



News & Updates

WHEN VIOLENT CRIME HAPPENS ON COMMERCIAL PREMISES: A LIABILITY PRIMER FOR OWNERS AND MANAGERS

Just days after the deadly movie theater shooting in Colorado, the first negligence lawsuit was filed against, among others, the owner of the cinema alleging that the theater was negligent in its provision of security. Following the initial shock and concern for the victims and their families after such news arises, the first question to come to the mind of owners and operators of retail or hospitality establishments may be: What if this had happened here?

It is crucial for the owners, occupants, or other persons or entities in control of retail properties to understand the potential liability implications if a violent crime were to occur on their premises. The following outlines key legal considerations for those in the retail and hospitality industries based on how these types of claims have played out in courts across New York. Understanding these issues may help shape proactive policies and procedures to help property owners and managers take proactive steps to help prevent such tragedies — or minimize their risk if a claim were to arise.

Liability for Violent Crimes

Jury verdicts for liability arising from criminal acts perpetrated upon a shopper, restaurant or hotel guest, or visitor to a property can expose a business owner to significant damages. This exposure exists despite the fact that the criminal act is committed by someone over whom the defendant has little or no control. In addition to the damages for personal injury, the economic impact of a highly publicized trial can cause damage to a restaurant's, hotel's, retailer's, or retail center's reputation in the community.

Generally, an owner of property may be liable for the injuries inflicted by a trespasser who, while on the owner's property, commits a violent crime against a third person. Although owners, landlords, tenants, and "permittees" have a common law duty to minimize foreseeable dangers on their property, including the criminal acts of third parties, they are not the insurers of a visitor's safety. [1]

Control

In New York, a critical element of a cause of action premised on a defendant's alleged failure to protect a patron from foreseeable harm caused by third persons is an allegation that the plaintiff's injury occurred on the defendant's property, or in an area under the defendant's control. It is not enough to allege that the incident resulting in a plaintiff's injury was foreseeable where the defendant lacked the opportunity to supervise and control the assailant. [2]

Foreseeability

Foreseeability is the critical point of analysis in claims for liability arising from criminal acts. Liability can arise only where the owner knew or should have known of the probability of conduct on the part of the trespasser which was likely to endanger the safety of those lawfully on the premises. In general, this notice can be established only by proof of a prior pattern of criminal behavior. [3] Whether an injury was foreseeable depends on the "location, nature, and extent of ... previous criminal activities and similarity, proximity, or other relationship to the crime in question." [4]

To establish foreseeability, the criminal conduct at issue must be shown to be "reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location." [5] Ambient neighborhood crime alone is insufficient to establish foreseeability. [6]

There is no requirement that the past experience relied upon to establish foreseeability "be of the same type of criminal conduct to which plaintiff was subjected." [7] Nonetheless, the inquiry must still be made as to the location, nature, and extent of those previous criminal acts and their similarity, proximity, or any other relationship to the crime in question. For example, in one case where it was claimed that a property owner failed to provide adequate security to prevent an attack in its parking lot, the court held that the "incidents that occurred in the parking lot and the store during the three years before plaintiff's assault were so dissimilar in nature from the violent attack upon plaintiff as to be insufficient, as a matter of law, to raise a triable factual issue as to foreseeability." [8]

Joint and Several Liability

New York Civil Practice Law and Rules (CPLR) § 1601 modifies joint and several liability by providing that if a joint tortfeasor (or wrongdoer) is found to be 50 percent or less at fault for the happening of an occurrence, then that tortfeasor's liability to the plaintiff is limited to his or her

percentage of fault. CPLR § 1602 provides a list of exceptions to the limitation of liability in § 1601, one of which is that the limitation does not apply to actions requiring “proof of intent.” While at first glance, this might appear to expose a landowner to liability for a portion of the plaintiff’s injuries greater than the percentage for which a landowner was found liable by a jury, the Court of Appeals has held that the § 1602 exception is not applicable to cases where a defendant is alleged to have negligently provided security from a non-party assailant. [9] Therefore, if the landowner is found to be 50 percent or less liable for the happening of the criminal attack upon the plaintiff, the landowner will be entitled to the limitation of liability and will only be required to pay the percentage of damages for pain and suffering assigned to it by the jury.

Security Contractors

A plaintiff’s claim against a company contracted to provide security services on the premises where his or her injury occurred is limited. Generally, a victim of violent crime does not have a claim against a security company retained by a property owner for the same reason discussed above on the liability of snow removal contractors — the security contractor generally only owes a duty to the landowner, the party with whom it contracted. [10]

This is not to say, however, that a security contractor is free from liability with respect to a plaintiff’s accident. As with snow removal contractors, the landowner who contracted for security services may be able to seek contribution or indemnity pursuant to its contract if the security contractor was negligent in the performance of its duties. [11]

Defenses

In cases where a plaintiff is injured by a criminal attack, a plaintiff’s allegations of foreseeability and control may be negated where a defendant shows that it has undertaken security measures. [12] For instance, where a defendant can show that it undertook affirmative steps to prevent criminal attacks, such as the provision of security guards or operable locks that would have served to prevent the attack, a defendant may avoid liability for a plaintiff’s injuries. [13]

Further, while internal operating rules may provide some evidence of whether reasonable care has been taken and thus some evidence of the defendant’s negligence or absence thereof, such rules must be excluded, as a matter of law, if they require a standard of care that transcends the area of reasonable care. [14] A defendant’s internal operating rules will be admissible, however, to show the absence of any rules. [15]

Investigation Checklist

Control

- Did defendant have control over the premises where the criminal activity occurred?
- Did the assailant gain access to the premises in a foreseeable manner?
- Were there any broken or inoperable security devices?

Foreseeability

- Was defendant aware of prior criminal activity?
- Did the attack occur in a “high crime” neighborhood?
- Was the criminal activity at issue similar to prior criminal activities (i.e., shoplifting vs. violent crimes)?

Defenses

- Did defendant take reasonable measures pursuant to internal operating rules to protect the safety of the people on its premises, including functioning locks?
- Was the criminal activity at issue dissimilar to prior criminal activities?
- Was the criminal activity at issue far removed in time from prior criminal activities?
- Was the landowner less than 50 percent at fault for the criminal attack on plaintiff?
- Did defendant have a security contractor from whom contribution and/or indemnification may be sought?

If you have questions about how this may impact your business, or for more information on Goldberg Segalla’s Retail, Hospitality, and Development Practice Group, please contact:

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[1] *Maheshwari v. City of New York*, 2 N.Y.3d 288, 778 N.Y.S.2d 442 (2004); *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 429 N.Y.S.2d 606 (1980); see also *Logan v. 530 W. 28th St., L.P.*, 48 A.D.3d 430, 849 N.Y.S.2d 804 (2d Dept. 2010); *Lomedico v. Cassillo* (Appeal No. 1), 56 A.D.3d 1271, 868 N.Y.S.2d 835 (4th Dept. 2008); *Martinez v. National Amusements, Inc.*, 50 A.D.3d 302, 855 N.Y.S.2d 82, 855 N.Y.S.2d 82 (1st Dept. 2008); *Polomie v. Golub Corp.*, 226 A.D.2d 979, 640 N.Y.S.2d 700 (3d Dept. 1996).

- [2] *Lomedico v. Cassillo* (Appeal No. 1), 56 A.D.3d 1271, 868 N.Y.S.2d 835 (4th Dept. 2008); *Urbano v. 710 Amsterdam Assoc., L.L.C.*, 39 A.D.3d 299, 835 N.Y.S.2d 35 (1st Dept. 2007); *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 694 N.Y.S.2d 445 (2d Dept. 1999); *Smith v. Fishkill Health-Related Center, Inc.*, 184 A.D.2d 963, 584 N.Y.S.2d 949 (3d Dept. 1992).
- [3] *Ishmail v. ATM Three, LLC*, 77 A.D.3d 790, 909 N.Y.S.2d 540 (2d Dept. 2010); *Ortiz v. Wiis Realty Corp.*, 66 A.D.3d 429, 887 N.Y.S.2d 10 (1st Dept. 2009); *Lomedico v. Cassillo* (Appeal No. 1), 56 A.D.3d 1271, 868 N.Y.S.2d 835 (4th Dept. 2008); *Karp v. Saks Fifth Ave.*, 225 A.D.2d 1014, 639 N.Y.S.2d 575 (3d Dept. 1996).
- [4] *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 598 N.Y.S.2d 160 (1993); *see also Browning v. James Props., Inc.*, 32 A.D.3d 1160, 821 N.Y.S.2d 696 (4th Dept. 2006); *Buckeridge v. Broadie*, 5 A.D.3d 298, 774 N.Y.S.2d 132 (1st Dept. 2004); *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 694 N.Y.S.2d 445 (2d Dept. 1999); *Karp v. Saks Fifth Ave.*, 225 A.D.2d 1014, 639 N.Y.S.2d 575 (3d Dept. 1996).
- [5] *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 694 N.Y.S.2d 445 (2d Dept. 1999); *see also Six Anonymous Plaintiffs v. Gehres*, 68 A.D.3d 1177, 890 N.Y.S.2d 675 (3d Dept. 2009); *Maria T. v. New York Holding Co. Assoc.*, 52 A.D.3d 356, 862 N.Y.S.2d 16 (1st Dept. 2008), *lv. denied* 11 N.Y.3d 708, 868 N.Y.S.2d 600 (2008).
- [6] *Six Anonymous Plaintiffs v. Gehres*, 68 A.D.3d 1177, 890 N.Y.S.2d 675 (3d Dept. 2009); *Browning v. James Props., Inc.*, 32 A.D.3d 1160, 821 N.Y.S.2d 696 (4th Dept. 2006); *Buckeridge v. Broadie*, 5 A.D.3d 298, 774 N.Y.S.2d 132 (1st Dept. 2004); *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 694 N.Y.S.2d 445 (2d Dept. 1999).
- [7] *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 598 N.Y.S.2d 160 (1993); *see also Maria T. v. New York Holding Co. Assoc.*, 52 A.D.3d 356, 862 N.Y.S.2d 16 (1st Dept. 2008), *lv. denied* 11 N.Y.3d 708, 868 N.Y.S.2d 600 (2008); *Novikova v. Greenbriar Owners Corp.*, 258 A.D.2d 149, 694 N.Y.S.2d 445 (2d Dept. 1999); *Polomie v. Golub Corp.*, 226 A.D.2d 979, 640 N.Y.S.2d 700 (3d Dept. 1996).
- [8] *Mulvihill v. Wegmans Food Mkts., Inc.*, 266 A.D.2d 851, 698 N.Y.S.2d 130 (4th Dept. 1999).
- [9] *Chianese v. Meier*, 98 N.Y.2d 270, 746 N.Y.S.2d 657 (2002); *see also Roseboro v. N.Y. City Transit Auth.*, 10 A.D.3d 524, 782 N.Y.S.2d 23 (1st Dept. 2004).
- [10] *Murshed v. New York Hotel Trades Council*, 71 A.D.3d 578, 898 N.Y.S.2d 25 (1st Dept. 2010); *Gerbino v. Tinseltown USA* (appeal no. 2), 13 A.D.3d 1068, 788 N.Y.S.2d 538 (4th Dept. 2004); *Dabbs v. Aron Security, Inc.*, 12 A.D.3d 396, 784 N.Y.S.2d 601 (2d Dept. 2004).
- [11] *Sprung v. Command Sec. Corp.*, 38 A.D.3d 478, 833 N.Y.S.2d 60 (1st Dept. 2007).
- [12] *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 598 N.Y.S.2d 160 (1993).
- [13] *Maheshwari v. City of New York*, 2 N.Y.3d 288, 778 N.Y.S.2d 442 (2004); *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 598 N.Y.S.2d 160 (1993); *Browning v. James Props., Inc.*, 32 A.D.3d 1160, 821 N.Y.S.2d 696 (4th Dept. 2006); *M. D. v. Pasadena Realty Co.*, 300 A.D.2d 235, 753 N.Y.S.2d 457 (1st Dept. 2002); *Ragona v. Hamilton Hall Realty*, 251 A.D.2d 391, 674 N.Y.S.2d 113 (2d Dept. 1998); *Vangeli v. Schneider*, 194 A.D.2d 916, 598 N.Y.S.2d 837 (3d Dept. 1993).
- [14] *See generally McCummings v. New York City Transit Auth.*, 177 A.D.2d 24, 580 N.Y.S.2d 931 (1st Dept. 1992); *Clarke v. New York City Transit Authority*, 174 A.D.2d 268, 580 N.Y.S.2d 221 (1st Dept. 1992).
- [15] *See generally Banayan v. F.W. Woolworth Co.*, 211 A.D.2d 591, 622 N.Y.S.2d 24 (1st Dept. 1995).

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