

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 22th day of February, 2005

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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MAGDY BOURAEE, M.D. and MARVAT
BOURAEE,

Plaintiff(s),

- against -

Index No. 3104/00

LUTHERAN MEDICAL CENTER and
"JOHN DOE,"

Defendant(s).

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The following papers numbered 1 to 5 read on this motion:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

Opposing Affidavits (Affirmations) _____

Reply Affidavits (Affirmations) _____

_____ Affidavit (Affirmation) _____

Other Papers _____

Papers Numbered

1-2

3-4

5

Upon the foregoing papers, defendant Lutheran Medical Center (LMC) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint.

Plaintiff Magdy A. Bouraee, M.D. commenced this action to recover damages for personal injuries sustained on November 26, 1998 when he was assaulted by an unknown assailant in the hospital operated, managed and maintained by LMC. At the time of the incident, plaintiff was a

general and vascular surgeon who practiced at the hospital. According to his examination before trial testimony, plaintiff was on the fifth floor of the hospital and needed to attend to business on the fourth floor. At approximately 3:20-3:25 PM, plaintiff proceeded to the elevator which was designated for use by the staff and patients of the hospital. After plaintiff entered the elevator, an unidentified man came on afterwards and asked plaintiff to press the button for the lobby. When plaintiff reached for the button, the man grabbed hold of plaintiff's neck and demanded money. The assailant pressed a sharp object against plaintiff's neck and during the course of an ensuing struggle plaintiff suffered lacerations to his neck, eye and left hand. To date, the assailant has not been apprehended or identified. Discovery is complete in this matter and a note of issue was filed on April 30, 2004.

In support of its motion for summary judgment, LMC submits reports it maintained for security incidents for the years 1996-1998 which reveal that there were no instances similar to the subject assault occurring inside the hospital, but rather involved altercations between patients, patients and staff, between individuals involved in an ongoing dispute, or incidents which took place outside of the building.* LMC contends that in light of the fact that no similar incidents had occurred for the two years prior to the subject assault, the attack was not foreseeable. Further, LMC maintains that since the attacker was never identified, it would be speculative to find that the assailant was not

*The only reported incident in the record of a similar assault, according to an LMC incident report submitted in support of the instant motion, occurred on December 11, 1996 when a doctor who practiced at LMC was grabbed from behind by a mugger who proceeded to take the doctor's wallet and beeper. However, this attack did not occur inside the hospital but on 56th Street between 4th and 5th Avenues (the hospital is located at 150 55th Street, between 1st and 2nd Avenues).

a patient, visitor, staff member, or other person who was entitled to be on the premises, and therefore it would be speculative to find that plaintiff's assault was proximately caused by the failure of LMC to provide minimal security. LMC notes that visiting hours for the hospital were from 2:00 PM-8:00 PM, the time in which plaintiff was attacked, that LMC treats as many as 500,000 patients per year and employs a large number of persons, that LMC grants privileges to many health care providers and provides access to food service vendors, medical equipment vendors, pharmaceutical vendors and waste management vendors and at various times, including visiting hours, the public is permitted to be on the hospital premises to visit with friends, family and loved ones.

In opposition to LMC's motion for summary judgment, plaintiff cites the examination before trial testimony of John Miller, Director of Security for LMC, Myles Davis, Senior Vice President of LMC, and Security Officers Francisco De Jesus, Billy Pyles, Domingo Pagan and Arturo Gonzalez, and submits the affidavit of its expert witness on security, Henry Branche. Additionally, plaintiff submits copies of twelve police reports which document criminal occurrences on Lutheran's property.

Plaintiff alludes to the testimony of the aforementioned security officers and Messrs. Miller and Davis to show that LMC's own security protocols were violated on the day of the incident. For example, it was stated that all three security officers on duty at the hospital "abandoned" their security posts to respond to a fire alarm in the emergency room at 3:29 PM. Additionally, while LMC security protocol required the presence of four security officers to be on duty at the time of the assault, officer Pyles finished his shift at 3:00 PM without being relieved, leaving only three security officers on duty at that point. Another protocol alleged to have been violated was a requirement that the security officers inquire as to the business of each visitor to the hospital and direct them

accordingly. Mr. DeJesus testified that it was his understanding when a visitor entered through the main lobby “you have to ask if they need help and where they are going.” Mr. Gonzalez, however, testified that security does not have to approach visitors “unless they ask you questions.” The witnesses testified that the subject elevator which was the location of the assault was designated for use by patients and staff, and Mr. Davis and Mr. Miller testified that security protocol was for the security officers to question visitors who were about to use the subject elevator and discourage those visitors from using that elevator.

Plaintiff further refers to the testimony of Mr. Miller with respect to a risk assessment of LMC in September 1996 and his recommendations to Mr. Davis about improving hospital security. One such recommendation was for the installation of an additional 24 security cameras as well as new monitors with better resolution and recording capability. Mr. Miller testified that LMC failed to implement such upgrades despite several requests. Mr. Miller further testified that he disagreed with LMC’s open visitor policy, which required passes only for certain restricted areas, stating that “as a security person, I think you have better tools if you kept [the universal visitor pass protocol].”

In his affidavit, dated October 15, 2004, plaintiff’s expert, Henry Branche, states that he reviewed a schematic drawing of the second floor of LMC, the security log book entries from November 26, 1998, and the deposition testimony adduced in this matter and believes that LMC committed “violations of sound security practice” including: 1) the failure to maintain a proper number of security staff given the size of the hospital and the history of criminal activity in and around the hospital; 2) the response of all three security officers on duty to the fire alarm call at 3:29 PM, leaving the front desk and emergency room entrance completely unguarded, 3) the failure to guard the staff/patient elevator; 4) inadequate staffing coupled with inadequate video surveillance,

in particular the failure to replace a camera over the 56th Street entrance to the hospital; 5) the absence of a visitor pass protocol; and 6) the failure of at least one of the security officers to make inquiries of visitors entering the hospital.

LMC has a “common-law duty to take minimal security precautions against reasonably foreseeable criminal acts by third parties” (*James v Jamie Towers Housing Co.*, 99 NY2d 639, 641 [2003]; *see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 519-520 [1980]; *see also Jacqueline S. v City of New York*, 81 NY2d 288, 295 [1993]). Further, “[i]n order to prevail at trial in a negligence case, a plaintiff must establish by a preponderance of the evidence that the defendant's negligence was a proximate cause of plaintiff's injuries. A plaintiff is not required to exclude every other possible cause, but need only offer evidence from which proximate cause may be reasonably inferred. Plaintiff's burden of proof on this issue is satisfied if the possibility of another explanation for the event is sufficiently remote or technical to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence. When faced with a motion for summary judgment on proximate cause grounds, a plaintiff need not prove proximate cause by a preponderance of the evidence, which is plaintiff's burden at trial. Instead, in order to withstand summary judgment, a plaintiff need only raise a triable issue of fact regarding whether defendant's conduct proximately caused plaintiff's injuries” (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550 [1998][citations and internal quotations omitted]).

In *Burgos* (92 NY2d at 551), the Court of Appeals stated that “a plaintiff who sues a landlord for negligent failure to take minimal precautions to protect tenants from harm can satisfy the proximate cause burden at trial even where the assailant remains unidentified, if the evidence renders it more likely or more reasonable than not that the assailant was an intruder who gained access to the

premises through a negligently maintained entrance.” Here, insofar as plaintiff points to the response of all security officers to the 3:29 fire alarm as a proximate cause of the attack (which was approximated by plaintiff to have occurred minutes earlier at 3:20-3:25 PM), there is no evidence to indicate that the assailant entered the hospital during the guards’ absence. In fact, there is no proof at all as to when and where the assailant entered the hospital. Likewise, it is not known whether the assailant was a patient or was visiting a patient, in which case he would have been allowed entry to the hospital at the time of the assault. In short, there is no proof to show that it was “more likely or more reasonable than not that the assailant was an intruder” or otherwise would have been prevented from entering the hospital had the recommended protocols been in place. Any finding that the assailant was an intruder would be pure speculation.

Of course, it is perfectly reasonable to find that the subject assault was proximately caused by the lack of sufficient security, particularly in and around the elevators. However, while there may be an inference that stronger security measures would have acted as a deterrent to the assault, this court is reminded that LMC’s duty is limited to taking *minimal* security precautions against *foreseeable* criminal acts by third parties. “Once an injury has occurred, the risk becomes obvious and it is tempting with the benefit of hindsight to conclude the risk was unreasonable and the harm foreseeable” (*Sanchez v State of New York*, 99 NY2d 247, 258 [2002]). However, in order to establish the element of foreseeability, plaintiff is required to present proof that the criminal conduct at issue was “reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location” (*Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 153 [1999]).

Ambient neighborhood crime alone is insufficient to establish foreseeability (*id.*). Whether an injury is foreseeable depends on location, nature and extent of previous criminal activity and similarity, proximity and other relationship to crime in question (*see Jacqueline S.*, 81 NY2d at 295). ““What safety precautions may reasonably be required of a landowner is almost always a question of fact for the jury. Conceivably, in assessing the reasonableness of the landowner's conduct, the jury might take into account such variables as the seriousness of the risk and the cost of the various available safety measures”” (*Novikova*, 258 AD2d at 154 quoting *Nallan*, 50 NY2d at 520, n 8). However, despite the apparent flexibility of this standard, it is not without limit. Rather, it has been repeatedly held that an owner or possessor of property is not the insurer of a visitor's safety (*Novikova*, 258 AD2d at 154).

With these principles in mind, this court has considered plaintiff's submission of twelve police reports concerning offenses which allegedly occurred on LMC property as well as a copies of “post analysis report[s]” from the 72nd Precinct of the New York City Police Department and finds these documents insufficient to raise an issue of fact with respect to foreseeability. Citing the police statistical reports, plaintiff contends that in sector “D,” which plaintiff classifies as “the small geographic area surrounding defendant LMC,” there were 133 assaults in 1996, 146 assaults in 1997 and 157 assaults in 1998. However, it is not apparent from these statistics as to the geographical ambits of sector “D,” the nature of the assaults involved or the circumstances involving same, i.e. the number of assaults which were ambush style attacks with a weapon, the number which were domestic altercations or rows between acquaintances, and the precise locations of the offenses and the conditions of those locations. The general crime statistics in the surrounding neighborhood offered by plaintiff thus “provide no basis for singling out the subject premises as one more likely

than another to be the situs of random criminal violence of the type at issue” (*Novikova*, 258 AD2d at 153). Accordingly, the “post analysis report[s]” of ambient neighborhood crime do not raise an issue of fact that the subject violent incident which occurred within the hospital building was foreseeable.

Turning to the 12 police reports submitted by plaintiff which document alleged incidents in the hospital building, it is noted that while most of the incidents are classified as assaults, the nature and circumstances of the incidents are significantly different from the nature and circumstances of the attack on plaintiff. The first report, dated March 8, 1997, details an incident whereby the perpetrator struck the victim in the face with keys. However, the corresponding incident report generated by LMC states that the victim was a LMC security officer who was struck by a “disorderly” patient who was being ejected from the emergency room. The second police report, dated March 25, 1997, states that the victim was attacked and scratched on the neck by a LMC staff member while the victim was going to see the staff member’s supervisor. The third report, dated September 27, 1997, states that the victim was attacked with a screwdriver, causing injury to the victim’s leg. The corresponding LMC incident report states that the victim was a LMC security officer who was struggling with an unruly patient in or around the emergency room when the patient stabbed the officer with a screwdriver. The fourth police report, dated October 26, 1997, does not involve an assault but rather details a burglary of the hospital gift shop. The fifth police report, dated October 30, 1997, also does not document an assault but rather the theft of a patient’s belongings while he was getting X-rays. The sixth police report, dated January 25, 1998, involves a LMC security officer who was punched by the father of a woman the officer was attempting to restrain. The seventh police report, dated January 29, 1998, states that a woman was pushed, shoved and

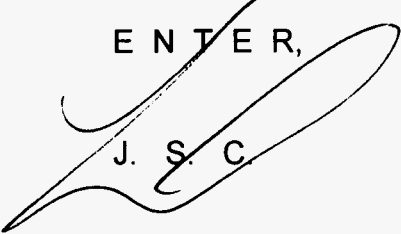
and punched by another woman who came to the hospital. The eighth police report, dated March 12, 1998, states that a LMC staff nurse was punched in the forehead by a “mental patient.” The ninth police report, dated April 8, 1998, details the alleged abuse of a patient by a LMC staff member, who was said to have yanked the patient’s blankets, causing the patient to fall from bed. The tenth police report, dated August 3, 1998, states without further detail that the victim was punched in the head by the perpetrator. The eleventh police report, dated August 27 1998, details an incident where a doctor was paged to the lobby to meet a person claiming to have a package from Maryland (where the doctor had family). The man then told the doctor that he had the wrong package and instructed the doctor to follow him out to his car to retrieve the right package. When the two men were outside of the hospital, the man punched the doctor in the nose and then fled. The twelfth police report, dated October 9, 1998, states that a nurse was punched in the back by a perpetrator after the nurse called security on the perpetrator’s mother.

Of the twelve reports submitted by plaintiff, only two involve an attack on an LMC staff member with any type of weapon, to wit, keys and a screwdriver, and these incidents involved altercations between an unruly patient in the course of being ejected and a security officer, which are clearly dissimilar to the ambush style attack involving plaintiff. The other incidents involve either simple theft or minor altercations in which no weapons were used. Further, none of the twelve incidents took place in the hospital elevators and there are no reported incidents in the record where a perpetrator committed a “mugging” or robbery attempt inside the hospital similar to the subject attack on plaintiff. Simply put, the assault on plaintiff here has not been shown to be “reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location” (*Novikova*, 258 AD2d at 153).

Accordingly, this court finds as a matter of law that the subject attack on plaintiff was not foreseeable. As a result, the complaint is dismissed as against LMC.

The foregoing constitutes the decision and order of the court.

E N T E R,
J. S. C.

A large, stylized handwritten signature in black ink is written over the typed text "E N T E R, J. S. C.". The signature is fluid and cursive, with a long horizontal stroke extending to the right.