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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RAJENDRA BAHADUR BHANDARI
et al.,

Plaintiffs and Appellants,

v.

7-ELEVEN, INC., et al.,

Defendants and Respondents.

B275219

(Los Angeles County
Super. Ct. No. VC062208)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lori A. Fournier, Judge. Affirmed.

Frank A. Weiser for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, David B. Shapiro,
Christopher J. Greenleaf and Caroline E. Chan, for Defendants
and Respondents.

A 7-Eleven employee who was robbed at gunpoint in the workplace was later shot and killed by the robber (or the robber's girlfriend) as the employee left the 7-Eleven to testify at the robber's criminal trial. The employee's parents alleged 7-Eleven and its franchisee, which was their son's direct employer, were negligent in failing to provide a security guard at the store. The trial court granted summary judgment for the defendants. We consider whether the summary judgment record requires a trial on the issue of whether the employee's murder was foreseeable.

I. BACKGROUND

A. *Facts*

In January 2010, Roshan Bhandari (Bhandari) began working at a 7-Eleven store in Bellflower (the Store) that defendant and respondent Daan & Daya, Inc. (D&D) operated pursuant to a franchise agreement with defendant and respondent 7-Eleven, Inc. (7-Eleven, and, together with D&D, defendants). During Bhandari's shift on October 23, 2010, someone robbed the Store and held a gun to Bhandari's head. The Los Angeles District Attorney charged Jahmal Ladale Frazier (Frazier) with committing the robbery.

In January 2011, Bhandari testified at a preliminary hearing in the criminal case against Frazier. On April 4, 2011, Bhandari testified at Frazier's jury trial but did not complete his testimony. The court ordered Bhandari to return the following day to do so.

Bhandari went to work at the Store at 6:00 a.m. on April 5, 2011. At approximately 7:00 a.m. that morning, a dark SUV parked outside the Store in a location affording it an unobstructed view of the Store's front doors. The SUV drove

away when a police officer pulled into the parking lot and entered the Store, but it returned to the same spot once the officer left. At approximately 8:02 that morning, Bhandari exited the front doors of the Store and walked toward a parking lot behind the Store. The SUV followed, and Bhandari was shot and killed approximately one minute later. The SUV belonged to Frazier's girlfriend, and there were indications both Frazier (who was not in custody during his trial) and the girlfriend were present when Bhandari was killed.

B. Procedural History

Bhandari's parents, plaintiffs and appellants Rajendra Bhandari and Deu Bhandari (plaintiffs), acting on behalf of Bhandari's estate, sued defendants for negligence in October 2012. In a first amended complaint, plaintiffs allege D&D knew Bhandari was the principal witness in the criminal case against Frazier and that Bhandari was to testify against Frazier on the day he was killed. Plaintiffs allege defendants failed to "provide adequate security for the [S]tore, including not providing a security guard," despite knowing the Store and its surrounding area had experienced multiple robberies and high crime in recent years. The trial court overruled a demurrer brought by defendants to the first amended complaint.

Defendants moved for summary judgment in June 2015. Defendants contended they had no duty giving rise to negligence liability because Bhandari's murder was not "foreseeable or preventable under the heightened standard for finding a duty to prevent third-party criminal acts under California law."

Defendants supported their motion with declarations of Manpreet Singh (Manpreet), who served as D&D's CEO, and

Davinder Singh (Davinder), who managed the Store's day-to-day operations.¹ Manpreet said he knew about the October 2010 Store robbery involving Bhandari but was unaware, until after Bhandari was killed, that he was scheduled to testify against Frazier that day. Manpreet said he knew of no assaults at the Store or in the parking lot prior to Bhandari's murder.

In his declaration, Davinder stated he was working at the Store on the day Bhandari was killed. He said Bhandari told him he had been in court the day before and might have to return later that day. Bhandari also told Davinder he did not feel well and asked to go home, at which point Davinder "relieved Bhandari from his shift." Davinder said neither Bhandari nor anyone else ever told him Bhandari felt threatened or fearful for his safety. Davinder did not see Bhandari's assailants or the attack.

Plaintiffs opposed the motion for summary judgment. They contended similar violent incidents at the Store in the five months preceding Bhandari's death rendered his murder sufficiently foreseeable to impose a duty on defendants to provide a security guard. Plaintiffs also asserted defendants knew that Bhandari was to testify at Frazier's trial on April 4 and 5, 2011.

Plaintiffs supported their contentions with declarations of three people—one of Bhandari's coworkers, Bhandari's brother-in-law Yubaraj Oli (Oli), and Deputy District Attorney Anna Marie Lopez (Lopez)—plus deposition testimony of Manpreet and Davinder that plaintiffs believed undercut the showing made in

¹ We refer to the Singhs by their first names to avoid confusion.

their declarations in support of defendants' summary judgment motion.

Bhandari's coworker, Store clerk Yogendra Bimali (Bimali), declared he was robbed at the Store at gunpoint in December 2010 and at knifepoint in February 2011. He said he expressed concern about his safety and Store security to Davinder after the robberies. Bimali additionally averred that Davinder told him Bhandari was expected to testify in the criminal case against Frazier. Oli stated in his declaration that Bhandari told him D&D's owners gave him time off to testify in Frazier's case on April 4 and 5, 2011.

In Lopez's declaration, she described the whereabouts of the SUV, Frazier, and Frazier's girlfriend on the morning Bhandari was killed. Frazier and his girlfriend left the girlfriend's father's house between 6:45 and 7:45 a.m. that morning, and Frazier arrived at the courthouse at approximately 8:41 a.m.

In Manpreet's deposition testimony, he reiterated Bhandari's robbery in October 2010 was the only Store robbery he was aware of prior to Bhandari's death. Davinder testified there may have been one other robbery during that time but he did not "think they took any money." Both Manpreet and Davinder indicated the only other crime the Store experienced was people shoplifting beer.

Davinder acknowledged during his deposition that he knew the police had arrested Frazier for the October 2010 robbery, and he agreed Bhandari might have mentioned something about the criminal case to him—although Davinder said he no longer remembered what. Davinder maintained he knew nothing about Bhandari testifying at Frazier's trial until the day he was killed.

According to Davinder, Bhandari was not scheduled to work that day and merely came in to complete some ordering that needed to be finished that morning. Davinder arrived at the store just before Bhandari left. As Bhandari was leaving, he told Davinder he had been in court the day before and might have to return later that day. Davinder said he did not know what case Bhandari was talking about, nor did he know Bhandari had been in court to testify.

Davinder also clarified (or, less charitably, contradicted) statements he made in his declaration. He said Bhandari did not ask to go home; Bhandari left because he had finished the project he came in to complete. Davinder also testified Bhandari did not say he felt unwell, just tired.

The trial court held a hearing on defendants' motion for summary judgment. Prior to the hearing, the court ruled on evidentiary objections defendants raised to the declarations of Bimali and Oli. The court sustained hearsay objections to Bimali's statement that Davinder told him Bhandari would be testifying in Frazier's criminal case and to Oli's statements that Bhandari told him D&D gave him time off to testify against Frazier.

At the summary judgment hearing, plaintiffs' counsel argued defendants' knowledge of the three armed robberies involving Bhandari and Bimali satisfied the applicable foreseeability standard to impose a duty on defendants to provide a security guard. Plaintiffs' counsel further argued the location and activity of the SUV on the morning of Bhandari's murder provided substantial evidence that a security guard might have deterred the killers.

Plaintiffs' counsel also objected to the court's evidentiary rulings. Counsel contended, for example, that Bimali's statement Davinder knew Bhandari was to testify against Frazier was admissible under Evidence Code section 1235, which excepts inconsistent statements by witnesses from the hearsay rule.

The trial court granted summary judgment for defendants. The court reasoned the Store robberies involving Bhandari and Bimali were "not 'similar' to a murder" and there was nothing in the record to suggest anyone knew Bhandari was a target. Accordingly, the court did not "think it was a foreseeable case that someone was going to commit a premeditated murder of [Bhandari]." The court also stated that even if defendants were determined to have a duty to provide security, plaintiffs had failed to adequately show the presence of a security guard would have prevented the murder. The court noted "the murder occurred not on the 7-Eleven premises but in the alley behind the store."

II. DISCUSSION

Plaintiffs advance an argument on appeal they did not raise below: that when an employee is killed in the course of his employment for an employer who lacks workers' compensation coverage, "it is presumed that the injury to the employee was a direct result and grew out of the negligence of the employer, and the burden of proof is upon the employer, to rebut the presumption of negligence." (Lab. Code, § 3708.) Plaintiffs' failure to plead this theory in their complaint, or to otherwise

raise it in the trial court, means we will not consider it now.² (See, e.g., *Jordan-Lyon Productions, Ltd. v. Cineplex Odeon Corp.* (1994) 29 Cal.App.4th 1459, 1472.)

Plaintiffs' alternative argument—that defendants' knowledge of the robberies preceding Bhandari's murder and Bhandari's role as a witness at Frazier's trial made his murder sufficiently foreseeable to create a duty to employ security guards—is not persuasive. Only a heightened showing of foreseeability can support the existence of such a duty, and on the record presented, plaintiffs have not come forward with "substantial responsive evidence sufficient to establish a triable issue of material fact" (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163) on the question of foreseeability.

A. *Standard of Review*

A party is entitled to summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); see also *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*).) A defendant may move for summary judgment on the ground plaintiff's action lacks merit. (Code Civ. Proc., § 437c,

² Plaintiffs made just one reference to workers' compensation insurance in their first amended complaint. They asserted defendants' "negligence was so egregious . . . that plaintiffs[] right to file this suit is permitted regardless of any worker's compensation remedy that may be available under California law." That statement cannot be construed as alleging a lack of workers' compensation coverage giving rise to a presumption of negligence.

subd. (a)(1).) The defendant bears the burden of producing evidence “that the plaintiff has not established, and reasonably cannot be expected to establish, one or more elements of the cause of action in question.” (*Patterson v. Domino’s Pizza, LLC* (2014) 60 Cal.4th 474, 500 (*Patterson*); accord, Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant carries that burden, the plaintiff may defeat summary judgment by presenting evidence “that a triable issue of one or more material facts exists as to the cause of action” (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at p. 850.)

We review a grant of summary judgment de novo. (*Patterson, supra*, 60 Cal.4th at p. 499) We consider the record before the trial court at the time of its ruling, with the exception of evidence to which the court appropriately sustained objections. (*Orange County Water District v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 367-368.) Because the trial court ruled in defendants’ favor in this case, “we liberally construe plaintiffs’ evidentiary submissions and strictly scrutinize defendants’ own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs’ favor.” (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

B. Summary Judgment for Defendants Was Appropriate Because They Had No Duty to Employ Security Guards

To prove a defendant is liable for negligence, “a plaintiff must show that [the] defendant had a duty to use due care, that [the defendant] breached that duty, and the breach was the proximate or legal cause of the resulting injury.’ [Citations].” (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 629.) The

existence and scope of a defendant's duty "is a critical element of negligence liability." (*Ibid.*)

In general, a person has "no duty to act to protect others from the conduct of third parties." (*Morris v. De La Torre* (2005) 36 Cal.4th 260, 269.) But an exception to that principle lies where a "special relationship" exists between the plaintiff and the defendant. (*Ibid.*) Pursuant to this special relationship doctrine, a business proprietor has a duty to its patrons and tenants "to take reasonable steps to secure common areas [of the business] against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures."³ (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 (*Ann M.*), disapproved on another ground in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 (*Reid*); accord, *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 229 (*Delgado*).) Implicit in the reference to "foreseeable criminal acts" is the notion that the "duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated." (*Ann M.*, *supra*, at p. 676.) Foreseeability is therefore "a crucial factor in determining the existence of duty." (*Ibid.*) We evaluate foreseeability for that purpose as a question of law. (*Id.* at p. 678.)

³ For the sake of discussion, we presume this duty would extend to the proprietor's employee if the proprietor lacked workers' compensation coverage. (See Lab. Code, §§ 3602, 3706; *Le Parc Community Assn. v. Workers' Compensation Appeals Bd.* (2003) 110 Cal.App.4th 1161, 1172.) Defendants did not assert the availability of a workers' compensation remedy as an affirmative defense.

Our Supreme Court concluded in *Ann M.* “that a high degree of foreseeability is required in order to find that the scope of a [business owner’s] duty of care includes the hiring of security guards,” and the court emphasized “that the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the [business owner’s] premises.” (*Ann. M.*, *supra*, 6 Cal.4th at p. 679, fn. omitted.) Our Supreme Court has since reaffirmed the principle that “only when ‘heightened’ foreseeability of third party criminal activity on the premises exists—shown by prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location—does the scope of a business proprietor’s special-relationship-based duty include an obligation to provide guards”⁴ (*Delgado*, *supra*, 36 Cal.4th at p. 240, italics omitted.)

Viewing the evidence in the light most favorable to plaintiffs, we agree with the trial court that defendants had no duty to employ a security guard at the Store. Assuming defendants were aware of the Store robberies that occurred before Bhandari’s murder, there is no evidence in the record that any Store employees were injured during any of those robberies, nor is there any evidence in the record from which we can reliably infer that defendants should have understood the

⁴ Absent a defendant’s awareness of “prior similar incidents” taking place on the premises, a duty to provide security guards might also be imposed where the premises are “inherently dangerous” or in “immediate proximity to a substantially similar business establishment that has experienced violent crime on its premises” (*Ann M.*, *supra*, 6 Cal.4th at pp. 679 & fn. 7, 680 & fn. 8.) Neither is the case here.

occurrence of the three robberies over the course of five to six months to be highly unusual for a 24-hour convenience store.⁵ Even more important, the prior robberies were not sufficiently similar to Bhandari's premeditated murder for defendants to be charged with a duty to anticipate such a crime and employ security guards in the hope of averting it. We recognize the rule enunciated in *Ann M.* refers to "prior *similar* incidents, not prior *identical* incidents" (*Claxton v. Atlantic Richfield Co.* (2003) 108 Cal.App.4th 327, 330 (*Claxton*)), but here the prior in-Store robberies and Bhandari's murder in the alley parking lot behind the Store are insufficiently similar to give rise to a duty to employ security guards. (*Ann M.*, *supra*, 6 Cal.4th at pp. 671, 679-680 [even assuming the defendants knew of prior assaults, purse snatchings, and bank robberies occurring at shopping center, the prior crimes were too dissimilar to the plaintiff's rape to give rise to a duty to employ security guards]; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1191 [no duty to provide security guards in underground commercial garage, despite prior robberies targeting a bank elsewhere on the premises, because the robberies were insufficiently similar to the sexual assault inflicted upon the plaintiff in the garage], disapproved on another ground in *Reid*, *supra*, 50 Cal.4th 512; compare *Claxton*, *supra*, at p. 339 [assault at gas station sufficiently similar to prior robberies and assaults at same station where the only distinction was the racial motivation behind the later assault].)⁶

⁵ Plaintiffs admit Bhandari's murder "was a premeditated, targeted hit . . . to prevent him from testifying" against Frazier.

⁶ In addition to a lacking the requisite high degree of foreseeability, consideration of several of the other factors

Our conclusion remains the same even if we presume Davinder knew that Bhandari was going to testify at Frazier’s trial.⁷ That knowledge, without more, is not enough to establish foreseeability of Bhandari’s murder. Witnesses frequently testify in court proceedings—including criminal proceedings—without reprisal, and plaintiffs adduced no evidence that Bhandari expressed concern about his safety because of his involvement in Frazier’s case. Nor is there evidence defendants were aware Bhandari’s killer was lying in wait or that Bhandari’s testimony at Frazier’s trial would make him particularly susceptible to being murdered at the Store. (Compare *Delgado, supra*, 36 Cal.4th at pp. 245-246 [even though “plaintiff produced insufficient evidence of heightened foreseeability in the form of prior similar incidents or other indications of a reasonably foreseeable risk of a violent criminal assault . . . that would have imposed upon defendant an obligation to provide [a] guard,” evidence in the record established the defendant knew an assault “was likely to occur . . . absent some intervention on [defendant’s] part,” and consequently, “defendant had a special-relationship-based duty to respond to the unfolding events by taking

discussed in *Rowland v. Christian* (1968) 69 Cal.2d 108 also points in the direction of holding defendants had no duty to employ security guards. (*Id.* at pp. 112-113 [listing factors, including the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, and the extent of the burden to the defendant of imposing a duty].)

⁷ Plaintiffs contend the trial court erred when it excluded this evidence as hearsay. We need not resolve the evidentiary contention.

reasonable, relatively simple, and minimally burdensome steps in order to address the imminent danger” to the plaintiff].)

DISPOSITION

The judgment is affirmed. Daan & Daya, Inc. and 7-Eleven, Inc. are entitled to recover their costs on appeal.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

RAPHAEL, J.^{*}

^{*} Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.