[Cite as *Mosby v. Sanders*, 2009-Ohio-6459.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92605

ISIAH MOSBY

PLAINTIFF-APPELLANT

vs.

ERNEST SANDERS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-616333

BEFORE: Gallagher, P.J., Boyle, J., and Jones, J.

RELEASED: December 10, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

J. Gary Seewald
Henkin & Seewald
The Bradley Building, Suite 205
1220 West 6th Street
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEES

For Inter-City Yacht Club, Inc.

Ryan N. Clark
Terrance P. Gravens
Rawlin Gravens Co., L.P.A.
55 Public Square
Suite 850
Cleveland, Ohio 44113

Also Listed:

Ernest Sanders, pro se
2832 East 100th Street, Down
Cleveland, Ohio 44104

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Plaintiff-appellant, Isiah Mosby, appeals the judgment of the Cuyahoga County Court of Common Pleas that granted summary judgment in favor of defendant-appellee, Inter-City Yacht Club, Inc. ("the ICYC"). Defendant Ernest Sanders is not a party to this appeal. For the reasons stated herein, we affirm the judgment of the trial court.

{¶ 2} The following facts give rise to this appeal. Mosby is an independent contractor who has performed work since 2003 for the ICYC, located at 7302 North Marginal Road in Cleveland. Mosby is not a member of the ICYC.

{¶ 3} Mosby has known Sanders since 2002 and was aware that Sanders was a member of the ICYC. Mosby performed work on Sanders's boat and vehicles, and he described Sanders as a "gentleman" with whom he had never had an argument.

{¶ 4} On September 26, 2005, Mosby received a call from Tommy Washington, the ICYC's grounds manager. Washington asked Mosby if he could come to the ICYC to open an office door because Mosby had the key. After bringing the key to Washington, Mosby went to the ICYC's bar. No alcohol is served at the bar, and according to Mosby, no alcohol was involved in these events.

{¶ 5} Sanders was present at the bar and began complaining to Mosby about work performed on Sanders's vans. Mosby states that the discussion escalated and Sanders assaulted him. There is no dispute that Mosby was

injured in the assault. Sanders was criminally charged and ultimately pled guilty to attempted felonious assault. *State v. Sanders* (Mar. 31, 2006), Cuyahoga County Common Pleas Court Case No. 473652-A.

{¶ 6} Mosby stated at his deposition that he had never previously seen Sanders lose his temper. However, he stated that he had heard of three prior incidents involving Sanders. First, Mosby stated that he was told by Sim Wynn about an argument Wynn had with Sanders about a welding machine. Second, Mosby stated that he heard from others that Sanders had an argument with Timothy Walton about paint and that Sanders purportedly knocked Walton down. Third, Mosby asserted that he was told that Sanders had made threatening comments pertaining to two older men outside their presence. Each of these alleged incidents occurred well before Sanders's assault on Mosby.

{¶ 7} Darlice Ogletree was the ICYC's commodore at the time of the Mosby incident. He testified that he was aware of the Wynn incident, which involved an argument about welding equipment and included no physical contact. Ogletree had also learned that Walton allegedly had been assaulted by Sanders. When Ogletree discussed this with Walton, Walton indicated he did not wish to pursue the matter and he did not confirm being assaulted. Ogletree was not aware of any other threats or altercations involving Sanders.

{¶ 8} Mosby filed this civil action against Sanders and the ICYC. Mosby's unopposed motion for summary judgment against Sanders was granted, and following a hearing, Mosby was awarded damages in the amount of $111,991.95

in compensatory damages and $75,000.00 in punitive damages against Sanders.

{¶ 9} The ICYC filed a motion for summary judgment that was granted by the trial court. The trial court found that "[Mosby] has failed to present evidence to show that [the ICYC] had superior knowledge that there was a substantial risk of harm to [Mosby] by allowing co-defendant Sanders to be present at the yacht club. Both [Mosby] and [the ICYC] allude to one physical altercation [Sanders] had previously been involved in, however neither party possessed facts surrounding the events or outcome of the prior altercation. As such, the court cannot find that [the ICYC] breached [its] duty of care in maintaining the premises in a reasonably safe condition."[1]

{¶ 10} Mosby filed this appeal, raising one assignment of error for our review that challenges the trial court's decision to grant summary judgment in favor of the ICYC.

{¶ 11} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 186, 2005-Ohio-4559, 833 N.E.2d 712. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine

[1] The ICYC filed a motion to strike documents attached to Mosby's brief in opposition to summary judgment. The trial court granted summary judgment without ruling on this motion. It is well settled that a motion not ruled upon is implicitly deemed denied. See *Fitworks Holdings, L.L.C. v. Pitchford*, Cuyahoga App. No. 88634, 2007-Ohio-2517. The documents do not alter our decision herein.

whether summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 286, 2009-Ohio-2136, 912 N.E.2d 637. Under Civ.R. 56(C), summary judgment is proper when the moving party establishes that "(1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 374, 2005-Ohio-2163, 826 N.E.2d 832, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 12} Under Ohio law, there generally is no duty to prevent a third person from causing harm to another absent a special relation between the parties. *Simpson v. Big Bear Stores Co*., 73 Ohio St.3d 130, 134, 1995-Ohio-203, 652 N.E.2d 702. The Ohio Supreme Court has recognized that "a business owner has a duty to warn or protect its business invitees from criminal acts of third parties when the business owner knows or should know that there is a substantial risk of harm to its invitees on the premises in the possession and control of the business owner." Id. at 135.

{¶ 13} The foreseeability of criminal acts of third parties depends upon the knowledge of the business owner and any duty imposed is based upon the

business owner's superior knowledge of a danger relative to that of his invitee. *Haddad v. Kan Zaman Restaurant*, Cuyahoga App. No. 89255, 2007-Ohio-6808. The totality of the circumstances must be "somewhat overwhelming" before a business owner will be held to be on notice of and under a duty to protect against the criminal acts of third parties. Id. Courts are reluctant to impose such a duty when no evidence of prior, similar occurrences appears on the record. *Brake v. Comfort Inn*, Ashtabula App. No. 2002-A-0006, 2002-Ohio-7167.

{¶ 14} In the case sub judice, our review of the "totality of the circumstances" reveals no evidence that the ICYC knew, or should have known, that Sanders presented a substantial risk of harm to its invitees.[2] The record fails to reflect that the ICYC had knowledge of prior violent altercations on the premises. Further, the evidence fails to demonstrate that the ICYC should have known that Sanders had a propensity for violence or a propensity to attack others.

{¶ 15} Regarding the three alleged prior incidents, no physical contact was involved in the Wynn dispute over welding equipment, there is no evidence that the ICYC had notice of the incident involving the indirect threats, and the only incident involving physical contact was where Sanders allegedly pushed Walton down. Walton did not confirm the assault or pursue the matter, and there is no

[2] Though not undisputed, we presume for purposes of our review that Mosby was a business invitee at the time of the assault.

indication that Walton suffered physical harm. Additionally, these incidents occurred well before Sanders's assault on Mosby.

{¶ 16} Our review reflects that the record contains no evidence of any prior violent behavior or similar incidents such that the ICYC could be deemed to have superior knowledge of a danger relative to Mosby. Mosby himself, who had heard of the prior alleged incidents involving Sanders, described Sanders as a gentleman and admitted that the incident was a "total surprise" and "unexpected."

{¶ 17} The record is simply devoid of evidence that the ICYC knew or should have known that Sanders presented a substantial risk of harm to invitees on the ICYC's premises. Accordingly, we conclude that summary judgment was properly granted and overrule Mosby's sole assignment of error.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

MARY J. BOYLE, J., and
LARRY A. JONES, J., CONCUR