the Court must view the record in a light most favorable to the nonmoving party.[5]

**Defendant Fatunmbi's Motion for Summary Judgment**

**1. Duty Owed by Defendant Fatunmbi to Plaintiff Reese**

Defendant Fatunmbi contends that he is entitled to summary judgment because Defendant Fatunmbi owed no duty to Plaintiff Reese. According to Defendant Fatunmbi, "[t]his case is about providing security for the security." Defendant Fatunmbi relies upon the decision of *Vorous v. Cochran*, issued by this Court in 1969.[6]

The *Vorous* Court granted summary judgment for the defendant landowner against the plaintiff tree surgeon who was injured when removing a tree from the property.[7] The Court ruled that "[b]y virtue of his undertaking to remove the defective branches, plaintiff with adequate notice of the defective condition assumed the risk of harm inherent in his undertaking to 'trim and top' the trees and is precluded from a recovery as a matter of law."[8] Defendant Fatunmbi relies upon this case for that proposition that Defendant Fatunmbi did not have a legal duty to provide security for the very persons who were retained to provide security for the party.

Plaintiff Reese contends that whether or not Defendant Fatunmbi met the standard of care for a property owner is an issue of fact that must be submitted to a jury. Although the cases cited by Plaintiff Reese concern the duty of the landowner or business owner to business invitees such as patrons or guests, Plaintiff Reese relies upon an expert who opines that Defendant Fatunmbi

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[4] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).
[5] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[6] 249 A. 2d 746 (Del. Super. 1969).
[7] *Id.* at 747.
[8] *Id.*

should have provided professional security. Based on the record now before the Court, Defendant Fatunmbi is not entitled to summary judgment at this time.

**2. Foreseeability of Plaintiff Reese's Injuries**

Defendant Fatunmbi contends that he is entitled to summary judgment as a matter of law because Plaintiff Reese will be unable to offer any proof at trial that the incident was foreseeable. Plaintiff Reese counters that the question of whether not incident was foreseeable is a question to be submitted to the jury and not an issue to be decided by the Court on summary judgment. The Delaware Supreme Court has consistently held that questions of foreseeability should be submitted to the jury.[9] Therefore, Defendant Fatunmbi is not entitled to summary judgment on the issue of foreseeability.

**3. Timing of Defendant Fatunmbi's Submission of an Expert Report**

Defendant Fatunmbi submits that Plaintiff Reese had not identified an expert witness by the deadline understood by the parties to be the discovery deadline. However, there has been some confusion regarding deadlines set by the Court in this case. Although the parties submitted a stipulation to the Court requesting a discovery deadline of December 31, 2012, the Revised Scheduling Order issued by the Court on December 6, 2012 identified a discovery deadline of December 31, 2013. Although this may have been a clerical error, no party requested a correction and counsel for Plaintiff Reese reasonably relied upon the deadlines as calendared according to the Court's order.[10] Moreover, when this case was reassigned to this judicial officer, the parties were offered the opportunity to supplement the pending motions for summary

[9] *Rogers v. Del. State Univ.*, 2006 WL 2085460, at *2 (Del. July 25, 2006) (citing *Peterson v. Del. Food Corp.*, 2001 WL 1586831, at *2 (Del. Dec. 6, 2001)).
[10] *See Christian v. Counseling Res. Assoc., Inc.*, 60 A.3d 1083 (Del. 2013) (where the Court found it was an abuse of discretion to enter judgment for the opposing party as sanctions for the failure to produce an expert report within the deadlines set by the trial court's scheduling order).

judgment that had been filed but not yet considered by the Court. Under these circumstances, summary judgment is inappropriate.

**Defendant Thunderguards Motor Cycle Club, Inc.'s Motion for Summary Judgment**

**1. Timeliness of Service of Process and/or Statute of Limitations**

Defendant Thunderguards' Motor Cycle Club, Inc. first argues that it entitled to summary judgment because the lawsuit against it was not served in a timely manner and/or that the lawsuit was initiated after the statute of limitations expired.

The incident in question occurred on April 10, 2009. The complaint was filed on December 13, 2010. The only named defendant was Cheryl Hollingsworth. The first amended complaint was filed on February 9, 2011 and added Defendant Fatunmbi. On April 11, 2011, Defendant Hollingsworth filed and answer and a third-party complaint against Thunderguards' Motor Cycle Club, Inc. a/k/a Westside Thunderguards Club. On April 20, 2011, the Court issued an Order with respect to a stipulation to amend the complaint and caption to add Defendant Thunderguards Motor Cycle Club, Inc. a/k/a Westside Thunderguards Club. On May 12, 2011, Defendant Thunderguards' Motor Cycle Club, Inc. was served with the second amended complaint. Accordingly, suit was filed against Defendant Thunderguards' Motor Cycle Club, Inc. two years and one day after the date of the incident in question and service of the second amended complaint was two years, one month and two days after the date of the incident in question.

Where an amendment is sought after the statute of limitations has run, the pleading will only relate back to the filing date of the action if: (1) the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading; and (2) within the period provided by statute or these Rules for service of the summons and complaint,

the party to be brought in by amendment: (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.[11]

Furthermore, Rule 4(j) provides a period of 120 days within which a complaint must be served on a defendant.[12] "The underlying purpose of the relation-back doctrine is to 'permit amendments to pleadings when the limitations period has expired, so long as the opposing party is not unduly surprised or prejudiced.'"[13] The goal of the doctrine is to encourage the disposition of litigation on its merits, leaving the discretion to permit or deny an amendment to the trial judge.[14] Absent prejudice, "the trial court is required to exercise its discretion in favor of granting leave to amend."[15]

Here, the record reflects that the amendment meets all of the requirements of Rule 15(c). The amendment relates back to the initial filing because it arises out of the same occurrence. Moreover, the second amended complaint was filed on April 19, 2011 and served on the Thunderguards Motor Cycle Club, Inc. on May 12, 2011, which is well within the two year and 120-day period required under *Alarmguard and Rule 4(j)*. Therefore, Defendant Thunderguards' Motor Cycle Club, Inc. is not entitled to judgment as a matter of law because of a late-filed complaint or because of a delay in service of process.

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[11] Super. Ct. Civ. R. 15(c); *Mullen v. Alarmguard of Delmarva, Inc.,* 625 A.2d 258, 263 (Del. 1993).
[12] Super. Ct. Civ. R. 4(j).
[13] *Walker v. Handler*, 2010 WL 4703403, at *2 (Del. Super. Nov. 17, 2010) (amended pleading relates back where notice was received after statute of limitations ran but before the 120 day period for service expired).
[14] *Id*.
[15] *Id*. (internal quotations omitted).

2. **Relationship between Defendant Thunderguards' Motor Cycle Club, Inc. and Westside Thunderguards Club**

It is undisputed that Plaintiff Reese was a member of Westside Thunderguards Club. It is also undisputed that Plaintiff Reese was providing security at the party as a member of Westside Thunderguards Club. Defendant Thunderguards' Motor Cycle Club, Inc. contends that it is entitled to judgment as a matter of law on the grounds that it has no cognizable relationship to Westside Thunderguards Club. However, Plaintiff Reese relies upon evidence developed through discovery and submits that Westside Thunderguards Club is merely a chapter of the incorporated entity Thunderguards' Motor Cycle Club, Inc. A genuine issue of material fact exists as to Plaintiff Reese's relationship with Defendant Thunderguards Motor Cycle Club, Inc. Therefore, summary judgment is inappropriate.

3. **Causal Connection between Actions of Defendant Thunderguards' Motor Cycle Club, Inc. and Injuries Claimed by Plaintiff Reese**

Defendant Thunderguards' Motor Cycle Club, Inc. contends that it is entitled to judgment as a matter of law on the grounds that there is no causal connection between the injuries suffered by Plaintiff Reese and the actions of Defendant Thunderguards' Motor Cycle Club, Inc. However, Plaintiff Reese has demonstrated that there are disputed issues of material fact that must be decided by a jury. For example, the record evidence developed through discovery includes deposition testimony by Plaintiff Reese which may support a finding a liability by Defendant Thunderguards' Motor Cycle Club, Inc. because it was responsible, in part, for assigning Plaintiff Reese to security detail at the party. Therefore, a genuine issue of material fact exists and summary judgment is inappropriate.

**NOW, THEREFORE, IT IS HEREBY ORDERED this 17th day of October, 2013:**

1. **Defendant Fatunmbi's Motion for Summary Judgment is DENIED on the issues on the issues of foreseeability of Plaintiff Reese' injuries and timeliness of Plaintiff Reese's submission of an expert report;**
2. **Defendant Fatunmbi's Motion for Summary Judgment is DENIED WITHOUT PREJUDICE on the issue of the duty owed to Plaintiff Reese; and**
3. **Defendant Thunderguards Motor Cycle Club, Inc.'s Motion for Summary Judgment is DENIED.**

*Andrea L. Rocanelli*

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**The Honorable Andrea L. Rocanelli**