Circuit Court for Prince George's County
Case No. CAL16-43517

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 02024

September Term, 2017

MOHAMED DIABY

v.

BERLINER SPECIALTY DISTRIBUTORS, INC., ET AL.

Fader, C.J.
Wright,
Shaw Geter,

JJ.

Opinion by Wright, J.

Filed: March 1, 2019

On July 4, 2016, two armed assailants robbed and shot Mohamed Diaby, appellant, on the premises of Berliner Specialty Distributors, Inc. ("Berliner Specialty"), appellees.[1] Mr. Diaby filed suit against appellees in November 2016 alleging tortious misconduct. In October 2017, Berliner Specialty moved for summary judgment. The Circuit Court for Prince George's County considered Berliner Specialty's Motion for Summary Judgment on December 12, 2017, and granted the motion.

Mr. Diaby timely appealed. He presents three questions for our review which we have consolidated into one:[2]

> 1. Did the circuit court err in granting summary judgment for Berliner Specialty on the negligence claim?

[1] Mr. Diaby named the following appellees/defendants in his complaint: Berliner Specialty Distributors, Inc., Guy Berliner, and Mitchell P. Berliner. For ease of reading, we will refer to these appellees collectively as "Berliner Specialty," except when it is necessary to refer to Guy Berliner individually. Mitchell P. Berliner left the business in 2007, some nine years prior to July 4, 2016.

[2] Mr. Diaby's original questions were as follows:

> 1. Did the trial court err in ruling Appellees owed no duty to Appellant when a special relationship existed between Appellees and Appellant due to a prior armed robbery and other criminal activity occurring on the Premises?
>
> 2. Did the trial court err in dismissing Appellant's claims against Appellee Mr. Berliner when Appellee Mr. Berliner directed or actively participated or cooperated in Appellee Berliner's negligent conduct and as such owed a duty to Mr. Diaby?
>
> 3. Did the trial court err in determining as a matter of law breach and proximate cause when these questions are to be decided by the trier of fact?

We answer this question in the negative and affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

For fifteen years, Mr. Diaby was employed as an ice cream truck driver in Prince George's County, Maryland. Around 2001, Mr. Diaby signed an agreement to purchase his ice cream inventory and supplies from appellees. Mr. Diaby paid Berliner Specialty a monthly fee to park his ice cream truck on its premises.

On July 14, 2016, Mr. Diaby returned to Berliner Specialty's lot earlier than planned because of the weather. After parking and locking up his truck, Mr. Diaby was approached by two armed assailants. The assailants robbed Mr. Diaby, struck him in the head, and shot him nine times. A tow truck driver heard the gunshots, witnessed the armed assailants fleeing the scene of the crime, and came to Mr. Diaby's aid. Emergency Medical Technicians ("EMTs") rushed Mr. Diaby to the emergency room, where he was admitted to the intensive care unit suffering from facial lacerations and multiple gunshot wounds. Mr. Diaby underwent several surgeries to remove the bullets and had to have two fingers amputated. There was no evidence as to how the assailants entered or fled the premises.

On the day the assault and robbery occurred, Berliner Specialty had the following security measures in place: cameras surveilling Berliner Specialty's parking lot, a barbed wire fence surrounding the premises, and security personnel patrolling the premises from approximately 6:00 p.m. until the parking lot closed.

In the months leading up to the crime, there had been no complaints by vendors of crime either on the premises or in the surrounding area. In fact, Mr. Diaby testified that he felt safe on the premises before the crime occurred.

On November 29, 2016, Mr. Diaby filed a complaint against Berliner Specialty for tortious misconduct in allowing the conditions that led to his injury in a lot owned, operated, managed, controlled, secured, and overseen by Berliner Specialty. On October 13, 2017, Berliner Specialty moved for summary judgment. Berliner Specialty argued that it did not owe a duty to Mr. Diaby because the crime was not foreseeable based on past similar crimes, it had no role in creating conditions leading to the crime, and it was not a substantial factor in causing the crime. Berliner Specialty claimed that, aside from "instances in which vendors broke into other vendor's ice cream trucks or got into altercations," it was unaware of previous crimes occurring on the premises.

On December 12, 2017, following a hearing on the motion, the circuit court granted appellees' summary judgment motion and explained that "any duty owed by a landlord is to eliminate the conditions on the premises that contribute to criminal activity, not to protect against the criminal activity itself." The court found that appellant did not point to any condition on the premises that Berliner Specialty failed to eliminate, and that Berliner Specialty did not breach any duty owed to Mr. Diaby. Mr. Diaby appealed. Additional facts will be presented as necessary below.

STANDARD OF REVIEW

This Court recently explained the standard of review for a circuit court's grant of summary judgment as follows:

> A circuit court may grant a motion for summary judgment if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law. We review a circuit court's decision to grant summary judgment *de novo* and without deference, by independently examining the record to determine whether the parties generated a genuine dispute of material fact and, if not, whether the moving party was entitled to judgment as a matter of law. We consider the record in the light most favorable to the non-moving party, drawing any reasonable inferences against the moving party. Moreover, when reviewing the issue of whether the circuit court erred in granting summary judgment, we consider only the grounds for granting summary judgment relied upon by the circuit court.

Landaverde v. Navarro, 238 Md. App. 224, 241 (2018) (citations and quotations omitted).

DISCUSSION

At trial, Guy Berliner testified that prior to Mr. Diaby's assault, Berliner Specialty had a "couple of guard dogs" on the premises, and that he told Berliner Specialty to "have full coverage" when installing the security cameras. Guy Berliner acknowledged that the company discontinued its use of the guard dogs and hired a security guard, named Moussa, around 2013. Upon being asked why Berliner Specialty got rid of the security dogs, Guy Berliner testified:

> A: Because they were guarding the property when the vendors were not there in the middle of the night. We thought it would be better for the vendors to have security while the vendors were there, as opposed to when they were sleeping at home.

Guy Berliner explained that Moussa would begin his shift at 5:00 or 6:00 a.m. and stay until closing, sometimes remaining a couple of hours later. He stated that after Moussa's shift ended, the security on the premises included the cameras, the barbed wire, and the locked gate. In explaining Moussa's qualifications, Guy Berliner said that Berliner Specialty wanted a guard "who knows the vendors because people come and go off the yard and if we have someone who knows the vendors, it would be better for us as opposed to someone who says I belong here and the vendor [does not know] whether they belong there or not." Guy Berliner explained that after Mr. Diaby's assault, Berliner Specialty hired off-duty police officers to patrol the premises.

In August 2007, nine years before the crime at issue in this case, Mohammed Njai, a vendor, was robbed at the gate leading to the Berliner Specialty parking lot by two to three armed persons. Mr. Njai stated that the robbery occurred at about 12:45 p.m. in the afternoon. Mr. Njai explained that he was "right in the yard" when "some guys" were "coming into the yard," and that after he entered the Berliner Specialty lot, a car occupied by three persons pulled up behind him. A woman, later identified as the driver of the vehicle, asked Mr. Njai, "how do you purchase an ice cream here[?]" He informed the woman that she had to purchase an account. The two men in the vehicle, armed with guns, took Mr. Njai's money and sped off. Mr. Njai stated that the assailants' vehicle was parked outside the gate, "right outside the fence." Other than this armed robbery, no other violent crimes occurred on the Berliner Specialty premises.

Mr. Diaby relies upon the robbery of Mr. Njai as the basis of his claim. Mr. Diaby avers that the circuit court erred in granting appellees' motion for summary judgment

because Berliner Specialty owed him a duty to protect him from the criminal acts of third parties. Specifically, Mr. Diaby claims that because of Mr. Njai's crime, which occurred nine years before his own, Berliner Specialty could reasonably foresee that Mr. Diaby could be victim to a violent armed robbery. Berliner Specialty responds that it did not owe a special duty to protect Mr. Diaby from criminal activity because "there was no criminal activity on the Premises that caused anyone to anticipate the harm that befell [Mr. Diaby.]"

Duty

To succeed on his negligence claim, Mr. Diaby must demonstrate that Berliner Specialty breached a duty owed to him. *Moore v. Jimel, Inc*., 147 Md. App. 336, 338 (2002). A properly pleaded claim of negligence includes four elements:

> (1) That the defendant was under a duty to protect the plaintiff from injury.
>
> (2) That the defendant breached that duty,
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> (3) That the plaintiff suffered actual injury or loss, and
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> (4) That the loss or injury proximately resulted from the defendant's breach of the duty.

Davis v. Frostburg Facility Operations, LLC, 457 Md. 275, 293 (2018); *see also Valentine v. On Target, Inc.*, 353 Md. 544, 549 (1999).

The resolution of the present matter turns on the evaluation of the first negligence element: duty. *Doe v. Pharmacia & Upjohn Co., Inc*., 388 Md. 407, 414 (2005). This is a question of law for the court. *Todd v. Mass Transit Admin*., 373 Md. 149, 155 (2002) (citing *Valentine*, 353 Md. at 549). "Duty" is defined as a legal obligation "to conform to

a particular standard of conduct toward another." *Warr v. JMGM Group, LLC*, 433 Md. 170, 181 (2013) (citation omitted). Foreseeability is "the principal determinant" of duty. *Doe*, 388 Md. at 416. However, foreseeability alone is not dispositive. *Kiriakios v. Phillips*, 448 Md. 440, 486 (2016). Specifically, in *Kiriakios*, the Court of Appeals provided several factors to use in determining whether a duty exists:

> [T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost[,] and prevalence of insurance for the risk involved.

Id. (citation omitted).

Generally, "a private person is under no special duty to protect another from the criminal acts by a third person[.]" *Valentine*, 353 Md. at 551-52 (citation omitted). There are three exceptions to this general "no duty" rule:

> (1) If the defendant has *control* over the conduct of the third party;
>
> (2) If there is a *special relationship* between the defendant and the third person or between the defendant and the plaintiff; or
>
> (3) If there is a *statute* or *ordinance* that is designed to protect a specific class of people.

Warr, 433 Md. at 189 (control); *Barclay v. Briscoe*, 427 Md. 270, 294 (2012) (special relationship); *Kiriakos*, 448 Md. at 457 (statute or ordinance).

In *Scott v. Watson*, 278 Md. 160, 166 (1976), the Court of Appeals held that "there is no special duty imposed upon [a] landlord to protect his tenants against crimes perpetrated by third parties on [a] landlord's premises." *See also Rhaney v. University of*

Maryland Eastern Shore, 388 Md. 585, 598 (2005) (citations omitted) ("A landlord's duty to a tenant within the common areas generally is one of reasonable care to protect against known, or reasonably foreseeable, risks."); *Smith v. Dodge Plaza Ltd. Partnership*, 148 Md. App. 335, 346 (2001) (reiterating the holding of *Scott*); *Valentine*, 353 Md. at 552 (reiterating the holding of *Scott*).

Rather, "a landlord who has set aside areas for the use of his tenants in common owes them the duty of reasonable and ordinary care to keep the premises safe." *Scott*, 165 Md. at 165 (citing *Macke Laundry Serv. Co. v. Weber*, 267 Md. 426, 429-31 (1972)). The landlord is "not an insurer" of tenants and "is only obliged to use reasonable diligence and ordinary care to keep common areas in reasonably safe condition." *Scott*, 278 Md. at 165 (quoting *Elmer Gardens, Inc. v. Odell*, 227 Md. 454, 457 (1962)). The landlord's duty "to exercise reasonable care for the safety of the tenants in common areas under his control is sufficiently flexible to be applied to cases involving criminal activity without making the landlord an insurer of his tenant's safety." *Scott*, 278 Md. at 169. Therefore, "[i]f the landlord knows, or should know, of criminal activity against persons or property in the common areas, he then has a duty to take reasonable measures, in view of the existing circumstances, to eliminate the conditions contributing to the criminal activity." *Id.* "[T]his duty arises primarily from criminal activities existing on the landlord's premises [–] not from knowledge of general criminal activities in the neighborhood." *Id*. at 553.

The above informs this Court as to general principles necessary to establish a duty to protect Mr. Diaby from injury.

Foreseeability and Special Relationship

Mr. Diaby avers that Berliner Specialty's duty to him was created by the foreseeability that such a crime would occur. To establish such foreseeability, Mr. Diaby points to the armed robbery of Mr. Njai in 2007 as well as a variety of crimes that have occurred on the premises during the last several years. At trial, Mr. Diaby attempted to introduce evidence of this criminal behavior by way of police logs of reported crimes. An objection to the introduction of the police logs was sustained by the circuit court, which noted that the "crime stuff . . . is not going to come in." *See Vanhook v. Merchants Mut. Ins. Co.*, 22 Md. App. 22, 26 (1974) (citation omitted) ("[A] court cannot rule summarily as a matter of law until the parties have supported their respective contentions by placing before the court facts which would be admissible in evidence."). Given that the circuit court found the police log evidence inadmissible and Mr. Diaby does not contest that ruling on appeal, we will not factor the police logs into our determination of whether a duty existed. We therefore only take into consideration the 2007 incident.

"[D]uty arises primarily from *criminal activities* existing on the landlord's premises." *Scott*, 278 Md. at 169; *see also Moore*, 147 Md. App. at 347; *Hansberger v. Smith*, 229 Md. App. 1, 21 (citing *Scott*, 278 Md. at 169) (explaining that a landlord could be held liable in negligence when the "landlord received numerous complaints about *criminal activity* in the parking garage of an apartment building, but failed to take any action to secure the property"); *Corinaldi v. Columbia Courtyard, Inc.*, 162 Md. App. 207, 224 (2008). The sole

instance of the criminal conduct as described is insufficient, as a matter of law, to create a duty for Beliner Specialty to provide security measures to prevent the conditions that led to Mr. Diaby's injuries. There is no case law to support the contention that one strong-armed robbery, nine years prior and not involving harm to the victim, put Berliner Specialty on notice of increasing criminal activity on the premises sufficient to give rise to a legal duty to protect against armed robbers on the parking lot.[3]

The conclusion we reach here is buttressed by court decisions in other jurisdictions that have addressed comparable scenarios. *See, e.g., Sigmund v. Starwood Urban. Inv.*, 475 F.Supp.2d 36, 45 (D.D.C. 2016) ("[I]n the instant case there is no comparable evidence of specific *incidents* of recent, similar crime[.]") (emphasis added); *Braitman v. Overlook Terrace Corp.*, 68 N.J. 368, 382 (2011) (holding that *prior break-ins* would make it reasonably foreseeable that a defective lock created an enhanced risk); *Petrauskas v. Wexenthaller Realty Mgmt., Inc.*, 186 Ill.App.3d 820, 829 ("While a landlord is not an insurer and cannot be held liable for harm done by every criminal intruder, *prior incidents* similar to the one complained of and which are connected with the physical condition of the premises may impose a duty of reasonable care.") (emphasis added) (citing

[3] In addition, in *Scott*, the Court of Appeals found that the previous crimes were insufficient to establish a duty because none of the crimes involved physical harm or threats. *Scott*, 278 Md. at 170. There was a similar finding in *Moore* because there was no evidence of any prior crime against a customer on the premises, let alone a rape. *Moore*, 147 Md. App. at 349.

Duncavage v. Allen, 147 Ill.App.3d 88, 100 (1986)). To reiterate, in the case at bar, the limited criminal activity some nine years in the past is insufficient as a matter of law to establish a special relationship.[4]

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[4] Our holding in this regard necessarily forecloses any merit to the argument that Guy Berliner, as an individual, actively participated or cooperated in what was not a breach of duty.