

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2020 CA 0411

TY CHRISTIAN STRAUSS

VERSUS

IRONSHORE SPECIALTY INSURANCE COMPANY AND FIFTH
AVENUE HOUSING PARTNERS, LP

DATE OF JUDGMENT: DEC 30 2020

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 658944, SECTION 22, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE TIMOTHY E. KELLEY, JUDGE

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BEFORE: WHIPPLE, C.J., WELCH, AND CHUTZ, JJ.

Disposition: REVERSED AND REMANDED.

CHUTZ, J.

Plaintiff, Ty Christian Strauss, appeals a summary judgment dismissing his personal injury suit, with prejudice, on the grounds that the owner of the apartment complex where he was shot during an attempted robbery had no duty to protect plaintiff from criminal acts by a third party. We reverse and remand this matter for further proceedings.

FACT AND PROCEDURAL BACKGROUND

On July 26, 2016, plaintiff was seventeen years old and had been living with his aunt, Tania Gobert, at The Manor at Lake Charles (The Manor) for several months. Early that morning, he was sitting on a stairway outside his aunt's apartment smoking a cigarette when he was approached by a man, a non-resident of The Manor, who asked plaintiff for a cigarette. The man walked away after plaintiff gave him a cigarette, but almost immediately returned with a gun and demanded plaintiff "[g]ive it up." As plaintiff attempted to run back inside his aunt's apartment, the man shot him twice in the back. According to plaintiff, he is now a paraplegic as a result of the injuries he sustained.

On June 22, 2017, plaintiff filed this personal injury suit against Fifth Avenue Housing Partners, LP ("Fifth Avenue"), the alleged owner of The Manor, and its liability insurer, Ironshore Specialty Insurance Company (collectively, "defendants"). Plaintiff alleged Fifth Avenue owed a duty to protect him against the criminal acts of third parties because The Manor was located in a "high crime area" and the attack upon him was "easily foreseeable." After various legal proceedings, defendants filed a motion for summary judgment on June 27, 2019, asserting The Manor "had no duty to protect Plaintiff ... from the unforeseeable criminal acts of a third party" and otherwise breached no duty to plaintiff. Following a hearing, the district court gave oral reasons for judgment finding Fifth Avenue did not owe plaintiff a duty to protect him against the criminal acts of third parties since it was

not foreseeable “that this sort of thing would occur on [The Manor’s] premises.” Accordingly, the district court granted defendants’ motion and signed a judgment dismissing plaintiff’s suit, with prejudice. Plaintiff has now appealed, essentially arguing the district court erred in granting summary judgment when a genuine issue of material fact existed regarding whether the attempted robbery and shooting was reasonably foreseeable.

DISCUSSION

A motion for summary judgment shall be granted only if the motion, memorandum, and supporting documents admitted for purposes of the motion for summary judgment show there is no genuine issue as to material fact and the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3) & (4). In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the district court’s determination of whether summary judgment is appropriate. *Alvarado v. Lodge at the Bluffs, L.L.C.*, 16-0624 (La. App. 1st Cir. 3/29/17), 217 So.3d 429, 432, writ denied, 17-0697 (La. 6/16/17), 219 So.3d 340.

The threshold issue in any negligence action is whether the defendant owed the plaintiff a duty.¹ *Meany v. Meany*, 94-0251 (La. 7/5/94), 639 So.2d 229, 233. Whether a duty is owed is a question of law. Generally, business owners owe no duty to protect others from the criminal acts of a third person. However, the Louisiana Supreme Court has held that business owners “do have a duty to implement reasonable measures to protect their patrons from criminal acts *when*

¹ Under the duty-risk analysis employed in Louisiana, a plaintiff must prove the following five elements to establish liability under the general negligence principles of La. C.C. art. 2315: (1) the defendant had a duty to conform his or her conduct to a specific standard of care (the duty element); (2) the defendant failed to conform his or her conduct to the appropriate standard of care (the breach of duty element); (3) the defendant’s substandard conduct was a cause-in-fact of the plaintiff’s injuries (the cause-in-fact element); (4) the defendant’s substandard conduct was a legal cause of the plaintiff’s injuries (the scope of protection element); and (5) actual damages (the damage element). *Pinsonneault v. Merchants & Farmers Bank & Trust Company*, 01-2217 (La. 4/3/02), 816 So.2d 270, 275-76.

those acts are foreseeable.” *Posecai v. Wal-Mart Stores, Inc.*, 99-1222 (La. 11/30/99), 752 So.2d 762, 766. (Emphasis added.) The *Posecai* Court adopted a balancing test to determine whether a business owner owes a duty of care to protect its customers from the criminal acts of third parties. Specifically, the court provided that “[t]he foreseeability of the crime risk on the defendant’s property and the gravity of the risk determine the existence and extent of the defendant’s duty. The greater the foreseeability and gravity of the harm, the greater the duty of care that will be imposed on the business.” *Posecai*, 752 So.2d at 768. For instance, a very high degree of foreseeability is required to give rise to a duty to post security guards, but a lower degree of foreseeability may only support a duty to implement lesser security measures such as using surveillance cameras, installing improved lighting or fencing, or trimming shrubbery. *Posecai*, 752 So.2d at 768.

The plaintiff bears the burden of establishing the business owner owed him a duty under the circumstances. *Posecai*, 752 So.2d at 768. The foreseeability and the gravity of the harm are to be determined by the facts and circumstances of the case. The most important factors to be considered are the existence, frequency, and similarity of prior incidents of crime on the premises. *Posecai*, 752 So.2d at 768. Nevertheless, the Supreme Court has made it clear that a business’ duty to protect customers from the criminal acts of a third party is not dependent solely upon there having been prior criminal acts on the premises. See *Pinsonneault v. Merchants & Farmers Bank & Trust Company*, 01-2217 (La. 4/3/02), 816 So.2d 270, 277. Other factors such as the location, nature, and condition of the property should also be taken into account. *Pinsonneault*, 816 So.2d at 277; *Posecai*, 752 So.2d at 768. The Louisiana Supreme Court has emphasized that business owners are in the best position to appreciate the crime risks posed on their premises and to take reasonable precautions to counteract those risks. *Pinsonneault*, 816 So.2d at 278; *Posecai*, 752 So.2d at 768. Thus, the nature of the surrounding area is a factor in determining

foreseeability, even when no violent crimes have occurred on the subject property itself.²

In this case, plaintiff would bear the burden at trial of proving Fifth Avenue had a duty to protect him from the criminal acts of a third party. Therefore, defendants could satisfy their initial burden of proof on the motion for summary judgment by pointing out an absence of factual support that Fifth Avenue owed such a duty to plaintiff because the shooting was not reasonably foreseeable. See La. C.C.P. art. 966(D)(1). Once defendants satisfied this burden, the burden shifted to plaintiff to produce factual support sufficient to establish the existence of a genuine issue of material fact. In the absence of such a showing, there was no genuine issue of material fact, and summary judgment was appropriate. *Id.*

It is undisputed that plaintiff's assailant did not reside at or have any connection with The Manor. Defendants argue Fifth Avenue had no duty to protect plaintiff from the criminal acts of a third party because it was not reasonably foreseeable that such a person would enter on The Manor property and shoot plaintiff while attempting to rob him. In support of this claim, defendants introduced the affidavits of Deon Tolliver, The Manor's on-site property manager, and Northa Linzer, the regional manager with supervision over The Manor. Ms. Tolliver, who had been property manager since December 2014, and Ms. Linzer, who had supervision over The Manor since January 2012, each asserted they had no knowledge of any armed robbery, shooting, violent crime, or crime "of any kind" against persons occurring at The Manor prior to the July 2016 shooting of plaintiff.

² See *Dearmon v. St. Ann Lodging, L.L.C.*, 18-0994 (La. App. 4th Cir. 3/27/19), 267 So.3d 639, 642-43 (even though there was no evidence of prior criminal activity at the defendant hotel, its central location in the New Orleans French Quarter was a factor in a safety expert's conclusion that both non-violent and violent criminal activity at the hotel was reasonably foreseeable); *Patton v. Strogon*, 39,829 (La. App. 2d Cir. 8/17/05), 908 So.2d 1282, 1289, writ denied, 05-2397 (La. 3/17/06), 925 So.2d 548 (the fact that the shopping center parking lot was relatively crime-free prior to the victim's murder is not the sole question in determining the owner's duty to those on its property).

They further asserted no employee of The Manor was notified that plaintiff's assailant was on the premises on the day of the shooting. Additionally, defendants presented excerpts from plaintiff's deposition in which he testified he did not know The Manor to be in a high crime area and knew of no criminal activity or trouble occurring on The Manor grounds prior to his shooting.

Thus, the evidence presented by defendants showing no violent crimes had previously occurred at The Manor shifted the burden to plaintiff to show there was a genuine issue of fact concerning the foreseeability of the criminal act upon plaintiff. See La. C.C.P. art. 966(D)(1). To meet this burden, plaintiff introduced an affidavit from his aunt, Ms. Gobert, who has lived at The Manor since approximately May 2012. According to the affidavit, Mr. Gobert was aware, prior to the shooting, of multiple car burglaries occurring at The Manor, which were reported to management. She also was aware that multiple shootings, fights, car burglaries, gang activity, and drug activity had occurred at immediately surrounding apartment complexes and that the area was subject to a high police presence. Additionally, plaintiff presented the affidavit of Tina Dunaway, who was a resident at The Manor from July 2013 to October 2016. She averred that during the time she lived there, she was aware of non-residents committing crimes on The Manor premises, which she reported to management. Similar to Ms. Gobert, Ms. Dunaway stated the area surrounding The Manor was subject to a high police presence in response to criminal incidents. Ms. Dunaway further asserted she was aware of multiple shootings, robberies, and drug activity occurring at the immediately surrounding apartment complexes while she lived at The Manor, and she had notified the management at The Manor of these incidents.

In further opposition to defendants' motion for summary judgment, plaintiff presented deposition excerpts from Joseph S. Pappalardo, the president of Latter & Blum, a property management company hired by Fifth Avenue to manage The

Manor. Mr. Pappalardo agreed with defense counsel that in determining whether measures should be implemented at The Manor, criminal activity at and around the property should be considered. He indicated such information would be helpful in identifying trends or issues that might need to be addressed. Plaintiff also presented excerpts from Ms. Tolliver's deposition in which she stated she had requested extra police patrols in November 2015 because of "guys" hanging around the driveway into The Manor, and she may have called police again in December 2015 to report people hanging around the area for several weeks. She also admitted she was aware of people coming onto The Manor premises through the back fence on more than one occasion. Further, Ms. Tolliver testified that, prior to plaintiff's shooting, she had implemented a "property curfew" at The Manor" pursuant to which residents were "encourage[d]" not to "hang out" on the premises after 10:00 p.m.

Finally, plaintiff presented an affidavit from John C. Villines, a crime prevention and security consultant.³ Mr. Villines has over thirty-eight years' experience in the fields of crime prevention, crime foreseeability, and security consulting. He stated his review of Lake Charles Police Department offense reports for The Manor and the immediately surrounding apartment complexes revealed there were reports of seventeen armed robberies and eight "strong arm" robberies that occurred in the common areas of these properties during the period from 2012 through July 2016, when plaintiff was shot. Based on the offense reports and his years of experience, Mr. Villines concluded The Manor was located in a high crime

³ In district court, defendants objected to the admissibility of Mr. Villines' affidavit, as well as to the affidavits of Ms. Gobert and Ms. Dunaway, but the district court overruled all objections. On appeal, defendants contend the district court erred in admitting the affidavits. However, because defendants did not seek a supervisory writ or answer plaintiff's appeal to challenge the district court's ruling, the correctness of the ruling is not before us. *See Thompson v. Center for Pediatric & Adolescent Medicine, L.L.C.*, 17-1088 (La. App. 1st Cir. 3/15/18), 244 So.3d 441, 447-48, writ denied, 18-0583 (La. 6/1/18), 243 So.3d 1062. Moreover, once a district court has overruled an objection and admitted an expert's affidavit, the court must consider the expert's opinions, without evaluating the credibility or weight of the affidavit, in determining whether summary judgment is appropriate. *Id.* at 447.

area or “hot spot” for crime. He opined that given the level of violent crime at similar properties in the immediate surrounding area and the lack of access control at The Manor, the occurrence of a violent crime at The Manor, such as plaintiff’s shooting, was reasonably foreseeable.

After conducting a *de novo* review of the evidence presented, drawing all reasonable inferences therefrom in favor to plaintiff, we find the district court erred in granting summary judgment in favor of defendants. See *Hines v. Garrett*, 04-0806 (La. 6/25/04), 876 So.2d 764, 765. While it is true that defendants presented evidence showing no violent crimes had occurred previously on The Manor premises, that factor is not the sole factor to be considered. Other factors such as the location, nature, and condition of the property should also be taken into account. *Pinsonneault*, 816 So.2d at 277; *Posecai*, 752 So.2d at 768. In opposition to the motion for summary judgment, plaintiff presented evidence showing multiple violent crimes, including seventeen armed robberies, had occurred in the immediate area of The Manor during the preceding four and one-half years. The Manor was located in a high crime area. Moreover, the affidavit of a former resident indicated she had notified management of multiple shootings, robberies, and drug activity occurring at the immediately surrounding apartment complexes. Evidence was also presented that the property manager was aware of non-residents “hanging” around or entering onto the property on occasion. Significantly, prior to the shooting, the property manager had implemented a voluntary 10:00 p.m. “curfew” at The Manor, from which an inference could be drawn that she was aware of at least some risk to its residents. We believe this evidence was sufficient to raise a genuine issue of material fact as to whether Fifth Avenue reasonably should have foreseen the occurrence of a violent crime on the premises. Further, because a determination of whether Fifth Avenue had a duty to protect against such criminal acts cannot be

made until it is determined whether such criminal acts were foreseeable, summary judgment was improperly granted herein.⁴ See *Patton*, 908 So.2d at 1290.

CONCLUSION

For the reasons assigned, the judgment of the district court granting defendants' motion for summary judgment and dismissing plaintiff's suit, with prejudice, is reversed. This matter is remanded to the district court for further proceedings consistent with this opinion. All appeal costs are assessed to defendants.

REVERSED AND REMANDED.

⁴ Given the posture of this case, we express no opinion on whether such a duty existed or, if so, the scope of any such duty. In general, "[t]he greater the foreseeability and gravity of the harm, the greater the duty of care that will be imposed on the business." *Posecai*, 752 So.2d at 768. Moreover, because we find merit in plaintiff's first assignment of error arguing a genuine issue of material fact existed regarding foreseeability, we pretermitt his remaining assignments of error. In those assignments of error, plaintiff argued the district court erred in rejecting the holding of *Posecai* requiring the location, nature, and condition of a property to be taken into account in determining foreseeability and in weighing evidence and making credibility determinations in ruling on defendants' motion for summary judgment.