

No. 72856-3-1

IN THE COURT OF APPEALS
DIVISION I OF THE STATE OF WASHINGTON

GILBERTO CANO JUAREZ,

Appellant,

v.

BRAVADO APARTMENTS, LLC, a foreign corporation doing
business in Washington as Buena Casa Apartments; JAGENDER
SINGH, and JANE DOE SINGH, a Marital Community; GURMEET
SINGH and JANE DOE SINGH 2, a Marital Community; and DOES
1-10,

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

In the evening hours of January 20, 2012, the plaintiff Gilberto Cano Juarez was walking from a restaurant located on 27th Place South in Kent, Washington to an apartment complex known as Buena Casa Apartments also located on 27th Place in Kent, Washington. Prior to entering the grounds of Buena Casa Apartments Mr. Juarez noticed that he was being followed by two unknown men. As Mr. Juarez walked through the gates into this complex, these two men physically assaulted him.

Although he claims he was living at Buena Casa Apartments on January 20, 2012, Mr. Juarez had not entered into a lease agreement or paid rent for the Buena Casa Apartment to the owners, defendants and respondents here, Bravado Apartments, LLC, Jagender Singh and Gurmeet Singh (collectively, "Bravado").

Mr. Juarez brought suit against Bravado claiming that they owed him an affirmative duty as a tenant and as a business invitee to protect him from the criminal acts of others on the premises. Bravado moved for summary judgment.

The trial court properly recognized that the evidence created no genuine issue of material fact to suggest that Mr. Juarez was a tenant, subtenant or a business invitee. The trial court resolved the issue of duty as a matter of law in favor of all defendants. The Court should affirm dismissal of this meritless case.

II. ASSIGNMENTS OF ERROR, ISSUES ON APPEAL

The issues for this Court to decide are simple:

FIRST: In Washington, a duty arises to protect another from third party criminal conduct only if a special relationship exists between the defendant and the third party or the third parties' victim. Absent a special relationship, no duty even from foreseeable criminal acts of a third party is owed. Mr. Juarez had no relationship of any kind with Bravado. Was the trial court correct in finding that Bravado did not owe Mr. Juarez a duty to protect him from the criminal actions of third parties over whom Bravado had no control?

SECOND: In the recent case of *McKown v. Simon Property Group Inc.*, ___ Wn.2d ___, 344 P.3d 661, 664-665, 2015 WL 967917 (March 5, 2015), the Court stated, "Once a duty is found to exist from the defendant to the plaintiff then concepts of foreseeability served to define the scope of that duty owed." If the Court finds no duty exists as a result of resolving the first issue, was the trial court correct in deciding that the issue of foreseeability did not create a duty owed by Bravado to Mr. Juarez?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

In the evening hours of January 20, 2014, Mr. Juarez walked from a restaurant located on 27th Place South in Kent, Washington to Buena Casa Apartments also located on 27th Place South in

Kent, Washington. CP 38. Before passing through the gated area leading onto Buena Casa Apartments, Mr. Juarez noticed two young men following him. CP 40. He had never seen either of them before. CP 42. These two men followed him through an open gate at Buena Casa Apartments. CP 39. These two men then assaulted Mr. Juarez. CP 41.

Mr. Juarez claims he was living at Buena Casa Apartments in apartment M110 at the time of his attack. CP 34. He claims he was living in this apartment with someone named either Marivel or Elizabeth (last names unknown) and two young girls who were the daughters of one of these women. CP 182-183. Mr. Juarez claims he paid \$350 per month to Marivel or Elizabeth, not to Buena Casa Apartments. CP 183. Mr. Juarez did not keep a car at Buena Casa Apartments and did not have a mailbox there. CP 19. He never spoke to anyone in the office or on the grounds that worked for Buena Casa Apartments about his tenancy or that he lived there. CP 35. Mr. Juarez never signed a lease of any kind with Buena Casa Apartments or with anyone living at Buena Casa Apartments. CP 32.

On January 20, 2012 apartment M110 at Buena Casa Apartments was rented by Bravado to Maria Rodriguez. CP 46, 48-50. Maria Rodriguez signed the lease and paid rent directly to Bravado. CP 46, 48-50. Gurmeet Singh who was involved in the

management of the apartments considered Maria Rodriguez the tenant. CP 46.

Neither Marivel nor Elizabeth was on the lease agreement between Maria Rodriguez and Bravado. CP 48-50. Neither had a lease with Bravado for Apartment M110. CP 46. The lease agreement did not allow Maria Rodriguez to assign the lease, sublet the premises or permit roomers or lodgers to stay in the apartment unless specifically named on the lease. CP 48-50. Mr. Juarez was not named on the lease as a tenant. CP 48-50.

To prove Mr. Juarez lived at Buena Casa Apartments he produced nothing more than his W-2 forms and an appointment notice from Harborview Medical Center with the address of 2632 S. 256th Street Apartment M110 Kent, Washington. CP 110 -102. The appointment notice is for an appointment scheduled on June 18, 2012, almost six months after the assault occurred. CP 102.

The only other evidence produced is testimony by Mr. Juarez that he lived at Buena Casa Apartments and “believed” he had a landlord-tenant relationship with Bravado. CP 57. For purposes of summary judgment, the trial court and Bravado assumed Mr. Juarez was living at Buena Casa Apartments at the time of his assault.

B. STATEMENT OF THE CASE

In his Complaint for Damages, Mr. Juarez claims that an

affirmative duty was owed to him by Bravado to protect him from criminal acts of third parties because he was a tenant and business invitee or because he was a subtenant of apartment M110. CP 3.

Based on the undisputed facts, Bravado moved the trial court for summary judgment as a matter of law, arguing that Bravado did not owe Mr. Juarez a duty because he was not a tenant or a business invitee of Bravado. Because no special relationship existed between Mr. Juarez and Bravado, Bravado did not owe Mr. Juarez an affirmative duty to protect him from the criminal acts of third parties over whom Bravado had no control. CP 27-29. Bravado had no relationship of any sort with Mr. Juarez. Bravado did not know that Mr. Juarez was living on the premises as he now claims. Mr. Singh had never met Mr. Juarez. CP 46. Rent was not paid by Mr. Juarez to Bravado and Bravado in no way benefited by Mr. Juarez paying someone else rent money.

After briefing and argument, the court granted summary judgment in Bravado's favor, finding that no special relationship existed between the parties and that Mr. Juarez was neither a tenant nor a business invitee of Bravado. CP 186-187.

This appeal followed.

IV. ARGUMENT

A. SUMMARY OF ARGUMENT

The trial court recognized that no triable issue of material

fact exists in this case. Mr. Juarez did not enter into a rental agreement with Bravado. He does not claim that he was in a relationship with Bravado's tenant Maria Rodriguez.

On these undisputed facts, the trial court entered judgment for Bravado as a matter of law. No special relationship existed between Mr. Juarez and Bravado that would require Bravado to protect Mr. Juarez from criminal acts of others. No relationship of any kind existed between Mr. Juarez and Bravado. Mr. Juarez was not a tenant, subtenant or business invitee of Bravado.

B. STANDARD OF REVIEW

This Court reviews a motion for summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts, as well as the reasonable inferences from those facts, in the light most favorable to respondents, the nonmoving parties. See *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

This Court can affirm the dismissal by the trial court on any ground found in the record. *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

The purpose of summary judgment is to avoid a useless trial. *Seven Gables Corp. v MGM, UA Entertainment Company*, 106 Wn. 2d 1, 13 721 P. 2d 1 (1986). A motion for summary judgment should be granted when there are no genuine issues as to material facts and the moving party is entitled to summary judgment as a

matter of law. CR 56 (c).

Summary judgment is a legitimate procedure for testing a party's evidence. *Cofer v. Pierce County*, 8 Wn. App. 258, 162-263, 505 P. 2d 476 (1973). A defendant may move for summary judgment by simply pointing out to the court that there is an absence of evidence to support the plaintiff's case. *Young v. Key Pharmaceuticals, Inc.* 112 Wn. 2d 216, 225, 770 P. 2d 182 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct 2548 91 L. Ed. 2d 265 (1986)). Summary judgment in favor of defendant is appropriate if the plaintiff fails to establish a prima facie case concerning an essential element of his claim. *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P. 3d 1068 (2001).

The party moving for summary judgment must meet the burden of showing there is no dispute as to any issue of material fact. But once that burden is met, the burden is shifted to the non-moving party to establish the existence of material facts regarding elements essential to its case. *Hiatt v. Walker Chevrolet Company*, 120 Wn. 2d 57, 66, 837 P. 2d 618 (1992).

This showing, if believed, must be beyond mere unsupported allegations and raise a genuine issue as to a material fact. *Brame v. St. Regis Co.*, 97 Wn. 2d 748, 649 P. 2d 836 (1982). Absent that showing, the court should grant the Defendant's motion. *Young*, 112 Wn. 2d at 225, 770 P. 2d 182 (quoting *Celotex*, 477 U.S. at 322-323).

C. THE TRIAL COURT WAS CORRECT IN DETERMINING THAT BRAVADO DID NOT OWE MR. JUAREZ A DUTY.

Mr. Juarez filed a negligence cause of action against Bravado claiming he was a tenant and business invitee, and that because of his status Bravado owed an affirmative duty to protect him. CP 4. Mr. Juarez subsequently claimed he was a subtenant, owed the same duty as a tenant is owed. CP 58. Because Bravado failed to protect him, Mr. Juarez claims he was injured. CP 4.

The threshold question in any negligence action is whether one party owes another a duty. *Folsom v. Burger King*, 135 Wn. 2d 658, 671, 958 P. 2d 301 (1998). The injured party must show that a duty arises from statute or case law. *Id.* If the injured party cannot show such a duty exists, the analysis ends and the negligence claim fails. *Id.* Mr. Juarez is not asserting a statutory duty here.

At common law, there was no duty to protect people in general from the criminal acts of third persons: "The general rule at common law is that a private person does not have a duty to protect others from criminal acts of third parties." *Hutchins v. 1001 Fourth Avenue Associates*, 116 Wn.2d 217, 223, 802 P. 2d 1360 (1991). A duty only arises to protect another from third party criminal conduct if a special relationship exists between the defendant and the third party or the third parties victim. *Id.* at 227-228, *see also* Restatement (Second) of Torts § 315.

Absent a special relationship, no duty even from foreseeable

criminal acts of a third party is owed. *Faulkner v. Racketwood Vill. Condo. Ass'n*, 106 Wn. App. 483, 486, 23 P. 3d 1135 (2001), *Griffin v. West RS Inc.*, 97 Wn. App. 557, 570, 984 P. 2d 1070 (1999) (emphasis added). As a landlord, Bravado may owe a special duty to its tenants because they were in a landlord tenant relationship with each other. The Washington Court, however, has taken a careful approach to imposing liability on landowners or possessors in general for criminal acts of others.

1. Mr. Juarez was not a business invitee of Bravado as claimed in his Complaint for Damages.

The special relationship between a business and its invitee under Washington law may lead to the duty to protect the invitee from the criminal acts of third persons. *Robb v. City of Seattle*, 176 Wn.2d 427, 295 P.3d 212 (2013). A business invitee is defined as “a person who is invited to enter or remain on land for the purpose directly or indirectly connected with business dealings with the possessor of land.” Restatement (Second) of Torts, § 332 (1965); see also *Younce v. Ferguson*, 106 Wn.2d 658, 667, 724 P.2d 991 (1986).

Bravado did not invite Mr. Juarez to enter Buena Casa Apartments. Bravado did not even know that Mr. Juarez was on Buena Casa Apartment property at the time of the assault. Bravado had no business dealings whatsoever with Mr. Juarez.

Mr. Juarez admits that he never paid monies or any other

benefit to Bravado. No evidence exists that Mr. Juarez's presence in anyway benefited Bravado. Mr. Juarez was not a business invitee of Bravado. There is no genuine issue of material fact; Bravado is entitled to judgment as a matter of law.

2. Mr. Juarez and Bravado were not in a landlord tenant relationship.

Mr. Juarez claims the trial court erred because the court focused solely on the fact that no contractual relationship existed between the parties. Contrary to what Mr. Juarez has pled, he now claims that a special relationship existed "by virtue of Cano-Juarez' tenancy at the property and duty owed to the original tenant." Appellant's Brief at 8.¹

a. A landlord-tenant relationship requires mutual agreement.

Mr. Juarez was not a tenant of Bravado. A landlord-tenant relationship is established when "the owner of premises permits another to take possession thereof for a determinate period of time." *Hughes v. Chehalis Sch. Dist. No. 302*, 61 Wn.2d 222, 224, 337 P. 2d 642 (1963). Moreover, Washington's Residential Landlord Tenant Act holds that a tenant "is any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement." RCW 59.18.030.

¹ Presumably, he is referring to Maria Rodriguez as the tenant, not the person to whom he was paying rent.

In *Griffin v. West RS Inc.*, 97 Wn. App. 557, 570, 984 P.2d 1070 (1999), the Court stated that the tenant looks to the landlord to address safety and other issues that arise in common areas on the leased premises. The tenant “entrusts” the landlord to address those issues:

[It is the] entrustment aspect of the relationship between landlord and tenant, not the mere existence of that relationship, that creates the special relationship between the two giving rise to a duty of the landlord to protect the tenant against criminal actions of third persons.

97 Wn. App. at 570

Mr. Juarez does not dispute that he had no rental agreement with Bravado. Mr. Juarez does not claim that he entrusted Bravado to do anything for him at any time. Mr. Juarez had no relationship whatsoever with Bravado.

Instead, Mr. Juarez claims that he was a tenant at Buena Casa Apartments because he believed he was and because he told others he was, namely his employer and Harborview Medical Center. Based on these facts Mr. Juarez claims that he stepped into the shoes of the original tenant, Maria Rodriguez; and somehow Bravado owed him the duty it owed to her, regardless of whether a contractual relationship existed at the time between Mr. Juarez and Bravado.

Mr. Juarez takes this argument one step further, and claims status of a tenant, not from the actual lessee Ms. Rodriguez, but

from some other woman, named Marivel or Elizabeth, who allegedly resided there with Ms. Rodriguez.

Mr. Juarez's argument lacks much, but one element necessary for a landlord-tenant relationship to exist is permission from the landlord to be on the property. Bravado did not know that Mr. Juarez was residing in apartment M110 at Buena Casa Apartments and did not agree to his presence. CP 46.

On the contrary, Bravado required that its lessee Maria Rodriguez sign a lease that specifically stated:

The LESSEE shall not assign this lease, sublet the premises, give accommodation to any roomers or lodgers, or permit the use of the premises for any purpose other than as a private dwelling solely for LESSEE(S)."

CP 48. It is undisputed that Bravado did not permit Mr. Juarez to take possession of or to dwell in this apartment. CP 46.

b. The *Griffin* Court did not extend a landlord's duty to protect any person on the property.

A possessor of land has no duty to all others under a generalized standard of reasonable care. *Hutchins v. 1001 Fourth Avenue Assocs.*, 116 Wn.2d 217, 221, 226, 803 P. 2d 1360 (1991). The duty that is owed to a tenant is *not* owed to any other resident, absent the presence of a contractual relationship.

Mr. Juarez cites *Griffin v. West RS, Inc.*, 97 Wn. App. 557, 569-570; 984 P.2d 1070 (1999), for the proposition that a "landlord

owes the same duty to a guest or subtenant that the landlord owes to a tenant.” Appellant’s Brief at 10. The *Griffin* court held that a landlord who leases a part of his property and retains control over any other part the tenant is entitled to use is subject to liability to the tenant and others lawfully on the leased property with the consent of the tenant or subtenant for physical harm caused by a dangerous condition upon that part of the leased property retained in the landlords control. *Griffin*, 97 Wn. App. at 569.

Mr. Juarez argues that the holding extends the landlord’s duty to him because he was “lawfully upon the premises with the consent of the original tenant.” Appellants Brief 11. But the facts do not support the argument.

Mr. Juarez admits he was not at the property as a guest or subtenant of Maria Rodriquez with whom Bravado had a contractual relationship. Instead, he claims he was there because he was paying someone else: a woman named Marivel or Elizabeth. Mr. Juarez has produced no evidence that Marivel or Elizabeth were subtenants of Maria Rodriquez.

In *Griffin*, no one questioned that the plaintiff was the defendant’s tenant. On that basis alone, that case is distinguishable, and provides no support to Mr. Juarez in this case.

c. Mr. Juarez was not a subtenant of Bravado.

A sublease is created when the tenant transfers a

possessory estate to another person for a time that is shorter in length than the remaining balance on the original lease. There is no evidence that any transfer was made by Maria Rodriguez to Mr. Juarez.

The original tenant remains in the same legal relationship with the landlord. Whether that relationship extends to a subtenant of the original tenant is not an issue before the Court, since Mr. Juarez does not claim he was a subtenant of Maria Rodriguez. He does not claim that he paid rent to her. He does not claim that he had any relationship with her at all. And Bravado specifically contracted against such a subtenant relationship derived from Ms. Rodriguez without its permission. CP 48.

Mr. Juarez has no evidence that the person to whom he paid rent was a subtenant of Maria Rodriguez. There is no evidence that the \$350 he claims he paid went to Maria Rodriguez for rent.

Mr. Juarez has also failed to produce any evidence that he was a subtenant of anyone. He does not state what the terms of the subtenancy were (*i.e.* length, possession, etc) and does not produce any evidence of an actual agreement.

Stating he “believed he was” is not enough to create such a relationship. Using apartment M110 as his address does not create a subtenant relationship.

The trial court correctly entered summary judgment in favor of Bravado, dismissing the claims of Mr. Juarez.

D. FORESEEABILITY DOES NOT CREATE A DUTY TO PROTECT ANOTHER FROM CRIMINAL ACTS OF THIRD PERSONS.

In his brief, Mr. Juarez cites the recent case of *McKown v. Simon Property Group Inc.*, ___ Wn.2d ___, 344 P.3d 661, 2015 WL 967917 (March 5, 2015), for the proposition that foreseeability answers the question of whether a duty is owed. See, Appellant Brief at 14. That case does not answer the question of **whether** a duty was owed. The *McKown* case concerned the **extent of the duty that was owed** by a landowner to a business invitee to protect from third party criminal conduct when such conduct is foreseeable based on prior criminal acts.

In *McKown*, the existence of a duty owed was already established given the relationship between the parties. That is not the case in the instant matter and is not the issue decided by the trial court here. The *McKown* court stated, "Once a duty is found to exist from the defendant to the plaintiff then concepts of foreseeability serve to define the scope of that duty owed." *McKown*, 344 P.3d at 664-665.

The *McKown* Court confirmed that the first inquiry, as described in *Hutchins v. 1001 Fourth Avenue Assocs.*, 116 Wn.2d at 226, is whether a duty to protect against third party criminal conduct is owed at all. That first question must be answered in the affirmative before the second question is addressed. The second question concerns the foreseeability of harm as a limit on the scope

of the duty owed. *McKown*, 334 P.3d at 665.

The Court further quoted *Hutchins*, stating “a possessor of land has no duty as to all others under a generalized standard of reasonable care under all the circumstances.” *Id.*, citing *Hutchins*, 116 Wn. 2d at 221. In a footnote, the Court noted, “[W]e have continued to address whether a duty is owed under traditional premises liability standards.” *McKown*, 334 P.3d at 666.

To reiterate, absent a special relationship, no duty even from foreseeable criminal acts of a third party is owed. *Faulkner v. Racketwood Vill. Condo. Ass’n*, 106 Wn. App. 483, 486, 23 P.3d 1135 (2001); *Griffin v. West RS Inc.*, 97 Wn. App. 557, 570, 984 P.2d 1070 (1999).

Mr. Juarez has failed to create any genuine issue of material fact from which the Court can find a special relationship existed between Mr. Juarez and Bravado.

V. CONCLUSION

This lawsuit was ideal for summary adjudication. Bravado was in a landlord tenant relationship for apartment M110 with Maria Rodriquez, not Mr. Juarez and not Marivel or Elizabeth. Mr. Juarez admits he had not entered into any agreement with Bravado; he did not pay rent to Bravado; and he did not sublease from the tenant Maria Rodriquez.

No special duty existed between the parties to this lawsuit and therefore no duty was owed by Bravado to Mr. Juarez. No genuine issue of material facts exists here and Bravado are therefore entitled to summary judgment. The trial court judgment should be affirmed.

Dated this 26 day of May, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused to be served in the manner indicated below a copy of the foregoing document directed to the following individuals:

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- Via Email, with recipient's approval**

DATED at Seattle, Washington, this 26th day of May, 2015.

Sandie Swartout
Sandie Swartout

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