NOT CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

DONALD VOSS,

Plaintiff and Appellant,

vs.

CANDLELITE INN, et al.,

Defendant and Respondent.

H013618

(Santa Cruz County Super.Ct.No. 127032)

While staying at the Candlelite Inn, Donald Voss was assaulted and battered by another guest in the motel's parking lot. He then sued Candlelite and Malcolm D. Moore (hereafter, collectively, Candlelite) for premises liability and negligence claiming that Candlelite failed to protect him from the assailant and heed actual notice of the potential for violence. The trial court granted Candlelite's motion for summary judgment on the ground that no duty existed. Voss appeals from the judgment, and we affirm.

SCOPE OF REVIEW

"'An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal

cause of injuries suffered by the plaintiff. [Citations.] On review of a summary judgment in favor of the defendant, we review the record de novo to determine whether the defendant has conclusively negated a necessary element of the plaintiff's case or demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial. [Citation.]' [Citation.]" (Pamela W. v. Millsom (1994) 25 Cal.App.4th 950, 956.)

"The existence of a duty is a question of law for the court." (Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, 674.) And foreseeability, when analyzed to determine the existence or scope of a duty, is also a question of law. (Id. at p. 678.) We therefore independently determine the existence and scope of the duty owed by Candlelite to Voss and, as it bears on the question, the foreseeability of the criminal conduct in this case.

UNDISPUTED FACTS

Voss and his fiancee Linda Chester were awakened at 12:20 a.m. on August 29, 1992, by motorcycles revving their engines and loud voices talking and shouting. They telephoned Candlelite's front desk at 12:30 a.m. and described the disturbance and requested assistance. Candlelite's clerk replied that no guests with motorcycles had registered but the manager would look into the problem.

Two other guests sharing a room at Candlelite also heard loud motorcycle noises and voices at approximately 12:30 a.m.

One of them, Karen McCracken, saw two men driving their motorcycles over the curb and into a room. She also called the front desk about the activities and complained about the noise. The clerk replied that he would look into it. McCracken never saw anyone try to abate the motorcyclists' activities.

The noise level decreased for a short time, but then grew louder with more revving engines and booming voices. Voss and Chester called the front desk again at 12:45 a.m. The clerk replied that rooms had been rented to motorcyclists and the staff would handle the problem.

The commotion continued, and Voss and Chester became concerned about the security of their bicycles which were on a rack above their car. They looked but did not see the manager or anyone else outside. They decided to retrieve the bicycles and bring them into their room. As they walked toward the carport they heard loud voices and a motorcycle revving and saw a group of motorcyclists leaving their rooms; one of them rode his motorcycle down the sidewalk. One motorcyclist addressed Voss and asked: "Do you have a problem?" Voss replied: "It's late and I'm trying to get some sleep. You guys are making lots of noise." Another queried: "If we don't stop the noise, what will you do about it?" Voss answered: "You'll see." One of the motorcyclists then walked up to Voss and, without warning, struck him in the face.

Before this incident there had never been any assaults and batteries, criminal activity, or acts of violence committed on Candlelite's premises.

DISCUSSION

"It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition. [Citations.] In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (Ann M. v. Pacific Plaza Shopping Center, supra, 6 Cal.4th at p. 674.)

In Ann M., the plaintiff sued the owner of a shopping center after she was raped in the center within her employer's leased premises. She alleged that the owner was negligent in failing to provide adequate security to protect her from an unreasonable risk of harm (the presence of transients and the potential for violent confrontation between transients and employees of the shopping center). The trial court granted the owner's motion for summary judgment on the ground of no duty, and the Court of Appeal affirmed the judgment. In affirming the Court of Appeal's judgment, the Supreme Court revisited and refined the rule announced in Isaacs v. Huntington Memorial Hospital (1985) 38 Cal.3d 112 (foreseeability required to establish the existence of a business landowner's duty to take reasonable steps to protect its tenants and patrons from third party crime can be established despite the absence of prior similar incidents on the premises). (Ann M. v. Pacific Plaza Shopping Center, supra, 6 Cal.4th at pp.

677-678.) It acknowledged criticism of the apparent abandonment of the "prior similar incidents" rule and concluded: "[A] high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards. We further conclude that the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises." (Id. at p. 679.)[1]

Voss tacitly acknowledges that Ann M. has reinstated the "prior similar incidents" rule as the yardstick for imposing a landlord's duty under a third-party crime scenario. And he grudgingly accepts that Candlelite's negative evidence on this issue has some relevance to the disposition of this case.[2] He makes two related arguments, however, in an attempt to

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[1] In a footnote, the court posed that other circumstances such as immediate proximity to a substantially similar business establishment that has experienced violent crime on its premises might provide the requisite degree of foreseeability; but it noted that the evidence in the case did not raise such an issue. (Ann M. v. Pacific Plaza Shopping Center, supra, 6 Cal.4th at p. 679, fn. 7.) In another footnote, the court also commented that the evidence in the case did not raise whether a shopping center was like a parking garage or all-night convenience store which can be considered so inherently dangerous that, even in the absence of prior similar incidents, providing security guards will fall within the scope of a landowner's duty of care. (Id. at p. 680, fn. 8.) The evidence in this case also does not implicate these fact patterns.

[2] Voss attacks the evidence of "no assaults and batteries" by asserting that it is a legal conclusion; but he has no counter to the evidence of "no criminal activity" or "no acts of violence." And he also attempts to argue that the trial court erred by denying his request to continue the summary judgment motion; he sought the continuance to have an opportunity to complete discovery on the prior similar incidents issue. (See discussion, ante.)

distinguish Ann M. from this case.

Voss first claims that Ann M. is a "constructive notice" case and this is an "actual notice" case. He reasons that Ann M. is concerned with imposition of a duty based on constructive notice provided by prior similar incidents while this case is concerned with imposition of a duty based on actual notice of a then-existing condition.

Voss raises a distinction without a difference. Notice is either actual (express information of a fact) or constructive (imputed by law). (Civ. Code, § 18.) "When the law imputes knowledge, it has the same legal effect as though there was actual knowledge." (Dolch v. Ramsey (1943) 57 Cal.App.2d 99, 105.) Thus, the legal effect of the facts in an actual notice case is the same as the legal effect of the facts in a constructive notice case. It follows that to the extent Ann M. instructs what kind of constructive facts will trigger a duty in a landlord third party crime scenario it also instructs what kind of actual facts will trigger the duty. (See Pamela W. v. Millsom, supra, 25 Cal.App.4th at p. 957 [foreseeability centers upon facts of which the defendant was or should have been aware].)

Voss's principal claim is that Candlelite's actual knowledge of a then-existing dangerous condition created a duty to act. He urges that Candlelite should have (1) attempted to quell the condition itself, or (2) called the police.

We acknowledge that "the scope of a landlord's duty to provide protection from foreseeable third party crime . . . is

determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed." (Ann M. v. Pacific Plaza Shopping Center, supra, 6 Cal.4th at p. 678.) And the burden of the corrective measures urged by Voss are relatively minimal. But Voss's analysis of foreseeability is unfocused.

"[I]n any analysis of foreseeability, the emphasis must be on the specific, rather than more general, facts of which a defendant was or should have been aware." (Pamela W. v. Millsom, supra, 25 Cal.App.4th at p. 957 [commenting that there is little utility in evidence that, for example, a place is in a high crime area]; see also Ann M. v. Pacific Plaza Shopping Center, supra, 6 Cal.4th at pp. 679-680 [court acknowledged that the evidence showed previous assaults and robberies in the shopping center but explained that even if the owner had notice of these acts they were not similar in nature to the rape suffered by the plaintiff].) Thus, Voss's argument that Candlelite had notice of a "then-existing dangerous condition" is insufficient because it is too general.

Here, the specific evidence is that Candlelite had notice of noisy guests. But Voss was injured not by noise but rather by an assault and battery. (See Gray v. Kircher (1987) 193 Cal.App.3d 1069, 1074 [court noted that the trial court correctly observed that it could not equate complaints to hotel manager about a noisy tenant with notice that the tenant involved was dangerous to other guests, thereby imposing a duty to perceive that a noisy tenant might act in a criminal manner].) Stated another way, the

facts of which Candlelite was aware do not equate to a danger that one of its guests might suffer from a criminal act.

Voss relies on Soldano v. O'Daniels (1983) 141 Cal.App.3d 443, where the court concluded that a bartender owed a duty to the plaintiff's decedent to call the police or permit a good Samaritan to call the police. But there, a saloon patron went across the street to an inn, informed the bartender that a man had been threatened in the saloon, and asked the bartender to call the police or allow him to call the police; the bartender refused, and the plaintiff's father was shot and killed in the saloon. Thus, in Soldano, the actual notice given to the bartender was of the actual danger posed.

In short, there can be no duty imposed upon Candlelite under a constructive notice theory because there is no specific evidence of a prior similar incident where a noisy tenant became dangerous to other guests; and there can be no duty imposed upon Candlelite under an actual notice theory because the facts known to Candlelite do not equate to the danger of a criminal act.

Voss nevertheless argues that the motorcyclists were a "gang" of large individuals having tough appearances and loud demeanor giving them an intimidating impact. This characterization coupled with the "criminal" behavior of driving motorcycles in and out of rooms, so the argument goes, makes it reasonably foreseeable that the gang members would be prone to violence. We disagree.

"Unfortunately, random, violent crime is endemic in today's society. It is difficult, if not impossible, to envision any

locale open to the public where the occurrence of violent crime seems improbable." (Ann M. v. Pacific Plaza Shopping Center, supra, 6 Cal.4th at p. 678.) Thus, any stereotypical situation can be embellished to include the probability of violent crime. If foreseeability, in the legal sense of the word, included this state of affairs the rule of Ann M. would be meaningless and the courts would be imposing "an unfair burden upon landlords and, in effect, [] forc[ing] landlords to become the insurers of public safety, contrary to well-established policy in this state." (Id. at p. 679.) We repeat: "[I]n any analysis of foreseeability, the emphasis must be on the specific, rather than more general, facts of which a defendant was [actual notice] or should have been [constructive notice] aware." (Pamela W. v. Millsom, supra, 25 Cal.App.4th at p. 957.)

Voss finally argues that "the motion for summary judgment on the 'constructive notice' duty should be continued under Code Civ. Proc. § 437c(h) to allow plaintiff the opportunity to complete his discovery on this issue. As seen in [a] declaration . . . representatives of the Santa Cruz police have been subpoenaed for the purpose of 1) authenticating the Police Report in this case, which contains detailed admissions by the defendants as well as the observations of the police; and 2) to inquire about other reports of violent crime at the Candlelite Inn for the past several years."

Under Code of Civil Procedure section 437c, subdivision (h), the trial court (not the appellate court) has discretion to find that facts essential to justify opposition to a motion for

summary judgment may exist but cannot, for reasons stated, be presented. If it so finds it must deny the motion or order a continuance. Voss made such a request below, and the trial court implicitly denied it. His above-recited argument is not properly framed and developed for purposes of appeal (abuse of discretion). We therefore treat the point as waived and pass it without consideration. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 479, p. 469.)

DISPOSITION

The judgment is affirmed.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Mihara, J.

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