

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

JAMES B. JOHNSON and)	
BARBARA JOHNSON,)	
)	
Plaintiffs,)	C.A. No. N11C-10-015 CLS
)	
v.)	
)	
AMERICAN CAR WASH,)	
INC.,)	
)	
Defendant.)	

Date Submitted: April 30, 2014
Date Decided: May 9, 2014

On Defendant's Renewed Motion for Summary Judgment. **GRANTED.**

ORDER

Gary S. Nitsche, Esq. and Samuel D. Pratcher, Esq., Weik, Nitsche & Dougherty, Wilmington, Delaware, 19899. Attorneys for Plaintiffs.

Nancy Chrissinger Cobb, Esq., Law Offices of Chrissinger & Baumberger, Wilmington, Delaware, 19806.

Scott, J.

Introduction

Before the Court is Defendant American Car Wash, Inc.'s ("Defendant") Renewed Motion for Summary Judgment in this personal injury action arising out of a physical altercation on Defendant's premises. For the following reasons, Defendant's motion is **GRANTED**.

Background

Defendant's car wash is solely owned by Dwayne "Shorty" Saylor ("Mr. Saylor"). At the time of the incident at issue in this case, the car wash consisted of six bays. Four of the bays were open without any enclosures. Two of the bays had wooden bi-fold doors on one side and plastic flaps on the other.¹

Plaintiff James Johnson ("Mr. Johnson") worked at the car wash for its previous owner² and quit approximately three months after Mr. Saylor purchased the business for reasons related to his pay.³ Afterward, Mr. Johnson continued to visit the premises on a daily basis.⁴ Mr. Johnson visited the car wash in order to wash his car, attempt to rent a portion of the property to run a store, and because he had a lot of friends there.⁵ Mr. Johnson intended to open the store with two other individuals, David

¹ Saylor Dep., at 31:7-32:6.

² Johnson Dep., at 9:23-10:17.

³ *Id.* at 13:3-13.

⁴ *Id.* at 20:5-10.

⁵ *Id.* at 20:11-12, 22:12-17.

Keckline and Tony Dolce (“Mr. Dolce”).⁶ Mr. Dolce was not employed by Defendant; he owned an ice cream truck.

On April 15, 2010, Mr. Johnson visited the car wash. Mr. Johnson’s purpose for visiting the car wash on that day is unclear. In his deposition, Mr. Johnson stated, “I don’t know whether it was to vacuum a car, whether it was to say hello to everybody. No particular reason. I didn’t have an appointment or anything.”⁷ Mr. Johnson also stated that he was there to meet with Mr. Dolce.⁸ Mr. Johnson was standing outside of one of the bays that had the bi-fold doors, when Mr. Dolce arrived at the car wash and requested to speak with Mr. Johnson. Mr. Johnson agreed to speak to Mr. Dolce and gestured toward the inside of the bay. Mr. Johnson went inside first and Mr. Dolce followed behind him. Then, Defendant’s employee, Brandon “Tink” Coates (“Mr. Coates”)⁹ ran into the bay past both men and closed the doors.¹⁰ Suddenly, without any “conversation” or “anger,”¹¹ Mr. Dolce reached for one of Mr. Johnson’s two knives that he carried holstered on his person¹² and stabbed Mr. Johnson in the chest, armpit and leg. In his

⁶ *Id.* at 39:6-16.

⁷ *Id.* at 32:18-33:2.

⁸ *Id.* at 41:21-42:4.

⁹ During the course of this action, the employee was referred to as “Tek.” In Defendant’s renewed motion, Defendant refers to the employee as “Tink” or “Brandon Coates.” Def. Renewed Mot., at ¶ 3.

¹⁰ *Johnson Dep.*, at 33:22-24, 47:6-14.

¹¹ *Id.* at 47:16.

¹² *Id.* at 48:1-9.

deposition, Mr. Johnson testified that he believed Mr. Dolce attacked him because, on one of the days prior to the incident, Mr. Johnson insulted Mr. Dolce.¹³

On October 3, 2011, Mr. Johnson and his wife (“Plaintiffs”) filed this suit against Defendant to recover for the injuries Mr. Johnson suffered as a result of Mr. Dolce’s attack.¹⁴ Plaintiffs did not file suit against Mr. Dolce. In their complaint, Plaintiffs asserted that, “suddenly and without warning, [Mr. Johnson] was assaulted, battered, and beaten, as a result of Defendant’s negligence, thereby causing Plaintiff to sustain significant personal injuries.”¹⁵ Plaintiffs attributed Defendant’s negligence to its failure to warn, prevent the altercation, provide adequate security, and properly supervise and train its staff and/or security. Defendant moved for summary judgment, arguing that it held no duty toward Plaintiffs because Mr. Johnson was not a business invitee and Defendant lacked notice. Defendant denied any liability based on Mr. Coates’ involvement because he was acting outside the course and scope of his employment.

Plaintiffs opposed the motion on several grounds. First, Plaintiffs asserted that Mr. Johnson was in fact a business invitee because he was there to discuss the store and to vacuum his car. Second, Plaintiffs argued that,

¹³ *Id.* at 54-55.

¹⁴ Ms. Johnson’s claim is for loss of consortium.

¹⁵ Compl., at ¶ 4.

since discovery was ongoing, summary judgment was not appropriate for the issues concerning notice and whether Mr. Coates was acting outside the scope of his employment. However, Plaintiffs did argue that Mr. Coates' act of closing the door prior to the attack demonstrated that Defendant had notice. Third, Plaintiff's argued that an issue remained as to whether Defendant undertook reasonable steps to make the property safe.

On August 21, 2013, the Court issued its decision denying Defendant's motion.¹⁶ The Court stated that Mr. Johnson's purpose for visiting Defendant's car wash was disputed;¹⁷ thus, an issue of fact existed for as to whether Defendant was a business invitee. In addition, based on Mr. Coates' act of closing the door prior to the attack, the Court inferred, in favor of Plaintiffs as the nonmoving parties, that Defendant might have had notice, via Mr. Coates, that Mr. Dolce might attack Mr. Johnson and, thus, found that an issue of fact existed.¹⁸ The Court's overall conclusion was that "the completion of discovery would be useful to the Court on these issues."¹⁹

Since that decision, the parties have completed discovery on these issues and the only relevant deposition taken was Mr. Saylor's. Mr. Saylor

¹⁶ Order, dated Aug. 21, 2013.

¹⁷ *Id.* at 2, n.1.

¹⁸ *Id.* at 7.

¹⁹ *Id.*

described the premises and testified that he was not on the premises on the date of the incident,²⁰ that he had viewed prior interactions between Mr. Johnson and Mr. Dolce, and that the two men were “together all the time.”²¹

Parties’ Contentions

On April 23, 2014, Defendant filed this renewed motion for summary judgment. Defendant maintains that no facts have been presented which show that Defendant had notice. In addition, Defendant relies on Mr. Saylor’s description of the bays to argue that Mr. Coates could not have run past the men to close the doors because “there was no door on that side to close.”²² Plaintiffs responded to the motion by requesting that the Court consider its arguments set forth in opposition to the first motion for summary judgment as its arguments in response to the current motion.

Standard of Review

Summary judgment is to be granted when “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 a judgment as a matter of law.”²³

²⁰ Saylor Dep., at 7:6-9.

²¹ *Id.* at 23:14-23.

²² Def. Renewed Mot., at ¶ 3.

²³ Superior Court Rule 56; *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party.²⁴ Where there is a material fact in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law, summary judgment is inappropriate.²⁵ If a motion for summary judgment is properly supported, the burden shifts to the non-moving party to show that there are material issues of fact.²⁶

Discussion

“In Delaware, it is well-settled law that business owners have a duty to exercise reasonable care to protect patrons from foreseeable danger.”²⁷ Those patrons, known as “business invitees,” are defined as “person[s] who [are] invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land.”²⁸ At the time of the first motion, discovery was ongoing and the parties disputed Mr. Johnson’s purpose for being on Defendant’s premises. While the Court found that an issue of fact existed as to whether Mr. Johnson was a business invitee because of this dispute, the Court ultimately concluded that discovery would provide further guidance on this issue.

Now that discovery is complete, no further evidence or testimony has been

²⁴ *Bailey v. City of Wilmington*, 766 A.2d 477, 479 (Del. 2001).

²⁵ *Tew v. Sun Oil Co.*, 407 A.2d 240,242 (Del. Super. 1979).

²⁶ *State v. Regency Group, Inc.*, 598 A.2d 1123, 1129 (Del. Super. 1991).

²⁷ *McCutchin ex rel. McCutchin v. Banning*, 2010 WL 23712, at *2 (Del. Super. Jan. 5, 2010).

²⁸ *Durham v. Leduc*, 2001 WL 1006232, at *2, 782 A.2d 263 (Del. 2001)(TABLE)(internal quotations omitted).

submitted to explain why Mr. Johnson was at the carwash. The Court has before it only Mr. Johnson's testimony in which he stated that he visited the car wash on a daily basis for various purposes and that, on the date of the incident, he did not know whether he was there to vacuum or socialize, but also that he was there for "no particular reason."²⁹ This testimony alone does not support a finding that an issue of fact exists as to whether Mr. Johnson was a business invitee, *i.e.*, whether he was on the premises for a "purpose directly or indirectly connected with business dealings with [Defendant]."³⁰ Therefore, the Court finds that Defendant had no duty to protect Mr. Johnson from Mr. Dolce and summary judgment is granted in favor of Defendant.³¹

Even if the Court were to find that an issue of fact existed as to whether Mr. Johnson was a business invitee, no duty to protect Mr. Johnson arose because the facts do not support an inference that Defendant had notice. As the Court explained in its prior decision, the business owner's duty in cases involving intentional harmful acts by a third person is contingent upon the owner having notice. To have notice, the owner must "know[] or ha[ve] reason to know that the

²⁹ Johnson Dep., at 32:18-33:2.

³⁰ *Durham*, 2001 WL 1006232 at *2.

³¹ See *McCurdy v. Carriage Run, Inc.*, 1979 WL 193322, at *1 (Del. Super. Mar. 28, 1979) ("An action in negligence is dependent upon the breach of a duty owed to the plaintiff. In the absence of a duty, there can be no negligence").

acts of the third person are occurring or about to occur.”³² In the first decision, the Court inferred, in favor of Plaintiffs, that the employee’s act of closing the door could suggest that there might have been some notice; however, the Court stated that the completion of discovery would also be helpful on this issue.

At this stage, the Court finds that Defendant has met its burden to show that no genuine issue of fact exists as to whether Defendant, directly or via its employee, knew or had reason to know that Mr. Dolce was likely to attack Mr. Johnson. The owner, Mr. Saylor, was not on the premises at the time of the incident. Neither Mr. Johnson’s testimony about his daily visits to the carwash nor Mr. Saylor’s testimony about Mr. Johnson’s and Mr. Dolce’s prior interactions suggest that Defendant knew that Mr. Dolce was likely to attack Plaintiff. Moreover, Plaintiff testified that there was no anger or verbal altercation on the day of the attack. In *Brynes v. Keenan*,³³ this Court found that an attack by a third person against a restaurant patron was “sudden and unprovoked” because “[i]t [was] undisputed that prior to the attack there was no indication of impending trouble.”³⁴ Consequently, the Court “conclude[d] as a matter of law that the attack was not foreseeable” and that, “[a]ccordingly, [the premises owner’s] duty to protect plaintiff never arose, and therefore [the owner] was not negligent in this

³² Order, dated Aug. 21, 2013 (quoting Restatement (Second) of Torts, Comment *f* (1965)).

³³ *Brynes v. Keenan*, 1987 WL 11446 (Del. Super. May 19, 1987) *aff’d sub nom. Brynes v. Brooks*, 542 A.2d 357 (Del. 1988).

³⁴ *Id.* at *3.

respect.”³⁵ Likewise, it is undisputed that there was nothing preceding the attack to indicate that it would occur and, thus, the attack was not foreseeable. Aside from Defendant’s employee’s mere closing of the doors, Plaintiffs have submitted nothing further which shows that Defendant had knew or had reason to know that Mr. Dolce would attack Mr. Johnson. Therefore, Defendant cannot be held to a duty to protect Mr. Johnson because there is no genuine issue of fact as to whether Defendant had notice.

Conclusion

For the foregoing reasons, Defendant’s Renewed Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.

³⁵ *Id.* at *4 (citing Restatement (Second) of Torts § 344, *comment f* (1965)).