IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

ROTINA PHILLIPS-POSTLE,	:	
	:	C.A. No. 04C-10-019 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
BJ PRODUCTIONS, INC., t/a Extreme Night Club, a Delaware corporation,	:	
	:	
Defendant, Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
LAMAR TRIBETT, JR and DON TRIBETT,	:	
	:	
Third-Party Defendants.	:	

Submitted: January 6, 2006
Decided: April 26, 2006

ORDER

Upon Defendant's Motion for Summary Judgment.
Denied.

Craig T. Eliassen, Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware; attorneys for the Plaintiff.

Tomas P. Leff, Esquire of Casarino Christman & Shalk, P.A., Wilmington, Delaware; attorneys for Defendant BJ Productions, Inc.

Benjamin A. Schwartz, Esquire of Schwartz & Schwartz, Dover, Delaware; attorneys for Defendant Don Tribett.

Lamar Tribett, Jr., *pro se*.

WITHAM, R.J.

Defendant, BJ Productions, Inc., t/a Extreme Night Club, filed a motion for summary judgment, arguing that there was an intervening cause when Plaintiff, Rotina Phillips-Postle, took the hand of an unidentified bystander, who accidentally pulled her to the floor when he was knocked down. Defendant also alleges that Plaintiff assumed the risk[1] because she was initially located in a relatively safe position, but then moved toward "the locus of the altercation." Additionally, Defendant contends that Plaintiff has not established a claim for negligence, specifically, Defendant's duty regarding Plaintiff as a business invitee. In her response, Plaintiff asserts that she has an expert to testify regarding the inadequacy of Defendant's security procedures, that the actions of the unidentified bystander are not a superseding cause, and that comparative negligence is a question for the jury.

For the reasons set forth below, Defendant's motion for summary judgment is *denied*.

Standard of Review

Superior Court Civil Rule 56(c) provides that judgment "shall be rendered

[1] Defendant refers to its argument as assumption of the risk. However, in *Koutoufaris v. Dick*, 604 A.2d 390, 397-98 (Del. 1992), the Supreme Court opined, "primary assumption of risk involves the express consent to relieve the defendant of any obligation of care while secondary assumption consists of voluntarily encountering a known unreasonable risk which is out of proportion to the advantage gained-the court ruled that the latter is totally subsumed within comparative negligence. We agree with this holding as a correct statement of Delaware law." As a result, Defendant's categorization of the defense as assumption of the risk is inaccurate because Plaintiff did not expressly consent to relieve Defendant of liability. Therefore, Defendant's argument would properly be referred to as comparative negligence. Because comparative negligence was raised as an affirmative defense, it will be considered in this opinion in place of the assumption of the risk argument.

forthwith if 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] On a motion for summary judgment the Court examines the record to determine whether any material issues of fact exist. Summary judgment will only be granted when, after viewing the record in a light most favorable to the non-moving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[3] Summary judgment will not be granted when a more thorough inquiry into the facts is desirable to clarify the application of the law to the circumstances.[4] Additionally, "issues of negligence are [generally] not susceptible of summary adjudication. It is only when the moving party establishes the absence of a genuine issue of any material fact respecting negligence that summary judgment may be entered."[5]

Discussion

Defendant's first contention is that the unidentified bystander pulled Plaintiff to the ground, which constituted an intervening cause. *Duphily v. Delaware Electric*

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[2] Super. Ct. Civ. R. 56.

[3] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973); *see also McCall v. Villa Pizza, Inc.*, 636 A.2d 912 (Del. 1994).

[4] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[5] *Id.* at 469.

Cooperative, Inc.[6] explains the concept of an intervening cause. In *Duphily*, the Supreme Court stated:

> An intervening cause is one which comes into active operation in producing an injury *subsequent* to the negligence of the defendant. The mere occurrence of an intervening cause, however, does not automatically break the chain of causation stemming from the original tortious conduct. This Court has long recognized that there may be more than one proximate cause of an injury. In order to break the causal chain, the intervening cause must also be a superseding cause, that is, the intervening act or event itself must have been neither anticipated nor reasonably foreseeable by the original tortfeasor.[7]

In the case *sub judice*, whether the intervening act of the unidentified bystander was anticipated or reasonably foreseeable by Defendant is a factual question. The Court also notes that the videos[8] of the altercation itself provides limited assistance at best. There is no definitive view of exactly how the fracas developed or why the Plaintiff moved. Clearly, this becomes a question for the jury. Consequently, this argument of Defendant is unpersuasive in a motion for summary judgment.

Next, Defendant asserts that Plaintiff was comparatively negligent by moving from a relatively safe area toward the altercation. However, in addressing comparative negligence, the Supreme Court has previously stated, "the determination

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[6] 662 A.2d 821 (Del. 1995).

[7] *Id.* at 829 (emphasis in original).

[8] Plaintiff's Exhibit F - Angle 2 and Exhibit G - Angle 1.

of the respective degrees of negligence attributable to the parties usually presents a question of fact for the jury. In rare cases, however, where the evidence requires a finding that a plaintiff's negligence exceeded that of the defendant, it is the duty of the trial court, as a matter of law, to bar recovery."[9] In this case, the issue of comparative negligence should be a question for the finder of fact because the evidence does not require a finding by this Court that, as a matter of law, Plaintiff's negligence exceeded Defendant's negligence. Thus, Defendant's second contention fails.

Defendant's last argument is that Plaintiff did not make a prima facie claim for negligence. Specifically, Defendant claims that Plaintiff did not establish its duty to her as a business invitee because the altercation was discoverable by Plaintiff. In *Furek v. University of Delaware*,[10] the Supreme Court opined, "[a] landowner who knows or should know of an unreasonably dangerous condition or use of his property has a duty to invitees to safeguard the invitee against such hazards including the conduct of third parties." Additionally, in a footnote, the Court reprinted Section 344 of the Restatement (Second) of Torts, which says:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable

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[9] *Trievel v. Sabo*, 714 A.2d 742, 745 (Del. 1998).

[10] 594 A.2d 506, 520 (Del. 1991).

care to

(a) discover that such acts are being done or are likely to be done, or

(b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.[11]

Pursuant to this analysis, there are still questions of fact that need to be resolved. Namely, the question of whether Defendant adequately protected Plaintiff from the harmful acts of the third parties involved in the altercation. There also appears to be a dispute between Defendant and Plaintiff as to how the injury even occurred. Therefore, Defendant's final argument fails as well.

Based on the foregoing, Defendant's motion for summary judgment is ***denied.***

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution

[11] *Id.* at 521.