

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX AT KINGSHILL

MICHAEL P. FOLEY

Plaintiff,

vs.

CILFA, LTD.,

Defendant.

CIVIL NO. 365/1992

ACTION FOR DAMAGES

NOT FOR PUBLICATION

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(Plaintiff, Pro Se)

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CABRET, J.

MEMORANDUM OPINION
(September 27, 1996)

THIS MATTER is before the Court on the defendant's motion for summary judgment, plaintiff's opposition thereto, and defendant's motion to deem summary judgment conceded. The Court had stayed this matter to allow a substitution of counsel, as a result of the disappearance of plaintiff's counsel. However, the substitution of counsel was never entered on the record. Additionally, the court-appointed trustee of plaintiff's counsel's files was ordered to personally notify the plaintiff of the pendency of this motion, which the record reflects has been done. All of this having failed to elicit any further response from the plaintiff, the Court is satisfied that this matter is ripe for disposition. Having reviewed the submissions of the parties

in this matter, the Court will grant the motion for summary judgment for the reasons set forth below.

FACTUAL BACKGROUND

The plaintiff filed this negligence action following an event which allegedly took place in the early morning hours of August 6, 1991, in the Pan Am Pavilion at No. 39 Strand Street, Christiansted, St. Croix. In his complaint, plaintiff states that he was traversing the defendant's property in order to reach his boat which was moored at the waterfront. While on defendant's property, plaintiff sustained serious personal injury as a consequence of an attack by an unknown assailant. According to plaintiff's complaint, he remembered nothing further until several days later when he woke up in a hospital in Puerto Rico.

The defendant in this matter was, at all relevant times, the fee-simple owner of Plots 39 and 39A Strand Street, also known as the Pan Am Pavilion. Plaintiff alleged that the injuries he sustained from the attack were a result of the negligence of the defendant. Specifically, he alleges that defendant, as possessor of the land, had a duty to exercise reasonable care to ensure that the premises were safe and fit for use by the plaintiff; that defendant knew or should have known that its property presented an unreasonable risk of harm to the plaintiff in the absence of security guards; and that defendant breached the duty of reasonable care by failing to employ security guards.

Defendant's motion for summary judgment is premised on the contention that, as the owner of the subject premises, it had obtained not only the fee-simple deed to the premises

when it purchased the property in January 1991, but also the "right, title, and interest" in the 1965 Master Lease ("Master Lease") governing the property which runs until the year 2015.¹ The property was leased at the time the defendant purchased it, and at all relevant times since. The lessee in possession of the property at the time of the alleged attack was Ralph Anzivino, Bankruptcy Trustee for the Estate of Oliver and Monica Plunkett ("Anzivino-Plunkett"). The defendant asserts that it is not liable to the plaintiff for any alleged injuries because the current lessee agreed, among other things, to be responsible for the "condition, maintenance and management of the demised premises . . . and the safety of all persons therein or thereon." (Article III, Master Lease; Defendant's Exhibit IV). A further provision in the Master Lease, which affects the liabilities of the parties, is an indemnification clause whereby the lessee agrees to assume responsibility for

... all liability, judgments, claims, demands, suits, actions, losses, penalties, fines, damages, costs and/or arising out of or from: any breach, violation or nonperformance of any covenant, condition, provision or agreement in this lease . . . and/or [c]laims of every kind or nature, arising out of the use and occupation of the demised premises by the Lessee, . . . and/or any injury to person or persons, including death, resulting at any time therefrom, occurring in or about the demised premises . . .

¹ Defendant purchased Plots 39 and 39A from Chase Manhattan Bank ("Chase") in February 1991. (See Defendant's Exhibit II.) As part of that transaction, Chase assigned and sold its "right, title and interest" in the 1965 Master Lease governing the Pan Am Pavilion to the defendant. (See Defendant's Exhibit III). The 1965 Master Lease was executed between Joseph Alexander and the W.O.F. Corp. (See Defendant's Exhibit IV). In 1970, W.O.F. Corp., assigned its rights, title and interest in the Master Lease to W.O.F. Co./Assoc. (See Defendant's Exhibit VI). On October 10, 1979, W.O.F. Co./Associate's assigned all of its rights, title and interest in the Master Lease to Oliver Plunkett. (See Defendant's Exhibit IX). Mr. Plunkett also executed a Leasehold Mortgage wherein he agreed to assume the terms of the Master Lease. (See Defendant's Exhibit X).

Id. Article Eight of the Master Lease specifically states that the lessee has control of the premises. Additionally, defendant states that in view of paragraph 19 of the September 1990 lease between Against All Odds, Ltd. and Anzivino (Defendant's Exhibit XI), which obligates Anzivino-Plunkett in its sole discretion to hire security guards to "patrol in and about . . . the premises known as the Pan Am Pavilion," (See Defendant's Exhibit XI), it is not liable for plaintiff's injuries. Plaintiff's opposition to defendant's motion impliedly concedes the effect of the liability limiting clauses as they relate to Plot 39.

SUMMARY JUDGMENT

Summary judgment is provided for in Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) states that summary judgment shall be entered "if the pleadings, 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." FED. R. CIV. P 56(c). In interpreting Rule 56(c), the United States Supreme Court has stated that summary judgment should be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In its review of a motion for summary judgment, a court must view the facts in a light most favorable to the nonmoving party and the burden of establishing that no genuine issue of material fact exists rests with the movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242

(1986). An issue of material fact is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 248. The "existence of disputed issues of material fact should be ascertained by resolving 'all inferences, doubts and issues of credibility against the moving party.'" *Ely v. Hall's Motor Transit Co.*, 590 F.2d 62, 66 (3d Cir. 1978) (quoting *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972)). However, there can be no genuine issue of material fact, where a complete failure of proof concerning an essential element of the nonmoving party's case is absent, which necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 322.

When the nonmoving party will bear the burden of proof at trial, the moving party's burden can be "discharged by 'showing' that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. If the moving party has carried this burden, the burden shifts to the nonmoving party who cannot rest on the allegations of the pleadings, bare assertions, or conclusory allegations, but must set forth specific facts by affidavit or other competent evidence showing there is a genuine issue of material fact. *Anderson*, 477 U.S. at 253-54. When the nonmoving party's evidence in opposition to a properly supported motion for summary judgment is "merely colorable" or "not significantly probative," the court may grant summary judgment. *Id.* at 249-50.

ANALYSIS

CIFLA, Ltd. ("CIFLA"), as the moving party, argues that it is not liable for plaintiff's injuries because it was not responsible for the maintenance or security of the Pan Am

Pavilion where plaintiff was injured. Specifically, defendant contends that judgment as a matter of law is appropriate because it owed no duty of care to plaintiff. According to CIFLA, it is protected from suits by third-parties as a result of the contractual delegation of duties contained in the lease between CIFLA and Oliver Plunkett.

The elements of a negligence cause of action are duty, breach of duty, causation and damages. RESTATEMENT (SECOND) OF TORTS §281 (1965).² Summary judgment in the defendant's favor is appropriate if the plaintiff cannot meet its burden as to any of the four elements. *Perez v. Gov't of the Virgin Islands*, 23 V.I. 220, 222 (D.V.I. 1987), *aff'd*, 847 F.2d 104 (3d Cir. 1988). Inasmuch as plaintiff asserts the negligence of the defendant as the basis for his claim, he will bear the burden of proof at trial. Defendant states that the sole responsibility for maintenance, repair, and upkeep of the Pan Am Pavilion including premises liability and the safety of all persons therein, rested with the lessees, Anzivino-Plunkett.³ Plaintiff, however, has failed to direct this Court's attention to any genuine issues of fact which would establish that CIFLA owed him a duty. Moreover, plaintiff basically concedes that it is the duty of Anzivino-Plunkett to provide for the safety of persons on Plot 39 Strand Street.⁴ The Court, therefore,

² In the absence of local laws to the contrary, the Restatements of Law have been adopted by statute as the rules of decision in the Virgin Islands courts. V.I. CODE ANN. tit. 1, §4 (1967).

³ Article III of the Master Lease obligates the lessee, Anzivino-Plunkett, by virtue of the October 1979 assignment between W.O.F. Associates and Oliver Plunkett, to be responsible for "the safety of all persons therein and thereon." (See Defendant's Exhibit IV at 4).

⁴ The Court notes that the harshness of the liability-limiting clause in this case is mitigated by the fact that it does not, in itself, act to bar plaintiff's remedy but merely limits the
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determines that plaintiff's failure to prove that this defendant owed him a duty, renders all other facts immaterial. *See Celotex*, 477 U.S. at 322. Thus, with respect to Plot 39 Strand Street, summary judgment is appropriate, as no genuine issues of material fact exist.

Plaintiff's main objection to the entry of summary judgment is premised on the fact that the parties are assuming that the attack occurred inside the Pan Am Pavilion, on Plot 39 Strand Street. Plaintiff claims that there is a genuine issue of material fact regarding where he was attacked. He argues that it is not clear whether he was attacked on Plot 39 or Plot 39A, an adjacent plot, of which he claims CILFA retained possession. As plaintiff contends that Plot 39A is not covered by the delegation of duties clause in the Master Lease, the question of liability concerning Plot 39A must, therefore, be resolved.

Since the defendant raised the issue of its contractual delegation of the duty to provide safety of any person in or about the Pan Am Pavilion, the plaintiff must identify specific facts by affidavit or other competent evidence showing there is a genuine issue of material fact. *See Anderson* at 248. Plaintiff has done nothing more than set forth bare assertions and conclusory allegations to support his contention that a factual issue remains. Without any form of corroboration, plaintiff states that the "cut through area," [where he last recalled walking before being brutally attacked], forms the common boundary dividing plots 39 and 39A Strand Street. (*See Plaintiff's Opposition to Defendant's Motion for Summary Judgment* at 1).

⁴(...continued)

party against whom it can be had. Plaintiff did have recourse against a potentially responsible party, unfortunately, the plaintiff did not pursue other potentially responsible parties until after the statute of limitations had run.

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However, in other instances, plaintiff asserts that he was attacked inside the Pan Am Pavilion, or that he "can remember getting down to the little passage to where the cut-through was . . ." (Defendant's Exhibit 1: Direct Deposition of Michael Foley, p. 50, ln. 6, 7). Plaintiff also alleges, without any substantiation, that the question of what areas are covered by the Master Lease, and hence, the liability-limiting clause, is also a factual issue.

A copy of the Site Map of the Pan Am Pavilion clearly establishes that Plot 39 includes the "cut-through" area wherein plaintiff admits that he was traversing prior to the assault. (See Defendant's Exhibit XVII). Defendant also argues that whether plaintiff was injured on Plot 39 or on Plot 39A, it is undisputed that plaintiff was attacked in the Pan Am Pavilion,⁵ and the delegation of duties clause in the Master Lease covers the Pan Am Pavilion. Furthermore, the defendant argues that paragraph 19 of the September 1990 lease between Against All Odds, Ltd.⁶ and Anzivino absolves it of any responsibility, as Anzivino-Plunkett, in its sole discretion, may hire security guards to "patrol in and about . . . the premises known as the Pan Am Pavilion." (Defendant's Exhibit XI). Finally, the defendant contends that there is no factual issue regarding what areas are covered by the Master Lease since the area covered by the Master Lease includes the "land bounded by Strand Street on the south; Sea or Waterfront to the north; Queen Cross

⁵ See Defendant's Exhibit XVI, EMT Report stating that plaintiff was found in the Pan Am Pavilion. See also Part II of Plaintiff's Pretrial Memorandum wherein plaintiff admitted that he was "traversing defendant's property at #39 Strand Street, Christiansted, more commonly known as the Pan Am Pavilion."

⁶ Against All Odds, Ltd., also known as Styxx Restaurant, currently leases approximately 2,869 square feet of space "in the building to the west across the boardwalk in the building known as the Pan Am Pavilion," from Anzivino-Plunkett. See Defendant's Exhibit XI.

Street to the west; and Club Comanche to the east," (Defendant's Exhibit IV), which comprises both Plots 39 and 39A.

The nonmoving party cannot create an issue of material fact through conjecture or speculation as to what evidence might be turned up by further discovery. *Lappe v. Parker Brothers Division of General Mills Fun Group, Inc.*, 575 F. Supp. 44, 46 (N.D. Ill. 1983). Plaintiff's claims that he may have been attacked on plot 39A and that said plot is not covered by the Master Lease are "merely colorable" and unsupported by any evidence in the record. Moreover, these bald allegations, without more, are insufficient to sustain a jury verdict in plaintiff's favor. As such, plaintiff has not met his burden under *Celotex*, which requires him to produce evidence sufficient to raise a genuine issue of material fact as to whether the defendant owed him a duty to provide for his safety on Plot 39A. This Court, therefore, determines that no genuine issues of material fact exist, which would preclude the entry of summary judgment.

CONCLUSION

Plaintiff has failed to direct the Court's attention to any issues of fact regarding whether the defendant had a duty to provide for his safety. As there are no genuine issues as to material facts, the defendant is entitled to summary judgment as a matter of law. An appropriate order follows.


MARIA M. CABRÉ
Judge