2014 IL App (1st) 1123626-U
No. 1-12-3626
Order filed April 2, 2014

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

RAY HERNANDEZ, Plaintiff-Appellant, v. ALL FURNITURE LIQUIDATORS, LUIS NAVA, and RICHARD SHAPIRO, Defendants-Appellees.	)))))))))))	Appeal from the Circuit Court of Cook County. No. 10 L 8565 The Honorable William Gomolinski, Judge, presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment affirmed where there was no evidence it was reasonably foreseeable to defendant employer that employee would be shot at his place of business.

¶ 2 Ray Hernandez was shot and injured while working as a salesperson at a furniture store. Hernandez sued All Furniture Liquidators and its owner, Luis Nava, alleging negligence in failing to provide him a safe workplace. (The building's owner also was named, but voluntarily

dismissed with prejudice.) All Furniture Liquidators and Nava filed a motion for summary judgment, which the trial court granted. Hernandez argues the trial court erred in finding the shooting was not reasonably foreseeable, since the store was in a high crime area, salespeople frequently carried cash, and the police were called to defendants' store on two occasions. We affirm.

¶ 3 BACKGROUND

¶ 4 Hernandez began working as a salesperson at All Furniture Liquidators in 2000 when the store was located in the 4600 block of South Western Ave., Chicago. In 2005, the store relocated a few blocks north to 4425 South Western Ave. On November 25, 2008, at about 4:30 p.m., a customer came in and asked Hernandez for a price on a mattress. Hernandez described the customer as a Hispanic man, 5'11" and 150 pounds. Hernandez, who was the only employee in the store at the time, went to the office to check. The man pulled a gun out of his right front pocket, and pointing it at Hernandez said, "Give me your money." As Hernandez reached with his left hand for the man's right arm, the gun went off. Hernandez felt blood running down his arm, and retreated back to the store office to call 911. While on the phone, he lost consciousness. Later, when he regained consciousness, Hernandez was told by doctors that he lost his eyesight due to a lack of oxygen following the shooting.

¶ 5 In July 2010, Hernandez filed a complaint in the circuit court alleging defendants had a duty to use ordinary care for his safety and breached that duty by failing to provide police protection in a high crime area, failing to warn him of and protect him from criminal activity, failing to provide proper training or adopt and enforce safety rules, and failing to provide a safe place to work. Defendants All Furniture Liquidators and Nava filed a motion for summary judgment, which after a hearing, the trial court granted, stating, in part:

"I think in construing all of the facts in the light most favorable to [plaintiff], that *** there are no issues of material facts, and I think that they are entitled to their motion for summary judgment.

Of course, the duty is a question of law for the Court to decide. I can't get over the issue of duty. I don't know based upon these specific facts, and these specific circumstances, as alleged and have transpired in this case, that there is any foreseeability.

I don't think it's objectively reasonable to say that *** there is a duty to protect from this type of activity that took place. Is it unfortunate? Yeah. Is it horrific what happened to Mr. Hernandez? I don't disagree. *** I don't believe *** based upon these facts and circumstances, that it was ever really foreseeable and that there is any real duty to guard against it, so for those reasons, I'm going to grant the motion for summary judgment."

¶ 6 Hernandez timely appealed, arguing a finding that the shooting was reasonably foreseeable was sufficiently supported by the facts, and therefore, defendants had a duty to protect him.

¶ 7 ANALYSIS

¶ 8 Summary judgment should be granted when the pleadings and evidence as a whole reveal no triable issue of material fact and the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). The purpose of summary judgment is not to resolve a question of fact, but to avoid an unnecessary trial where no genuine issue of material fact exists. *Watkins v. Schmitt*, 172 Ill. 2d 193, 203 (1996). When making that determination, the pleadings are construed liberally in favor of the nonmoving party. *Harrison v. Hardin County Community*

Unit School District No. 1, 197 Ill. 2d 466, 470 (2001). And the nonmoving party "must present a factual basis which would arguably entitle [the nonmoving party] to a judgment." *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996). This court reviews the lower's court grant of summary judgment *de novo*. *Weather-Tite, Inc. v. University of St. Francis*, 233 Ill. 2d 385, 389 (2009).

¶ 9 To recover in an action for negligence, a plaintiff must establish the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury to the plaintiff proximately caused by the breach. *Sameer v. Butt*, 343 Ill. App. 3d 78, 85 (2003). The question of the existence of a duty is a question of law and, in determining whether a duty exists, the trial court considers whether a relationship existed between the parties that imposed a legal obligation on one party for the benefit of the other party. *Id*. (citing *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 215 (1988)).

¶ 10 Generally, Illinois law does not impose a duty on a property or business owner to protect another from a criminal attack by a third person. *Id*. at 86. An exception has been recognized, however, where a relationship exists between the injured party and the business owner and the criminal attack was reasonably foreseeable. *Id*. Illinois law recognizes four special relationships that will impose on a business owner a duty to warn or protect from harm: (1) common carrier and passenger, (2) innkeeper and guest, (3) business invitor and invitee, and (4) voluntary custodian and protectee. *Iseberg v. Gross*, 366 Ill. App. 3d 857, 861 (2006). A person is a business invitee on the land of another (1) the person enters by express or implied invitation; (2) the entry is connected with the owner's business or with an activity conducted by the owner on the land; and (3) the owner receives a benefit. *Sameer*, 343 Ill. App. 3d at 86.

¶ 11 Hernandez contends he was an independent contractor for the furniture store and thus, a business invitee to whom defendants owed a duty to warn or protect him from harm. Like the trial court, we need not make a determination about Hernandez's status as an independent contractor/business invitee, because the facts do not support a finding that the shooting was reasonably foreseeable by defendants.

¶ 12 Illinois courts have held that even if a "special relationship" exists, no duty to protect against criminal acts will be imposed unless the incident should reasonably have been foreseen by the owner. *Rowe*, 125 Ill. 2d at 215-16. "Where injury results from freakish, bizarre, or fantastic circumstances, no duty is present and no negligence claim can be asserted." *Washington v. City of Chicago*, 188 Ill. 2d 235, 240 (1999). Anyone "can foresee the commission of a crime virtually anywhere at any time." *Bence v. Crawford Savings & Loan Ass'n*, 80 Ill. App. 3d 491, 495 (1980). "The question is not whether a criminal event is foreseeable, but whether a duty exists to take measures to guard against it." *Bence*, 80 Ill. App. 3d at 495.

¶ 13 Hernandez argues defendants had a duty to protect him from being shot because the store was located in a high crime neighborhood, he often worked alone, and he carried large amounts of cash because the store had no safe place to keep it. Hernandez also asserts that on two occasions while working at the store, he had to call the police for assistance. Specifically, at the store's prior location, someone tried to buy furniture using a fraudulent credit card. When Hernandez called the police, the perpetrators fled the store and were involved in a car accident that killed one of the perpetrators. Hernandez asserted he was always afraid the perpetrators would return to the store. The second incident, which occurred at the store where the shooting happened, involved a customer who was angry that furniture he ordered did not arrive on time.

When the customer became unruly, Hernandez called the police, who escorted the customer out of the store. Hernandez asserted he complained to Nava on three or four occasions that the store was unsafe and needed security. Hernandez contends that all of these factors made it reasonably foreseeable to defendants that he could be the victim of a crime and imposed a duty on them to take steps to protect him.

¶ 14 To support his argument that the shooting was reasonably foreseeable, Hernandez relies primarily on *Osborne v. Stages Music Hall, Inc.*, 312 Ill. App. 3d 141 (2000). In *Osborne*, the plaintiff was injured outside of defendant's bar when she was kicked in the face by another patron. Shortly before the incident, several of defendant's bouncers got into an altercation with the assailant and his friend. After the fight, the bouncers forced the two intoxicated men outside and locked the door. The bouncers saw the expelled patrons pounding on the door, trying to get back inside, swearing at them, and indicating they wanted to continue to fight. *Id*. at 149. When the plaintiff left the bar from the door that was locked, one of the expelled patrons felt a push from behind, and thinking it was one of the bouncers, " 'did a spinning heel kick' " and struck the plaintiff in the face. *Id*. at 144.

¶ 15 In reversing the trial court's directed verdict in favor of defendant, the appellate court reasoned that the defendant, knowing the expelled patrons were intoxicated, combative, and angry, "exported" the problem out to the sidewalk. The court found that based on the bouncers' knowledge, it was reasonably foreseeable that allowing patrons to leave through the locked door into the path of the potentially dangerous men would lead to the patrons being attacked. *Id*. at 149. Thus, the court held that defendant owned plaintiff a duty to protect her against the apparent danger. *Id*.

¶ 16 Hernandez contends that as in *Osborne*, the defendants had knowledge that an attack was probable and had duty to protect him. Because the decision in *Osborne* relies on facts that are dramatically different from those in this case, it lends no support for plaintiff's argument. In *Osborne*, the defendant's employees witnessed the intoxicated assailants acting violently, causing them to be removed from the bar. They then saw the men continuing to act in a threatening manner as they stood outside. Under those circumstances, it was reasonably foreseeable that the men could attack a person who exited the bar. Conversely, here, the perpetrator gave no indication he intended to hurt Hernandez and had not engaged in any prior act of violence that would reasonably lead defendant to believe he might harm or injure Hernandez.

¶ 17 A case analogous to this one is *Costa v. Gleason*, 256 Ill. App. 3d 150, 151 (1993). In *Costa*, the plaintiff, entered defendant's bar at about 7:30 a.m. Since it was past closing time, a bar employee locked the door. The employee saw two patrons get up to leave and unlock the door as they were exiting. When the employee went toward the front door to re-lock it, a man tried to enter the bar. When the employee told the man the bar was closed, an argument ensued, the man pulled out a gun and shot plaintiff. The appellate court affirmed the trial court order granting summary judgment to defendants based on plaintiff's failure to present "evidence of previous disruptions, acts of violence, or warnings of any sort which would have given defendant notice that such an assault was probable." *Id*. at 152. The court stated, "The occurrence in this case, an individual entering a lounge, pulling out a gun and opening fire, is so extreme that it is difficult to conceive of how defendant could have guarded against it. Further, as a policy matter, it would be unreasonable to require defendant to assume the duty of guarding against an isolated occurrence no one could have foreseen." *Id*.

¶ 18 Similarly, Hernandez failed to offer any evidence that would have alerted defendants that Hernandez was likely to be shot on the premises. As in *Costa*, the shooting was a sudden occurrence without warning. Hernandez contends the two earlier incidents in which the police were called to the store should have put defendants on notice that he could be injured. But neither of those incidents involved violence or a threat of violence to Hernandez. Generally, to establish that a business has a duty to protect others from the criminal acts of third parties on its premises due to its knowledge of prior criminal incidents, the injury must be reasonably foreseeable and must have resulted from the same risk as was present in the prior criminal activity. *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 527 (1995). The crimes must be of the same or similar type to the crime in question to warrant a finding of foreseeability. *Id*. at 527. Nothing in the nature of the prior two incidents would make a shooting at the store reasonably foreseeable.

¶ 19 We also reject Hernandez's contention that his prior conversations with Nava about the safety conditions at the store and the need for security made it reasonably foreseeable to defendants the shooting reasonably foreseeable and imposed a duty on them to take steps to protect him. In the absence of evidence of other similar criminal occurrences, a store employee's subjective belief about the risks associated with his employment are an insufficient basis on which to deem the criminal acts of third parties foreseeable. Cf. *Hill v. Chicago Housing Authority*, 233 Ill. App. 3d 923, 933 (1992) (vague allegations regarding prior criminal events against unnamed victims and at unspecified times did not raise issue as to foreseeability of criminal act against plaintiff).

¶ 20 Hernandez next contends that *Gordon v. Chicago Transit Authority*, 128 Ill. App. 3d 493 (1984), supports a finding that even in the absence of prior violent incidents at the store,

defendants should have reasonably foreseen that he could be shot and taken steps to protect him. In *Gordon*, the plaintiff was a female CTA passenger, who was robbed and sexually assaulted at 7 p.m. while riding on a southbound CTA train. The CTA contended the trial court erred in denying its motion for a directed verdict on the basis that in the absence of prior sexual assaults on the train, the CTA could not have foreseen that the plaintiff would be raped while a passenger. *Id*. at 498. In affirming, the appellate court found that despite the absence of evidence of prior rapes on a CTA train, sufficient evidence existed to show a pattern of criminal activity on the trains, noting that during a nine-month period the year before the plaintiff was assaulted, 21 crimes were reported against persons on the same train route. *Id.* at 499. Although none of these reported crimes involved a sexual assault, many victims were women, and most of the incidents occurred between 5 p.m. and 10 p.m. *Id*. The court also found that the CTA knew or should have known that the configuration of the CTA trains, with a motorman's booth opened for passenger use, provided a place of concealment, which increased opportunities for criminal activity. *Id*. Further, the CTA had crime statistics at its disposal but failed to use them to effectively deploy resources and personnel to prevent transit crimes. *Id*. All of these factors taken together led the court to conclude that "[d]espite the absence of evidence indicating that prior rapes had occurred aboard moving rapid transit trains, there was sufficient evidence to support the conclusion that the CTA, by reason of the physical conditions conducive to passenger isolation and the prior pattern of criminal activity aboard its trains, should have anticipated the potential danger of such an attack and taken measures to minimize the risk." *Id*. at 500.

¶ 21 Hernandez contends that as in *Gordon*, defendants should have anticipated he might be shot despite the absence of prior similar incidents at the store. We disagree. In *Gordon*, the

defendant had in its possession statistics showing criminal activity over a nine-month period on the same train line at about the same time of day with women being the primary victims. Conversely, Hernandez has not presented any evidence of a pattern of extensive criminal activity at defendants' store during his eight years at the two locations. In that time, police were called only twice, and neither incident involved a crime against a person, or suggests a "pattern of criminal activity" that would have alerted defendants to anticipate what occurred here.

¶ 22 We also reject Hernandez's contention that the store's location in an allegedly high crime neighborhood with a higher than average rate of aggravated battery and robbery, made it reasonably foreseeable that he could be the victim of a criminal attack. A similar argument was raised in *Petraukas v. Wexenthaller Realty Management, Inc.*, 186 Ill. App. 3d 820 (1989). There, the plaintiff was raped in her apartment and sued the building owner alleging that the building was located in a "high crime" area and that defendants knew or should have known that one month before she was attacked, a person was fatally shot across the street from the apartment building. Plaintiff also alleged that before the attack, an unauthorized person gained access into the building whom defendants escorted from the premises. *Id*. at 824. In affirming the trial court's dismissal of plaintiff's complaint, the appellate court stated, "[t]he prior criminal activity and the injury to plaintiff need not be of the exact same nature but plaintiff's injury must have resulted from the same risk as was present in prior incidents of criminal activity." *Id.* at 827 (citing *Rowe*, 125 Ill. 2d at 227). The court noted that plaintiffs' allegations of prior criminal activity had "no connection" to the apartment building where she was assaulted. *Id*.

¶ 23 Even assuming Hernandez's allegations regarding the criminal demographics of the neighborhood are correct, absent evidence of similar prior incidents of criminal activity in the

store, it was not reasonably foreseeable that Hernandez might be shot such that defendants had a duty to guard against it.

¶ 24 As the trial court so aptly observed, what happened to plaintiff was unfortunate and horrific. But in the absence of evidence showing it was reasonably foreseeable, we affirm the trial court's order granting summary judgment.

¶ 25 Affirmed.