

Wrobel v Doe

2017 NY Slip Op 32068(U)

June 6, 2017

Supreme Court, Erie County

Docket Number: I2013-802541

Judge: Donna M. Siwek

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

PAUL WROBEL,

Plaintiff,

v.

Index No. I2013-802541

JOHN A. DOE, JOHN B. DOE,
JOHN C. DOE, BUFFALO BILLS, INC.,
APEX SECURITY GROUP, INC.,
CONTEMPORARY SERVICES CORPORATION,
COUNTY OF ERIE, ERIE COUNTY
SHERIFF'S DEPARTMENT, and TIMOTHY B.
HOWARD, ERIE COUNTY SHERIFF

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SIWEK, J.,

MEMORANDUM DECISION

Pending before the Court are three defense motions for summary judgment.

This action arises from injuries plaintiff sustained while attending a Buffalo Bills/Miami Dolphins Thursday night game on November 15, 2012 at Ralph Wilson Stadium. Plaintiff met two friends at a bar the night of the game and as part of a promotion, rode in a bus with 50 or 60 others to the stadium. When he arrived, he tailgated with his friends and consumed approximately five beers. Plaintiff was given a single ticket to the game; his two friends were seated two to four rows in front of him in the upper deck of Section 335. When plaintiff entered the stadium, he claims he saw security personnel dressed in yellow vests at the gate, and security personnel dressed in bright green vests as he walked through the tunnel to his section. Plaintiff was wearing a Miami Dolphins jersey. A few minutes into the first quarter, he left his seat with his friends to use the restroom and buy a beer. About five minutes after returning to his seat, and without warning, by his own account, he was struck in the back of the head by an unknown fan behind him (John Doe defendant). Plaintiff turned around and three unidentified persons, the unknown defendants, jumped on him, punched and pushed down onto his back. The altercation lasted between one and three minutes and was broken up by fans and security. Three individuals were led away by security and ejected from the game. Security officers also assisted the plaintiff

to a medical station in the stadium. He did not return to the game, but left the stadium and returned to the bus. There was no interaction between the plaintiff and the unknown individuals behind him before the altercation. The plaintiff was not aware of any fights in the section prior to the incident, nor did security personnel respond to any incidents prior to the altercation. None of the defendants have an incident report about the altercation or the removal of the three men.

Security at the game in question was a collaborative effort between the Buffalo Bills, Inc. ("Bills"), and co-defendants Contemporary Services Corporation ("CSC") and Apex Security Group, Inc. ("Apex"). The Bills contracted with CSC and Apex to provide security within the stadium. CSC representatives met weekly with the Bills and had "post production" meetings after all games. The Bills followed NFL Best Practices guidelines for security and fully staffed the stadium for 70,000 fans regardless of whether the game was day or night and regardless of the opponent. CSC was responsible for aisle walks in the concourse and seating areas, access control monitoring, credential checking for access around the stadium, and witnessed fan behavior issues. CSC employees who saw a fight or altercation were expected to break it up or call Apex, depending on the situation. Apex was responsible for making arrests, if necessary. CSC did not have the authority to make arrests. CSC employees performed two aisle walks per quarter during the Bills game, looking for problem areas. Apex employees and Bills ushers also performed aisle walks. CSC personnel are stationed at the top of the catwalk, in the entrances to the seating areas, in the concourse and in the ramp. CSC is also responsible for bag check and security wandering at the entrance gates and are generally not in the stadium during the first quarter because they are still working at the gates. At 90 percent of the games, CSC is not in the stadium until the beginning of the second quarter.

Game day employees are required to take alcohol management and crowd management and control seminars. CSC and Apex employees are required to prepare incident reports or “cards” for incidents occurring during the game. The Bills and CSC required reports of all ejections. There was not an incident report that corresponds with plaintiff’s injury. The Bills utilized in-house security for games as well, and the Erie County Sheriff’s Department handled the traffic detail outside the stadium at the time. The Bills organized pre-game and post-game meetings relative to security before each game which were attended by representatives of Apex, CSC and the County. The Bills mandated a 250 person detail for Apex, divided into 22 independent crews deployed throughout the stadium. Apex was deputized to make arrests after the first quarter ended. Before the beginning of each game, Apex details were located in the stadium parking lots and at admissions gates and pursuant to their agreement with the Bills, Apex remained outside the stadium until the end of the first quarter. Prior to Apex entering the stadium, security rested with the Bills and/or CSC. After the first quarter, Apex representatives primarily patrolled the upper deck and catwalk of the 300 level.

In opposition to the motion, plaintiff’s counsel has referenced and submitted *in camera*, certain policies of the Buffalo Bills, as well as the NFL Best Practices for Stadium Security. Plaintiff notes the lack of a record of the incident involved in this case and suggests there is a triable issue of fact as to the failure of defendants’ duty to the plaintiff and negligence in crowd management.

I. Defendants Buffalo Bills, Inc. and County of Erie’s Motion for Summary Judgment.

Plaintiff’s claim against the Bills and County of Erie (“County”) sounds in premises

liability. Plaintiff asserts these defendants were negligent in causing, creating or having actual and/or constructive notice of the alleged dangerous nature of the unknown co-defendants. The Bills and the County seek summary judgment dismissing the complaint against them, because they neither caused, created nor had actual or constructive notice of the dangerous nature of the Doe defendant(s). The Bills and the County further assert that they did not owe a duty to protect the plaintiff from the attack, because it was an unforeseeable, spontaneous, unprovoked and unpreventable criminal act of third parties.

An owner or lessee in possession of real property has a duty to maintain its premises in a condition reasonably safe for those foreseeably on the premises. *Maheshwari v. City of New York*, 2 N.Y.3d 288, 294 (2004). While this duty may extend to foreseeable criminal acts by third parties, owners and lessees are not the insurers of a visitor's safety. *Maheshwari* at 294. It is well settled that there is "no legal duty to protect against an occurrence which is extraordinary in nature and would not suggest itself to a reasonably careful and prudent person as one which should be guarded against." *Stern v. Easter*, 92 A.D.3d 1250, 1251 (4th Dept. 2012).

We find that the defendants have met their burden on their motion for summary judgment to establish that they took all reasonable measures to provide security within and throughout the stadium and that they did not cause or create the allegedly dangerous nature of the unknown assailants and co-defendants. The moving defendants have established that they took the requisite precautions against foreseeable criminal activity of third parties. In opposition, the plaintiff has failed to proffer any expert testimony or factual support to establish that the security measures in place at the game and in compliance with the NFL Best Practices were not followed or were not sufficient. The attack was not a foreseeable result of any security breach,

by all accounts defendants took reasonable measures to deal with crowd control and other forms of disorderliness short of unprovoked criminal acts. A random criminal attack... is not a predictable result of the gathering of a large group of people... Security officers cannot be everywhere at once... it is difficult to understand what measures could have been undertaken to prevent plaintiff's injury except presumably to have had a security officer posted at the precise location where the incident took place... surely an unreasonable burden. *Maheshwari, supra*.

Moreover, the defendants have established that they did not have actual or constructive notice of a dangerous situation to subject them to liability. The sudden and violent incident was not preceded by escalating hostilities that would otherwise have served to put the defendants on notice of a possible violent confrontation. *See, O'Connor v. Syracuse University*, 66 A.D.3d 1187 (3d Dept. 2009). We further note a general awareness of a dangerous condition (altercations in the past) is insufficient to constitute constructive notice of this particular altercation. *Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 969 (1994). Finally, even assuming a lapse in security, the plaintiff's injuries were not the result of any such lapse, but were caused by an independent, intervening criminal act. *Maheshwari, supra*. Because the plaintiff has failed to raise a triable issue of fact as to the negligence of the Buffalo Bills and the County of Erie, they are entitled to judgment as a matter of law.

II. Defendant Contemporary Services Corporation's Motion for Summary Judgment.

Plaintiff's claim against CSC is that it was negligent in failing to warn of an unruly crowd, failing to have trained security or crowd management personnel or on-duty police officers on-site and failing to determine the number of workers that were needed in various locations to ensure safety of the event. The basis of CSC's motion for summary judgment is that it cannot be

held liable to the plaintiff because it did not owe him a duty. *See, Pulka v. Edelman*, 40 N.Y.2d 781 (1976). In support of its motion, CSC points to the plaintiff's testimony that there was security personnel in the area where he was seated, that he did not have any difficulty in the stands before the assault, and that he did not complain to anyone at the stadium about fans around him before the altercation.

We find that CSC has met its burden of establishing that it lacked actual or constructive notice of any allegedly dangerous condition. *See, Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 (1986). No one, not even the plaintiff, had notice of the random act of violence. Even assuming that the incident involving the plaintiff may have occurred later than the first quarter, beginning in the second quarter, there are six aisle walks performed, two by CSC, two by Apex and two by the Bills ushers. There is no evidence that CSC encountered or had notice of a problem in the plaintiff's section before the attack.

The random act of violence by the three unidentified fans was unforeseeable, and therefore, CSC cannot be held liable to the plaintiff for injuries sustained in the assault. *See, e.g. Pink v. Rome Youth Hockey Assn., Inc.*, 28 N.Y.3d 994 (2016); *Maheshwari, supra*. Plaintiff has failed to come forward with expert testimony or evidence to suggest that CSC failed to take reasonable measures to deal with crowd control at the November 15, 2012 Bills game or that CSC could have or should have predicted that the plaintiff would be assaulted in a random act of violence.

As noted herein above, plaintiff's injuries were the result of an independent intervening act. *Maheshwari, supra*. In the absence of a causal nexus between CSC's conduct and the plaintiff's injuries, we agree that CSC is entitled to summary judgment dismissing the complaint

against it.

III. Apex Security Group, Inc.'s Motion for Summary Judgment.

In support of its motion for summary judgment, Apex notes that during the first quarter, security within the stadium was the responsibility of the Bills and/or CSC. Apex detail did not enter the stadium until the beginning of the second quarter, at which time they patrolled the upper deck and upper catwalk area of the 300 level sections. Apex notes that there is no dispute that the subject incident occurred during the first quarter, before Apex detail would have been deployed throughout the stadium.

We agree with Apex that it is not subject to liability to the plaintiff by virtue of its contract with the Bills, first because Apex was not contractually required to be in the 300 level during the first quarter and second because there is no basis to apply the *Espinal* line of cases to the facts of this case. *Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136 (2002). We agree with Apex that its agreement with the Bills did not require its personnel to be in the stadium at the time the plaintiff was injured. Apex had no contractual or common law duty to the plaintiff and is entitled to summary judgment. Even assuming Apex had personnel in the stadium at the time of the incident, our findings as to foreseeability in granting the co-defendants' motions would apply equally to Apex as the plaintiff's injuries were the result of a sudden, unanticipated criminal act.

IV. Conclusion.

Finally, to the extent that the plaintiff suggests that a lack of an incident report or a field

investigation card for the incident involving the plaintiff raises a triable issue of fact, we note that even if any of the moving defendants had a duty to prepare an incident report, the failure to do so does not raise a triable issue of fact to withstand summary judgment, because the manner in which the incident occurred, which is not in dispute, was the result of a random, unforeseen criminal act which occurred without warning in the first quarter of the game.

This is the Decision of the Court. Submit Order on notice.



Hon. Donna M. Siwek
Justice of the Supreme Court

Dated: June 6, 2017