

<b>Smith v Arms Acres</b>
2016 NY Slip Op 31790(U)
September 28, 2016
Supreme Court, New York County
Docket Number: 151526/2012
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 55

-----X  
BRYAN SMITH,

Plaintiff,

**DECISION/ORDER**  
**Index No. 151526/2012**

-against-

ARMS ACRES and "JANE DOE," a fictitious name,  
intended to be the assailant of the plaintiff,

Defendants.

-----X  
HON. CYNTHIA KERN, J.:

Plaintiff commenced the instant action seeking recovery for personal injuries he allegedly sustained when a fellow resident of defendant Arms Acres, a drug and alcohol rehabilitation center, grabbed his ankle, thereby causing him to trip. Arms Acres now moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff's complaint. For the reasons set forth below, Arms Acres' motion for summary judgment is denied.

The relevant facts are as follows. Plaintiff was a resident in the "detox unit" of Arms Acres, a drug and alcohol rehabilitation center. On or about October 29, 2011, as he was being escorted down a hallway in the detox unit by Alejandria Griffith ("Griffith"), a milieu counselor for Arms Acres, he and Griffith passed two women sitting on the ground in the hallway and playing a game. According to plaintiff's deposition testimony, one of the women suddenly grabbed his ankle, causing him to lose balance and hit the wall, thereby sustaining injuries (the "alleged assault" or the "incident"). Further, according to plaintiff's deposition testimony, he had never seen or spoken to his alleged assailant before. According to the deposition testimony of Joanne Elliott ("Elliott"), Arms Acres' associate executive director, the alleged assailant was not a detox patient, but rather was likely placed in the detox unit due to overcrowding in other units. Pursuant to Arms Acres' detox unit resident rules, residents are prohibited from loitering in hallways.

However, according to Elliott's deposition testimony, residents are generally allowed to sit in hallways as long as they do not become too loud, in the discretion of the milieu counselors and nurses.

Arms Acres' motion for summary judgment dismissing plaintiff's complaint on the grounds that it had no duty to protect plaintiff from the alleged assault and that its alleged negligence did not proximately cause plaintiff's injuries is denied. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

Generally, landowners only have a duty to control the conduct of third persons where they have the opportunity to control and are reasonably aware of the need for such control. *Rivera v. 21<sup>st</sup> Century Restaurant, Inc.*, 199 A.D.2d 14, 15 (1<sup>st</sup> Dept 1993); *Tafsiou v. Arms Acres*, 123 A.D.3d 807, 807 (2<sup>d</sup> Dept 2014). An owner has no duty to protect persons on the premises "from unforeseeable and unexpected assaults nor to take any protective measures unless there was a foreseeable risk of harm from criminal activities of third persons on the premises." *Rivera*, 199 A.D.2d at 15. To establish its *prima facie* right to judgment as a matter of law dismissing a negligence claim on the ground that an assault was unforeseeable, the defendant must show that it was unaware of prior similar altercations or incidents or of the assailant's "alleged violent or aggressive tendencies," such that it was not on notice of the risk of an assault. *See Schnorr v. Emeritus Corp.*, 118 A.D.3d 1307, 1308 (4<sup>th</sup> Dept 2014) (holding that the defendant's affidavit stating that its assistant director was unaware of any prior similar altercations between the decedent and the assailant was insufficient to establish its entitlement to summary judgment as the affidavit did not state that defendant was unaware of any prior similar altercations or incidents involving the assailant or state that defendant lacked notice of the assailant's "alleged violent or aggressive tendencies"). *See also Navarra v.*

*Four Winds Hospital-Westchester*, 95 A.D.3d 850, 851 (2<sup>d</sup> Dept 2012) (“The defendant failed to offer any evidence that an alleged attack on the infant plaintiff by another patient was not reasonably foreseeable”).

In the present case, Arms Acres has failed to establish a *prima facie* entitlement to summary judgment on the ground that it had no duty to protect plaintiff from the allegedly unforeseeable assault. Arms Acres has failed to submit any evidence that it was unaware of any prior similar incidents involving the alleged assailant or that it lacked notice of her allegedly violent tendencies. Instead, Arms Acres merely relies on the deposition testimony of plaintiff that he had never seen the alleged assailant before the incident, which is insufficient to establish its entitlement to summary judgment.

Arms Acres’ argument that an assault is unforeseeable as a matter of law where there were no prior similar incidents between the assailant and the plaintiff himself is without merit as courts have held that prior similar incidents between the assailant and other individuals or knowledge of the assailant’s violent tendencies may put the defendant on notice of the risk of an assault. See *Schnorr v. Emeritus Corp.*, 118 A.D.3d at 1308; *Roberts v. Nostrand Hillel Food, Inc.*, 90 A.D.3d 1011, 1011 (2<sup>d</sup> Dept 2011) (holding that defendants established their *prima facie* entitlement to summary judgment by submitting evidence that they had no knowledge about plaintiff’s assailant “that would put them on notice of his propensity to assault the plaintiff, *nor any notice of prior similar incidents*”) (emphasis added).

Arms Acres has also failed to establish its entitlement to summary judgment dismissing plaintiff’s complaint on the ground that the incident occurred suddenly and spontaneously and therefore that any lack of supervision could not have been a proximate cause of plaintiff’s injuries. If the wrongful conduct of the third person is “extraordinary and intervening,” the defendant’s negligent act or omission did not proximately cause the plaintiff’s injury. *Mirand v. City of New York*, 84 N.Y.2d 44, 50 (1994). “The test to be applied is whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the [facility’s] negligence.” *Id.* Courts have held that an incident may occur in “so short a time span that any lack of supervision was not the proximate cause of the injury.” See *O’Neal v. Archdioceses of N.Y.*, 286 A.D.2d 757, 757 (2<sup>d</sup> Dept 2001) (holding that an assault wherein a resident of a youth facility suddenly punched another resident,

despite the presence of three staff members in the room, occurred so quickly that any lack of supervision was not the proximate cause).

In the present case, the court cannot determine as a matter of law that the alleged lack of supervision was not a proximate cause of plaintiff's injuries. It is undisputed that the alleged assailant was sitting in the hallway before she allegedly grabbed plaintiff's ankle, which was in contravention of defendant's written policy prohibiting residents from loitering in hallways. If the alleged assailant had been "properly" supervised in accordance with the written policy and had not been allowed to sit in the hallway as plaintiff walked past, she would not have had the opportunity to trip plaintiff. Thus, considering all the circumstances, the incident may have been a normal or foreseeable consequence of the alleged lack of supervision.

Accordingly, Arms Acres' motion for summary judgment is denied. This constitutes the decision and order of the court.

DATE : 9/28/15

CK  
KERN, CYNTHIA S., JSC  
HON. CYNTHIA S. KERN  
J.S.C.