DEBBIE SMITH V. GERALD DANIELS. ET AL, C.P. Franklin County Branch, No. A.D. 1991-355

Civil Action - Summary Judgment - Negligence - Landlord's Duty to a business visitor from the wilful intervention of a criminal whose actions caused the injuries

1. Summary judgment may only be granted where "the pleading, deposition, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035(b); *Allen v. Merriweather,* 413 Pa.Super. 410, 411, 605 A.2d 424, 425 (1992).

2. A landlord out of possession is generally not responsible for injuries suffered by a business invitee on the leased premises.

3. A landlord has no general duty to its tenants to protect them from the criminal incursions of third persons absent a pre-existing duty, or in a situation wherein the landlord, either gratuitously or for consideration, has undertaken a duty, and negligently performs that duty thereby bringing about injury.

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OPINION AND ORDER

KAYE, J., February 20, 1995:

OPINION

On August 1, 1989, Debbie Smith ("plaintiff") was the victim of a violent sexual assault committed by defendant Gerald Daniels ("Daniels") while she was working as a cashier at defendant Blue Chip Mini Mart ("Blue Chip") on Molly Pitcher Highway, Greencastle, Franklin County, Pennsylvania. Blue Chip is situate in the Molly Pitcher Mini Mall, which was owned by defendant, Richard Sterner ("Sterner"). Daniels has since died, and motions

for summary judgment have been entered with plaintiff's concurrence against all other defendants except Sterner, who has filed a motion for summary judgment which is now before the Court for disposition.

Summary judgment may only be granted where "the pleading, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035(b); *Allen v. Merriweather,* 413 Pa.Super. 410, 411, 605 A.2d 424, 425 (1992). On a motion for summary judgment, the Court must not decide any issues of fact. The Court's sole function is to determine whether there are any genuine issues of fact to be tried. *Thorsen v. Iron and Glass Bank,* 328 Pa.Super. 135, 141, 476 A.2d 928, 931 (1984). In ruling upon a motion for summary judgment, the record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Hayward v. Medical Center of Beaver County,* 530 Pa. 320, 608 A.2d 1040 (1992). Further, on a motion for summary judgment, we must accept as true all well-pleaded facts in the non-moving party's pleadings, and give the non-moving party the benefit of all reasonable inferences to be drawn therefrom. *Melat v. Melat,* 411 Pa.Super. 647, 602 A.2d 380 (1992). Summary judgment may be entered only in a case that is clear and free from doubt. *Elder v. Nationwide Insurance Company,* 410 Pa.Super. 290, 599 A.2d 996 (1991).

Although the moving party has the burden of showing that no genuine issue of material facts exists, where a motion for summary judgment has been made and properly supported, the party seeking to avoid the imposition of summary judgment must show by specific facts in their depositions, answers to interrogatories, admissions or affidavits that there is a genuine issue of material fact for trial. *Marks v. Tasman,* 527 Pa. 132, 589 A.2d 205 (1991).

We observe in ruling on this motion that there are no material facts in dispute. The parties agree that Daniels entered the Blue Chip convenience store referred to above at about 2:30 o'clock

a.m. on August 1, 1989. Plaintiff was the sole employee in the store at the time. Daniels jumped over the counter, and forced plaintiff into a back room of the store, where he forced her to perform oral sex on him and where he otherwise physically abused her. He than stole plaintiff's car, and fled to Maryland, where the vehicle was recovered. Subsequently, it was determined that Daniels had AIDS.

Plaintiff's legal theory for recovery against Sterner is that although he obviously was not involved in the crimes committed against plaintiff, he nonetheless is liable for her damages because he failed to take steps to provide adequate safety and security of those in plaintiff's position, i.e. as an employee of the leased structure, so the basis for this claim is founded on negligence. It is black letter law that to sustain a cause of action grounded in negligence the plaintiff must establish: 1/ a duty by the defendant to the plaintiff to conform to a certain standard of conduct; 2/ a breach of that duty; 3/ a causal connection between the defendant's conduct; and 4/ a subsequent injury to the plaintiff. *Casey V. Geiger*, 346 Pa.Super. 279, 289-290, 499 A.2d 606, 612 (1985). Thus, the threshold inquiry in any negligence action becomes whether a duty was owed by the alleged tortfeasor to the injured person.

Both sides in this dispute cite the decision of *Henze v. Texaco, Inc.*, 352 Pa.Super. 538, 508 A.2d 1200 (1986) in support of their respective positions. In that case, Virginia Henze tripped over a loose threshold in the doorway of an office in a service station operated by David Rice, trading as Rice's Texaco, a sub-lessor from Texaco, Inc., which leased the station from Leo and Rose Pancari. At the time of the incident, Rice had occupied the premises for ten (10) years under an agreement which required that Rice maintain the service station "in good repair and in good, clean and safe and healthful condition" and which permitted Texaco, Inc. to make any repairs necessary at Rice's expense. Except for replacement of a kickplate by Texaco, Inc., all prior repairs had been made by Rice, who had discovered the looseness of the threshold and tried to tighten it by adjusting the screws which held it in place on 2-3 occasions. Following a jury trial, the Pancaris were found not to be negligent; negligence was apportioned as follows: Texaco, Inc.-52%; Mrs. Henze-35%; and

David Rice-13%. Texaco's motions for judgment n.o.v. and for a new trial were denied by the trial court, but this decision was reversed by Superior Court, which held that Texaco, Inc. was entitled to judgment n.o.v.

> A landlord out of possession is generally not responsible for injuries suffered by a business invitee on the leased premises. *Dinio v. Goshorn,* 437 Pa. 224, 228-229, 270 A.2d 203, 206 (1969); *Bouy v. Fidelity-Philadelphia Trust Co.,* 338 Pa. 5, 7, 12 A.2d 7, 8 (1940); *Pierce v. Philadelphia Housing Authority,* 337 Pa.Super. 254, 257, 486 A.2d 1004, 1005 (1985); 22 P.L.E. Landlord and Tenant §257 (1959). See: Prosser and Keeton on Torts §63 (5th ed. 1984); Restatement (Second) of Torts §356 (1965). This rule is subject to several exceptions. A landlord out of possession may incur liability (1) if he has reserved control over a defective portion of the demised premises, see: *Smith v. M.P.W. Realty Co.,* 423 Pa. 536, 539, 225 A.2d 227, 229 (1967); *Pierce v. Philadelphia Housing Authority, supra;* (2) if the demised premises are so dangerously constructed that the premises are a nuisance per se, see: *Miller v. Atlantic Refining Co.,* 12 D.&C.2d 713, 719 (1957), aff'd, 393 Pa. 466, 143 A.2d 380, 383 (1958); (3) if the lessor has knowledge of a dangerous condition existing on the demises premises at the time of transferring possession and fails to disclose the condition to the lessee, see: *id.*; (4) if the landlord leases the property for a purpose involving the admission of the public and he neglects to inspect for or repair dangerous conditions existing on the property before possession is transferred to the lessee, see: *Yarkosky v. The Caldwell Store, Inc.,* 189 Pa.Super. 475, 481, 151 A.2d 839, 842 (1959); (5) if the lessor undertakes to repair the demised premises and negligently makes the repairs, see: *Coradi v. Sterling Oil Co.,* 378 Pa. 68, 71, 105 A.2d 98, 99 (1954); or (6) if the lessor fails to make repairs after having been given notice of and a reasonable opportunity to remedy a dangerous condition existing on the leased premises, see: *Goodman v. Corn Exchange National Bank and Trust Co.,* 331 Pa. 587, 590, 200 A. 642, 643 (1938). See generally: 22 P.L.E. Landlord and Tenant §§257-260; Prosser and Keeton on Torts §63 (5th ed. 1984); Restatement (Second) of Torts §§356-362 (1965).
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> 352 Pa.Super. at 541-542,
> 508 A.2d at 1202.

Although plaintiff in the case *sub judice* was on the premises due to her position as employee of the possessor of the land, while the victim in *Henza* was there as a customer of the business, both had entered the premises for a purpose connected with the possessor's business, and thus both were there as what is termed a "business visitor", which is a type of invitee, in the Restatement (Second) of Torts §332 (1965). Thus, it would follow that the duty owed would be identical. However, *Henze,* and the law cited therein, addressed the issue of the landlord's duty to a business invitee vis-a-vis an injury resulting from a physical defect on the property, not from the wilful intervention of a criminal whose actions caused the injuries, so we think *Henze* is inapplicable to the case *sub judice*.

It would appear that the duty of Sterner to plaintiff is that which is set forth in *Feld v. Merriam*, 506 Pa. 383, 485 A.2d 742 (1984), wherein plaintiffs were tenants of a large apartment complex owned by one of the defendants. In attempting to park their car in an assigned parking space, plaintiffs were set upon by three criminals who physically victimized them. Plaintiffs then sued their landlord, alleging that the landlord owed a duty of protection, that the duty had been breached, and that they sustained resultant injuries. The Pennsylvania Supreme Court found that the landlord had no general duty to its tenants to protect them from the criminal incursions of third persons absent a preexisting duty, or in a situation wherein the landlord, either gratuitously or for consideration, had undertaken a duty, and negligently performs that duty thereby bringing about injury.

In *Feld,* the Pennsylvania Supreme Court overturned Superior Court, which had extended the landlord's duty to maintain the common areas of leased premises to be free form the risk of harm resulting from a physical defect in the premises to that of the risk of a criminal act committed by a third person. Justice McDermott wrote for the Supreme Court as follows:

> ... in so holding that court failed to recognize the crucial distinction between the risk of injury from a physical defect in the property, and the risk from the criminal act of a third person. In the former situation the landlord has effectively perpetuated the risk of injury by refusing to correct a known

> and verifiable defect. On the other hand, the risk of injury from the criminal acts of third persons arises not from the conduct of the landlord but from the conduct of an unpredictable independent agent. To impose a general duty in the latter case would effectively require landlords to be insurers of their tenants [sic] safety: a burden which could never be completely met given the unfortunate realities of modern society.
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> 506 Pa. at 392, 485 A.2d at 746.

The facts as alleged herein do not indicate that Sterner had undertaken to provide security for the tenants of his property, and thus there was no duty created, nor is there any basis to find that there existed a previous duty to provide security. Absent such allegations, we do not find that Sterner owed a duty to plaintiff, and there can be no legal basis for the instant suit in such a vacuum. Since a landlord has no general duty to provide protection against the criminal acts of third persons, and since Sterner did not undertake a duty of providing security, we find that plaintiff has failed to plead an arguably sustainable cause of action, and we will therefore grant defendant Sterner's motion for judgment on the pleadings.

ORDER OF COURT

NOW, February 20, 1995, after oral argument and consideration of the briefs presented, the Court hereby grants the motion for judgment on the pleadings filed by defendant Richard Sterner.