COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-998

ROBIN MILTON, personal representative,[1]

vs.

GEORGE MAVRIDIS & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff appeals from the summary judgment entered for the defendants in this wrongful death action. The decedent had been shot by an individual with an AK-47 rifle when she was shopping in a building owned by the defendants and leased to Sanusie "Mo' Kabba (Mo) and Madijan Kabba (Madijan)[3] for the operation of a convenience store.

The defendants moved for summary judgment on the basis that as landowners they did not owe any duty to the decedent to protect her from the intentional criminal act of a third person which was not foreseeable as a matter of law. The plaintiff opposed the motion and submitted, among other materials, the

[1] Of the estate of Tahitia L. Milton.

[2] Sotiria Kourtelidis.

[3] The lessees were named as third-party defendants, but are not parties to this appeal.

affidavits of two persons designated as experts on the subject of the likelihood of criminal activity in the neighborhood where the crime occurred. The judge allowed the defendants' motion. On appeal the plaintiff contends that the judge erred in allowing the motion because there were issues of material fact and that the judge should have considered the affidavit of one of the experts. We affirm.

Standard of review. We review the allowance of a motion for summary judgment de novo "without deference to the motion judge's reasoning." All Am. Ins. Co. v. Lampasona Concrete Corp., 95 Mass. App. Ct. 79, 80 (2019). We must determine whether "viewing the evidence in the light most favoable to the nonmoving party, the moving party is entitled to judgment as a matter of law." Meyer v. Veolia Energy N. Am., 482 Mass. 208, 211 (2019). See Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 123 n.1 (1997).

Background. In October, 2005, George Mavridis and his wife, Sotiria Kourtelidis, purchased a four-story, mixed-use building located at 338-342 Warren Street in the Roxbury section of Boston (building or property).[4] In close proximity to the building were two churches, a fast-food restaurant, a police

[4] The building has six residential apartments and two commercial spaces on the ground floor. At all relevant times, the same laundry has occupied one of the commercial spaces.

station, and a mall. The churches and the laundry had barriers over some of their windows. There was evidence that the building was located in a high crime neighborhood.[5]

A self-employed contractor, Mavridis was a hands-on landlord who visited the property two times per week. He cleaned all the common areas, performed repairs for his residential tenants, and collected all of the rents in person.[6]

On June 1, 2009, Mavridis entered into a five-year commercial lease agreement with Mo and Madijan. Before leasing the premises to the Kabbas, Mavridis did not perform any criminal background checks.[7] Pursuant to the lease, Mavridis authorized the Kabbas to operate a convenience store called the

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[5] In opposition to the summary judgment motion, the plaintiff submitted an affidavit from Professor James Alan Fox, a noted criminologist, who compiled a lengthy spreadsheet showing that, in his view, between January 1, 2006 and May 31, 2010, 985 "violent" offenses were committed in the area. For purposes of the spreadsheet, the "area" was broadly defined as Warren Street, the two streets intersecting Warren at either end of the block on which the building is located, and the street on which the mall is located.

[6] Mavridis emigrated to the United States from Greece in 1996. English is his second language. Kourtelidis, an employee of an investment company, is not involved in the day-to-day management of the building.

[7] At the time, there were pending criminal charges against Mo. In January, 2009, he was arrested and charged with possession of counterfeit notes, possession of marijuana with intent to distribute near a school or park, and unlawful possession of firearms without an FID card. Shortly after the lease was signed, Mo was arrested again and charged with similar drug-related charges. All State charges against Mo were resolved in July, 2010.

Quick Stop at 338A Warren Street (premises). The Kabbas were required to maintain the premises in good condition, while Mavridis was obligated to maintain the structure of the building. Under the "Lessor's Access" provision, Mavridis retained the rights to enter the store to remove unapproved placards and signs, and at his election, to make "repairs and alterations." Mavridis had no key to the premises and no involvement in the Kabbas's business. The lease did not address security issues.

On the afternoon of October 23, 2010, a gunman, accompanied by an armed accomplice, entered the store and fired many gunshots; at least one of the men fired an AK-47 rifle. Mo, who was standing by the cash register behind plexiglass, survived; a customer who lived in the neighborhood, Tahitia L. Milton, was killed. The assailants were never caught. Robin Milton, the personal representative of Tahitia's estate (the plaintiff), brought this suit, alleging that the negligence of the property owners caused Milton's death.

Discussion. To prevail on a negligence claim, a plaintiff "must establish that the defendant owed the plaintiff a legal duty, and that a breach of that duty proximately caused injury to the plaintiff." See Petrell v. Shaw, 453 Mass. 377, 385 (2009). The question whether the defendants owed a duty of reasonable care in the circumstances is one of law. See

Holloway v. Madison Trinity Ltd. Partnership, 95 Mass. App. Ct. 628, 630-631 (2019) ("existence of a duty is . . . an appropriate subject of summary judgment . . . because such questions are resolved by reference to existing social values and customs and appropriate social policy" [citations and quotations omitted]). Although proximate causation is generally a question of fact for the jury, it may be decided as matter of law "where there is no set of facts that could support a conclusion that the plaintiff's injuries were within the scope of liability." Leavitt v. Brockton Hosp., Inc., 454 Mass. 37, 44-45 (2009). The concept of foreseeability defines both the "limits of a duty of care and the limits of proximate cause." Whittaker v. Saraceno, 418 Mass. 196, 198 (1994). See id. at 199 n.3; Belizaire v. Furr, 88 Mass. App. Ct. 299, 304-305 (2015).

The disposition of the summary judgment motion, and this appeal, thus turn on whether, based on the established facts of record, Milton's murder was reasonably foreseeable to the defendants. See Mullins v. Pine Manor College, 389 Mass. 47, 55-56 (1983). We conclude that, in the absence of evidence of prior similar criminal acts on the premises which would have made Milton's murder foreseeable, and also because there was no distinctive relationship between Milton and Mavridis as was present in Mullins, supra at 56,, Mavridis owed no duty to

Milton to take steps "to provide protection against a not reasonably foreseeable act of violence." Whittaker, 418 Mass. at 200-201. We also conclude that there is no genuine issue of material fact on causation: the crime was not sufficiently foreseeable that Mavridis's acts or omissions could be found to be its proximate cause.

"As a general rule, a landowner does not owe a duty to take affirmative steps to protect against dangerous or unlawful acts of third persons" (citation omitted). Belizaire, 88 Mass. App. Ct. at 304. In exceptional cases, the Supreme Judicial Court has, however, extended liability to landlords who ignore "criminal activities that occur on [their] premises and were known or should have been known to them." Id. at 304, quoting Griffiths v. Campbell, 425 Mass. 31, 34 (1997). If a lawful visitor to the property is attacked, "and the owner or landlord knew of or should have known of both the previous attacks and the potential for a reoccurrence based on a failure to take measures to make the premises safer," liability may attach.[8] Belizaire, supra at 304, quoting Griffiths, 425 Mass. at 35.

[8] We note that where, as here, a tenancy is in place that limits the property owner's control over the premises, the plaintiff's burden in establishing a duty owed to the victim to protect her against the criminal acts of third parties is "substantially increase[d]." Belizaire, 88 Mass. App. Ct. at 302-303.

After careful review of the record, we conclude that under the totality of the circumstances, the shooting here was outside the scope of foreseeable risk. No prior similar incidents occurred inside or in front of the building. The only prior incident in the Quick Stop cited at all was nonviolent.[9] None of the prior criminal offenses committed inside or in front of the building was connected to the Kabba brothers in any way. None involved the use of a firearm. There was no evidence of any drug activity in the building.[10] In short, any prior criminal acts were too dissimilar to put the defendants on notice of a potential threat to the physical safety of shoppers in the convenience store. Compare Whittaker, 418 Mass. at 199-201; Belizaire, 88 Mass. App. Ct. at 305-306.

To support the claim that a triable reasonable foreseeability issue exists, the plaintiff points to a Mayor's Convenience Store Safety Initiative issued in February, 2010. As part of that three-pronged initiative, the city offered to provide free "training for store owners, managers, and employees

[9] The police were called to the Quick Stop to head off a confrontation between an individual and a store employee over a mutual girlfriend. The reporter informed the police that "there was no robbery," and indicated that the suspect was among a group of individuals who had trashed his store the previous week.

[10] There was no evidence that Mavridis received any complaints from any of his tenants about either the Quick Stop or the Kabbas, and no evidence that any tenant raised safety concerns with Mavridis.

on how to properly maintain cash registers and what to do when a robbery occurs"; the police promised to launch enhanced outreach efforts to convenience stores; and after thorough in-store assessments, the city promised to help store owners "achieve better security by improving visibility, installing alarm systems, and security cameras." The plaintiff argues that, had the defendants taken minimal safety measures, more likely than not, this crime would not have occurred.[11]

First, the initiative was plainly directed toward convenience store owners or operators. Even assuming the services were available to commercial landlords and building owners, there is no evidence in the record that the defendants knew about the initiative and ignored it; for this reason, the mayor's initiative did not put the defendants on notice that a crime like this was foreseeable.[12] And, even if the defendants

[11] In the view of the plaintiff and her expert, appropriate safety measures would have included the removal of the signs and placards obstructing the glass windows and door (giving a clear line of sight to the back of the store); installation of surveillance cameras; posting in the store entryway of video camera surveillance warning signs and signs about low cash; removal of graffiti from the exterior of the building; and relocation of the cash register from the back of the store to the front.

[12] The record is short on facts about the initiative. The plaintiff provided the press release announcing the initiative and a notice in the Greater Grove Hall Newsletter that the city was offering grants of up to $500 toward upgraded security systems. Sketchy and undeveloped information is insufficient to raise triable issues of fact. See Matthews, 426 Mass. at 131 n.6.

should have known about it, as the commercial landlord, Mavridis had no right under the lease to instruct the Kabbas to move their cash register to the front of the store or to install security cameras or to take most of the other recommended initiatives; that type of edict could not be construed as a "repair" or an "alteration" of the premises. In any event, even if we concluded that the defendants should have implemented these safety measures to the full extent permitted by the lease, and we do not, we conclude that the plaintiff could not show that such a breach of duty proximately caused the harm.

Those safety measures clearly are designed to deter potential criminals who are looking for easy stores to rob and who are concerned about being identified or caught. Because Milton's murder is unsolved, the motive for the attack is unknown. It is possible that Milton's death occurred in the course of an armed robbery, and that clear windows and a door, a camera, and signage in the entryway might have dissuaded the gunmen from selecting Quick Stop for a robbery. It is equally, and perhaps more plausible, that the gunmen were targeting Mo for reasons relating to his drug-dealing activities.[13] The

[13] The police commissioner at the time did not think the shooting was related to a robbery. He was quoted in a local newspaper, saying, "We can say that in the case of the store owner, we're investigating motivations. It does not appear to be a simple robbery. There are other factors there." A later article

method by which the attack was carried out apparently evidenced a complete lack of concern about detection.[14] Toting an assault rifle, the murderer and his armed accomplice entered the Quick Stop in broad daylight and shot off a number of bullets in a small space. Arguably, these are not the types of individuals who would have stopped to read the warning signs in the entryway and been scared away. A third motive for the attack is also possible -- that it was simply a random hate crime or other act of violence, directed at immigrants, members of a minority group, or others. The point is that it would be entirely speculative here to infer that security measures would have dissuaded the gunmen from committing this appalling crime. See McLaughlin v. Vinios, 39 Mass. App. 5, 7 (1995) ("inferences must be based on probabilities, not possibilities, and may not be the result of speculation" [citation omitted]).

The affidavit of Dr. Rosemary Erickson, a forensic sociologist, which was submitted by the plaintiff as part of its opposition to the defendants' summary judgment motion, also did not raise a genuine issue of material fact. See Griffiths, 425 Mass. at 32-33. Erickson's opinion that the murder was

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attributed to the commissioner a statement that "robbery was not the motive in the shooting."

[14] The image of the shooter was in fact captured on a surveillance camera. It is unclear whether the camera belonged to the Kabbas or to another individual or business in the neighborhood.

foreseeable to the landlord was predicated on four main factors: (1) the prior "violent" crime at the location; (2) the prior crime in the area; (3) the criminal behavior of the Kabbas; and (4) the lack of appropriate measures taken for crime prevention. Even assuming that Erickson was qualified to testify as a security expert,[15] her foreseeability opinion rests on unsupported facts, faulty premises, and conjecture. In other words, nothing Erickson submitted, even if it had been considered, precludes summary judgment.

As for the first factor, there was no admissible evidence of any prior crime at all at the Quick Stop. If the "location" is deemed to include the building and its vicinity, there was no "assault and battery" documented in any of the apartments, as Erickson stated. In fact, as the plaintiff now concedes, there were no prior similar incidents in the building or in the vicinity. As for the second factor, this is a premises liability case. The "area" in which the 985 crimes were committed extended far beyond the immediate neighborhood of the building. Similarly, to the extent that Erickson relied upon

[15] The motion judge observed that Erickson's expertise pertained to robberies, not murders. The judge, therefore, "deem[ed] Dr. Erickson unqualified to opine about the foreseeability of murder, an inherently random, unpredictable, and expressive act, as opposed to robbery, an essentially rational crime of opportunity."

the high CAP Index Score[16] of 338 Warren Street, Roxbury, that number was based on an analysis of "the crime and social disorganization" within a three-mile radius of the property. In assessing foreseeability, the defendants may not be charged with knowledge of unrelated crimes committed at such a distance away from their property. See Foley v. Boston Hous. Auth., 407 Mass. 640, 645 (1990) (prior, off-premises assault two years before attack did not support finding of foreseeability); Toney v. Zarynoff's, Inc., 52 Mass. App. Ct. 554, 562-563 (2001) (evidence of kidnapping that occurred more than 1,000 feet from restaurant and was unconnected with defendants' premises was irrelevant and thus inadmissible).

Turning to the criminal activity of the Kabbas, Erickson states, without record support, that Mavridis could have obtained information about Mo's pending criminal charges and prevented the murder by not renting to him.[17] There was no

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[16] In her affidavit, Erickson explained that CAP stood for "Crime Against Persons and Crime Against Property." She described it as "a readily available, reliable measure of crime in the area. . . . It is a sophisticated computer analysis designed to identify the risk of crime at a location." She explained that she measured crime in the area using "the CAP index and the Boston Police Department (BPD) reports to the surrounding streets."

[17] When the lease was signed in June, 2009, Mo had not yet been convicted of any crime. Under the Criminal Offenders Record Information (CORI) statute then in effect, data about Mo's arrest and criminal charges was unavailable. See G. L. c. 6, § 172, sixth par. On appeal, the plaintiff concedes the point, but argues the defendants should have run a check sometime

evidence that the defendants knew or should have known about the undercover investigation of Mo or the "increasing" criminal activities by the Kabbas between June, 2009 and October, 2010.[18] Finally, Erickson states that, if Mavridis had taken certain safety measures consistent with industry standards, the murder, more likely than not, would never have happened. For reasons discussed previously, this opinion was pure conjecture. The same may be said about her opinion that if the attack was a targeted hit on Mo, the gunmen "likely" chose to carry it out at the store (instead of another location) because of the lack of security measures.

The defendants' building in Roxbury is, in fact, located in a high crime area. However, we reject the suggestion that the location of the murder was sufficient to send the foreseeability issue to the jury. Prior to Milton's murder, this particular

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between July, 2010 (when Mo pleaded guilty) and Milton's murder. However, the plaintiff cites no authority for the proposition that a commercial landlord has a duty to monitor his tenants in this fashion during the lease term. Nor is there any reason to believe that the defendants had a reason to run a criminal record check. See Griffiths, 425 Mass. at 35 (notwithstanding landlord's knowledge of prior drug activity at premises, murder of police officer during drug raid was not foreseeable).

[18] At the time of Milton's murder, Mo was under surveillance by Federal law enforcement authorities for his role in a drug trafficking ring. On January 31, 2014, following Mo's plea of guilty to conspiracy and extortion charges, a Federal judge sentenced him to a term of sixty-three months. On October 3, 2010, Madijan was arrested in Rhode Island and drugs were seized from his car.

convenience store had never been robbed. There were no victims of any crimes that would have put the defendants on notice that they should upgrade the security in their building to prevent future crimes. A possessor of land is not a guarantor of the safety of business invitees. See Luisi v. Foodmaster Supermarkets, Inc., 50 Mass. App. Ct. 575, 577-579 (2000) (affirming summary judgment on inadequate security claim notwithstanding evidence of previous violent and nonviolent crimes inside store and its vicinity).

On this record, the plaintiff cannot show that the defendants could reasonably have foreseen Milton's tragic murder. For that reason, the plaintiff has no reasonable expectation of proving one or more essential elements of her negligence claim, and summary judgment properly entered.

Judgment affirmed.

By the Court (Milkey, Hanlon & Sacks, JJ.[19]),

Joseph F. Stanton

Clerk

Entered: November 25, 2019.

[19] The panelists are listed in order of seniority.