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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present: HON. ROBERT ROBERTO, JR.
Justice

TRIAL/IAS PART 1
NASSAU COUNTY

JIM FOX, Individually and as f/n/g of MATTHEW FOX, an infant,

Plaintiff(s),

Index No. 6913/03

-against-

Motion Date: 8/8/05

LOWE'S MOVIE THEATERS, INC., FORSUM MANAGEMENT CORP., ANDREW VECCHIONE and 3601 TURNPIKE ASSOCIATES, JEFFREY MANAGEMENT COMPANY and CRESCENT PLAZA,

CAL #2005N0790

SEQ. # 8, 9, 10

Defendant(s).

The following papers read on this motion 10

Notices of Motion, Cross Motion, with supporting papers..... 3
Affirmations in Opposition (pltff)..... 2
Affirmations in Partial Opposition (3601 Tpke Assocs., Crescent and Jeffrey)..... 1
Replies..... 3
Memorandum of law (def. Forsum)..... 1

Upon the foregoing papers it is ordered that the motion for summary judgment by defendant Forsum Management Corp. ("Forsum") (motion seq. # 8), motion for summary judgment by defendants 3601 Turnpike Associates, Jeffrey Management Company and Crescent Plaza ("Mall defendants") (motion seq. # 9) and cross motion for summary judgment by defendant Lowes Movie Theaters, Inc. ("Loews") (motion seq. # 10) are decided as follows:

This is a negligence action against 1) a private security company (Forsum) hired to provide security at a shopping mall known as the Nassau Mall in Levittown, New York, 2) the Mall defendants, owners and managers of the mall, and 3) Loews, which operates a movie theater at the mall. It is undisputed that the infant plaintiff Matthew Fox was assaulted at the mall in front of the theater during the evening of April 4, 2003 by defendant Andrew Vecchione, causing injury. All defendants except Vecchione, who apparently has not appeared in the action, now move for summary judgment.

Forsum's Motion

The Court finds that by way of its attorney's affirmation, Forsum has properly submitted pleadings, deposition transcripts and other proof in support of its motion (*see, Olan v Farrell Lines, Inc.,* 64 NY2d 1092). The evidence presented evidence demonstrates, *prima facie,* the movant's entitlement to judgment as a matter of law, shifting the burden to the plaintiffs to come forward with proof meriting a trial (*see, e.g., Zuckerman v City of New York,* 49 NY2d 557, 562).

Forsum's submissions indicate that at approximately 11 p.m., prior to the attack, the then-17 year old Fox and his friends were verbally threatened with physical harm by Vecchione in front of the Loews theater at the mall. This went on for approximately 20 to 25 minutes. Although Vecchione's motives are not relevant here, this seems to have occurred because another young man in Fox's party of friends had engaged a young woman in conversation, in whom Vecchione apparently had an interest. Fox was standing on the sidewalk adjacent to the mall parking lot as the verbal assault continued.

Fox saw a security vehicle patrolling the parking lot, but made no attempt to contact it, nor anyone in the theater. Fox testified that he did not feel he was in danger during this time. Vecchione then grabbed Fox from behind, kicked him in the ankle and threw him to the ground. At a hearing conducted during the criminal case that later was brought against Vecchione, a Nassau County police officer testified that he had been sitting in his marked police car approximately 150 feet away, but had not noticed anything unusual going on until he observed that an individual, later identified as Vecchione, was looking very animated. The officer then exited his car and approached the scene, and ultimately arrested Vecchione for the assault.

At the time of the incident Forsum provided security services to the Mall defendants pursuant to a verbal agreement with Jeffrey Management Company. According to the witness Forsum produced for the examination before trial, Michael Norrito, this agreement provided that Forsum would have a vehicle patrolling the parking lot. He described the driver's duties as follows: "Main responsibilities were driving around to see if anyone needed help in a car, watch out for carjackers, anything they saw out of the ordinary, call 911...If someone was getting attacked, as a security guard, you first call 911, and from there, you try to assist" (Norrito EBT, at 15-16).

The foregoing indicates that there was no contractual benefit conferred on the plaintiff as a member of the general public, nor did any common-law duty to the plaintiff exist (*see, Dabbs v Aron Sec., Inc.,* 12 AD3d 396; *Durham v Beaufort,* 300 AD2d 435; *Haston v East Gate Sec. Consultants,* 259 AD2d 665). It also is *prima facie* proof that any failures on its part did not contribute to the happening of the occurrence that caused plaintiff's injuries, as the attack was sudden and was not witnessed by the Forsum employee on duty at the time.

In opposition, the plaintiffs stress that Norrito admitted that the one car Forsum provided was inadequate to cover a parking lot the size of the one at the mall, that there was no effective way to contact the one Forsum guard present, and statements by 1) Norrito that Forsum's guards were to "try to assist" a person being attacked, and 2) Loews' witness, Amy Dreyhaupt, to the effect that it was Forsum's duty to protect persons at the premises and that its performance was poor. However, the contentions regarding inadequate coverage and communications as bases for denying summary judgment assume that Forsum had a duty to persons in Fox's position, and do not address the absence of such a duty under the authority cited above. Further, with regard to the inadequate coverage, such arguments also ignore the fact that the decision to pay for only one car obviously rested with the parties hiring Forsum, not Forsum itself.

The statement by the Loews' witness is wholly conclusory, as no facts are presented in support of such statement that might indicate the existence of such a duty on Forsum's part. Lowes' complaints about the inability to reach Forsum personnel, and Forsum's poor performance generally, are not relevant to this issue. Norrito's statement about trying to assist a person who was being attacked, at best, raises some question as to whether Forsum had assumed a duty to act on behalf of a member of the public in such a circumstance – but such a duty would not come into play unless one of its employees actually witnessed an attack or altercation. There is absolutely no proof of any such observation in this case. It should be noted that Norrito also testified that the guard's duty "is basically the same as a civilian. You call 911. You don't have any power" (Norrito EBT, at 17).

Finally, even assuming the existence of a duty flowing to Fox, plaintiffs assertion that Forsum had prior notice of acts such as the one that underlies this suit is unsupported by any evidence in the record. Allegations made by the plaintiffs of prior similar incidents are insufficient (*see, Williams v Citibank, N.A.,* 247 AD2d 49). Nor can the verbal abuse that preceded the attack constitute such notice. There is no proof that Forsum's employee knew that the altercation was in progress; moreover, the sudden, criminal act by Vecchione cannot be seen as foreseeable, especially in view of Fox's own testimony that he never felt in any danger while Vecchione was yelling at him and/or his friends (*see, Florman v City of New York,* 293 AD2d 120; *Durham v Beaufort,* 300 AD2d 435, *supra,* at 436). Accordingly, the motion to dismiss the complaint should be granted to this defendant.

There also is no basis for withholding summary judgment on cross claims asserted by co-defendants. Loews has not opposed Forsum's motion. The Mall defendants do oppose, and argue that they may be entitled to common-law indemnity, but no such cross claim is found in their answers. Even if such a claim had been made, these defendants raise no facts from which one may infer a breach of a duty owed to them, such as a nonperformance of

an act solely within Forsum's province that was the proximate cause of plaintiff's injuries (*cf., Baratta v Home Depot USA,* 303 AD2d 434, 435).

Accordingly, Forsum's motion for summary judgment is granted in its entirety, and the complaint and all cross claims asserted against it are dismissed.

Mall Defendants' Motion

The Court finds that by way of its attorney's affirmation, the Mall defendants have properly submitted pleadings, deposition transcripts and other proof in support of their motion (*see, Olan v Farrell Lines, Inc.,* 64 NY2d 1092). The evidence presented evidence demonstrates, *prima facie,* the movants' entitlement to judgment as a matter of law, shifting the burden to the plaintiffs to come forward with proof meriting a trial (*see, e.g., Zuckerman v City of New York,* 49 NY2d 557, 562).

The Mall defendants present proof that the mall property of approximately 40 acres was owned by 3601 Turnpike Associates (stated to an incorrect name, the correct one being Nassau Mall Plaza Associates) and Crescent Plaza, and that Jeffrey Management Company was their managing agent. Linda Coneys, an employee of Jeffrey Management Company, described her job duties as encompassing "maintenance of the properties" (Coneys EBT, at 18). Given that statement, and the Mall defendants failure to produce testimony, leases or other documentary evidence to support their attorney's claim that they were simply "out of possession landlords" who thus owed no duty of care to persons on the premises, they have failed to make a *prima facie* showing that summary judgment can not be awarded to them on that basis (*see, Portaro v Tillis Inv. Co.,* 304 AD2d 635, 636; *Pastor v R.A.K. Tennis Corp.,* 278 AD2d 395). However, the Coney EBT is sufficient as *prima facie* proof that they had no notice of prior criminal activity such that the security precautions they took – *i.e.,* the hiring of Forsum – was so inadequate given the risk that they can be held liable for Vecchione's criminal act.

More specifically, it is well established that landlords and managing agents have a duty to take minimal security precautions to protect members of the public from the foreseeable acts of third parties, even though they are not insurers of public safety *(Wayburn v Madison Land Ltd. Partnership,* 282 AD2d 301, 303; *Buros v Aqueduct Realty Corp.,* 92 NY2d 544, 548; *Jacqueline S. v City of New York,* 81 NY2d 288, 292). However, it must be shown that they knew or had reason to know from past experience that there is a likelihood of such acts occurring in the subject area before a breach of this duty can be demonstrated (*Nallan v Helmsley-Spear, Inc.,* 50 NY2d 507, 519) – and liability could therefore be grounded on the fact that notwithstanding such knowledge, such minimal precautions were not taken (*see, Rudel v National Jewelry Exhange Co.,* 213 AD2d 301 [as crime occurred in New

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York City diamond district, presence of only one unarmed security guard creates issue of fact as to adequacy of security]). The Mall defendants, as noted, have demonstrated that they did not have that knowledge.

In response, plaintiffs assert that Loews had informed the Mall defendants of fighting at the theater, pointing to the testimony of Loews witness, Amy Dreyhaupt. However, a review of the same reveals, as the Mall defendants' counsel correctly points out, that she had testified that she had informed managers at Loews only, not employees of the moving Mall defendants (Dreyhaupt EBT at 54- 55, 97-98). Therefore, even assuming that the problems described by Dreyhaupt rose to the level of prior criminal activity – and there is absolutely no proof of prior arrests or criminal assaults noted anywhere in the record – no issue of fact is present that a finder of fact might conclude that they had knowledge of prior incidents and that the security steps they took in response were inadequate.

Accordingly, summary judgment is granted to the Mall defendants, and the complaints and the cross claim asserted against them by Loews are dismissed.

Lowes' Cross Motion

Initially, the Court will entertain the cross motion. Though untimely under the Court 's certification order, it is nearly identical to the motion of the Mall defendants, which plaintiffs do not attack on such procedural basis (*see, Boehme v A.P.P.L.E. A Program Planned for Life Enrichment,* 298 AD2d 540; *cf., Bressingham v Jamaica Hosp. Med. Ctr.,* 17 AD3d 496).

The Court finds that by way of its attorney's affirmation, Loews has properly submitted pleadings, deposition transcripts and other proof in support of their motion (*see, Olan v Farrell Lines, Inc.,* 64 NY2d 1092). The evidence presented evidence demonstrates, *prima facie,* the movant's entitlement to judgment as a matter of law, shifting the burden to the plaintiffs to come forward with proof meriting a trial (*see, e.g., Zuckerman v City of New York,* 49 NY2d 557, 562).

Specifically, the examination before trial of Amy Dreyhaupt and other proof indicate that although Loews undertook to control crowd conditions in front of the theater, and was concerned about security, it had no specific knowledge of the verbal altercation that was occurring, and that Vecchione's physical act was sudden and unforeseeable. Thus, although like the Mall defendants, Loews had a duty to minimize foreseeable dangers, including criminal acts of third parties, because it exercised control over the area where the attack occurred (*Buros v Aqueduct Realty Corp.,* 92 NY2d 544, 548; *Jacqueline S. v City of New York,* 81 NY2d 288, 292), there was no breach of that duty in its failure to interdict Vecchione. It simply did not know – any more than Fox himself, the victim, knew – that the attack was imminent. Under such circumstances, it cannot be held liable (*see, Maheshwari v City of New York,* 2 NY3d 288).

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In response, the plaintiffs have failed to raise any issue of fact as to either actual or constructive knowledge that an attack by Vecchione was about to occur; as noted above, Fox never reported the harassment to any employee. Nor have plaintiffs demonstrated that Loews had any knowledge of Vecchione, his presence that night, or his tendencies to violence.

Accordingly, summary judgment is also granted to Loews and the complaint as against it is dismissed.

The action against Vecchione is severed and continued.

Date: Oct. 27, 2005

ENTERED

OCT 31 2005

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ROBERT ROBERTO, JR., J.S.C.