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

JAMES B. JOHNSON and BARBARA JOHNSON, Plaintiffs,	)	
	)	C.A. No. N11C-10-015 CLS
v.	)	
AMERICAN CAR WASH, INC.,	)	
Defendant.	)	

Date Submitted: May 13, 2013
Date Decided: August 21, 2013

On Defendant's Motion for Summary Judgment. **DENIED.**

ORDER

Gary S. Nitsche, Esq., Weik, Nitsche & Dougherty, Wilmington, Delaware, 19899. Attorney for Plaintiffs.

Nancy Chrissinger Cobb, Esq., Law Offices of Chrissinger & Baumberger, Wilmington, Delaware, 19806.

Scott, J.

Introduction

Before the Court is Defendant American Car Wash's ("Defendant") Motion for Summary Judgment. The Court has reviewed the parties' submissions. For the following reasons, Defendant's motion is **DENIED**.

Background

Plaintiff James B. Johnson ("Mr. Johnson") started working for Defendant for about three months after the business changed hands from another owner. Although he no longer worked there, he continued to visit the property for various reasons, such as visiting friends, using the car wash's amenities, and discussing plans for opening a small store on Defendant's property where he would sell certain car wash related items. Plaintiff had several prior communications with "Shorty", the person who could lease the location for the store on the property, and viewed the lease space with him on April 13, 2010.

On April 15, 2010, Mr. Johnson went to Defendant's property to vacuum his car.[1] Mr. Johnson was standing outside of a car wash bay when Tony Dolce ("Mr. Dolce"), Mr. Johnson's prospective partner for the store business, pulled into the parking lot. Mr. Dolce exited his vehicle, looked at Mr. Johnson and said, "Can I talk to you?" Mr. Johnson said "Sure." Mr.

[1] There is a dispute as to what Mr. Johnson's purpose was for being at the car wash. He may have been there to discuss business, socialize, or to vacuum his car.

Dolce did not appear angry as he gestured towards the inside of the bay. Then, Defendant's employee, "Tek," ran into the bay and closed the bay's front and rear garage doors. While the front garage door was still open, Mr. Johnson turned toward the front door, but Mr. Dolce reached for Mr. Johnson's knife which he kept in a holster on his person. Mr. Johnson wrestled with Mr. Dolce, but he was unable to stop him from obtaining the knife. However, Mr. Johnson was able to retrieve another knife that he carried on his person. As he retrieved his knife, Mr. Dolce stabbed him in the chest, pulled the knife out, and attempted to stab him again. Mr. Johnson blocked him with his arm and Mr. Dolce inflicted a seven-to-eight inch cut under Mr. Johnson's left armpit and then stabbed him in his left leg. Mr. Johnson then stabbed Mr. Dolce. Mr. Johnson eventually stumbled, fell, and hit his head on the concrete.

In his deposition, Mr. Johnson stated that he wasn't sure why Mr. Dolce attacked him, but a day or so prior to the altercation, Mr. Johnson insulted Mr. Dolce after he had failed to keep an appointment to discuss the business.

Parties' Contentions

Plaintiffs filed this action in negligence claiming that Defendant breached its duty owed to Plaintiff as a business invitee. Specifically,

Plaintiffs claim that Defendant failed to take reasonable measures to prevent the altercation from occurring or escalating, provide adequate security, and properly and reasonably train its staff.

Defendant moves for summary judgment arguing that, as a matter of law, Mr. Johnson was not a business invitee on the date of the incident and that Defendant owed no duty to protect Mr. Johnson from Mr. Dolce's actions. Defendant argues, in the alternative that, assuming an issue of fact exists as to whether Mr. Johnson was a business invitee, Plaintiffs' claims fail not only because there was nothing to put Defendant on notice, but since Mr. Dolce's conduct was superseding criminal activity. Defendant also challenges any assertion of liability based on Tek's actions because he was acting outside the course and scope of his employment.

Plaintiff opposes Defendant's motion on the grounds that discovery has yet to be completed. Plaintiff intends to depose Tek, Shorty, and Mr. Dolce. Plaintiff asserts that since he was a business invitee, Defendant is liable based on Restatement (Second) of Torts § 344 (1965).

Standard of Review

Summary judgment is to be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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."[2] When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party.[3] Where there is a material fact in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law, summary judgment is inappropriate.[4] If a motion for summary judgment is properly supported, the burden shifts to the non-moving party to show that there are material issues of fact.[5]

Discussion

The parties have provided three possible explanations for Plaintiff's visit to Defendant's property. Therefore, an issue of fact exists as whether Plaintiff was a business invitee on Defendant's premises. A landowner's duty to a business invitee is to ensure that "the premises [is] free of any dangerous condition known or discoverable by the possessor of the land."[6] He or she will be liable if there is "physical harm caused to a business invitee by a condition on the land if he knows of it, or if by the exercise of reasonable care he would discover the condition and, realizing that it

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[2] Superior Court Rule 56; *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[3] *Bailey v. City of Wilmington*, 766 A.2d 477, 479 (Del. 2001).
[4] *Tew v. Sun Oil Co*., 407 A.2d 240,242 (Del. Super. 1979).
[5] *State v. Regency Group, Inc*., 598 A.2d 1123, 1129 (Del. Super. 1991).
[6] *DiOssi v. Maroney*, 548 A.2d 1361, 1366 (Del. 1988).

involves an unreasonable risk of harm to the business invitee, give him warning."[7]

When the physical harm is caused by "accidental, negligent, or intentionally harmful acts of third persons []," the business premises owner will be liable if he "fail[s] [] to exercise reasonable care to (a) discover that such acts are being done or likely to be done, or (b) give warning adequate to enable visitors to avoid the harm, or otherwise to protect them against it."[8] The landowner's "residual obligation" to "reasonably anticipate, and to protect the business visitor from, the likelihood that third persons will pose a danger to the business visitor"[9] is triggered only when the business landowner "knows or has reason to know that the acts of the third person are occurring, or about to occur."[10]

The intentional torts or criminal acts of a third party may be considered the "superseding cause" of harm for which a party will not be liable, "unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created,

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[7] *Hamm v. Ramunno*, 281 A.2d 601, 603 (Del. 1971).
[8] Restatement (Second) of Torts, § 344; *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 525-26 (Del. 1987) ("there is a residual obligation of reasonable care to protect business invitees from the acts of third persons").
[9] *DiOssi,* 548 A.2d at 1367.
[10] Restatement (Second) of Torts, § 344, Comment *f.*

and that a third person might avail himself of the opportunity to commit such a tort or crime."[11]

Defendant is correct that the facts presented to the Court thus far do not clearly demonstrate that Defendant knew or should have known that Mr. Dolce would attack Plaintiff. However, since Defendant's employee closed the bay doors before the incident began the Court will infer, in favor of Plaintiffs, that Defendant might have had some notice, via its employee, that Mr. Dolce might attack Plaintiff. Therefore, an issue of fact exists as to whether Defendant had knowledge or reason to know that Mr. Dolce would attack Mr. Johnson and whether Mr. Dolce's conduct constituted a superseding cause.

Defendant also argues that it is not liable for Tek's actions since Tek was acting outside of the course and scope of his employment based on the Restatement of Agency (Second) § 228. The question of whether a tortuous act is committed within the course and scope of employment must be left to the jury, unless the question is so clear that it should be decided as a matter of law.[12] Sections 228 and 229 of the Restatement provide factors to guide the Court in determining whether employee conduct is within the scope of

[11] Restatement (Second) of Torts, § 448.
[12] *Draper,* 181 A.2d at 569.

his employment.[13] Although Tek was a window tinter, the full extent of his duties at the car wash has yet to be discovered. Therefore, summary judgment is inappropriate on this issue.[14]

Based on the foregoing analysis, the Court finds that genuine issues of fact exist as to whether Plaintiff was a business invitee, whether Defendant knew or had reason to know that Mr. Dolce would attack Plaintiff, and whether Defendant bears any responsibility based on Tek's actions. The Court agrees with Plaintiffs that the completion of discovery would be useful to the Court on these issues.[15] Therefore, summary judgment is denied without prejudice.

Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment is **DENIED.**

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

[13] *Id.* at 570.
[14] It is notable that Comment *b* to Section 448 Restatement (Second) of Torts, explains that business premises owners may also be liable for acts of third parties who are servants "acting outside of the scope of their employment."
[15] *Singeterry v. H.H. Moor, Jr. Trucking Co., Inc.* 1996 WL 527313, at *3 (Del. Super. June 20, 1996).