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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

SANDRA CROUCH,

Plaintiff and Appellant,

v.

RIO RANCHO DISCOUNT MALL et. al.,

Defendants and Respondents.

E053424

(Super.Ct.No. CIVDS907155)

OPINION

APPEAL from the Superior Court of San Bernardino County. David Cohn, Judge.

Affirmed.

Ellis Law Corporation and Andrew L. Ellis for Plaintiff and Appellant.

Law Offices of Richard F. Lemus and Richard F. Lemus for Defendant and Respondent Lucio Del Valle, dba Rancho In House Security.

Osman & Associates and Richard L. Scott for Defendant and Respondent Rio Rancho Discount Mall, Inc.

Plaintiff and appellant Sandra Crouch is the mother of Terry Lee Green (decedent), who died from a gunshot wound while shopping. Defendant and respondent

Rio Rancho Discount Mall, Inc. (the Mall) owns the shopping mall, and defendant and respondent Lucio Del Valle, dba Rio Rancho In House Security (Del Valle) provided security for the Mall where the killing took place. Plaintiff sued the Mall and Del Valle for the wrongful death of decedent, including claims for negligence and premises liability. Defendants moved for summary judgment, alleging an absence of a duty. The trial court granted the motion and entered judgment in favor of defendants. Plaintiff appeals, and we affirm.

## I. PROCEDURAL BACKGROUND AND FACTS

The Mall, located on West Foothill Boulevard in Rialto, hired Del Valle to provide security. On October 7, 2007, Del Valle's employees, Raul Borja and Jose Ruano, were on duty as security guards. Borja and Ruano were trained security guards who were allowed to carry Tasers. At approximately 6:15 p.m., decedent and his companion, Terrel Wilds, entered the Mall. About the same time, a group of seven males entered. Ruano radioed Borja and the two were keeping an eye on the group of seven men. The security guards were supposed to watch a group like that to "make sure they were not going to steal anything." As decedent and Wilds passed the group of seven males, they began yelling at each other. Ruano radioed Borja to "[b]e careful[ because] these guys . . . don't come with good intentions.'" The two males walked on, making it appear as if they were going to leave; however, about a minute or a minute and a half later, they walked back to the group and a fight broke out. After a few punches were thrown, one of the seven males pulled out a gun and shot and killed decedent.

On May 19, 2009, plaintiff initiated this action for wrongful death, general negligence and premises liability against the Mall. She alleged defendants “negligently caused, maintained, managed, controlled the area inside [the Mall] . . . such that 7 individuals wearing gang apparel, were allowed to enter past security personnel to enter the premises, such that the area [was] dangerous, failing to prevent one of the seven from entering the premises with a weapon, improperly and/or incorrectly allowing patrons in the area where the dangerous condition existed, rendering the area on said premises dangerous and legally causing the injuries to plaintiff complained of herein.” On August 24, 2009, the Mall filed a cross-complaint for contribution, indemnity and declaratory relief against Del Valle. Eleven days later, plaintiff filed an amendment to her complaint naming Del Valle as Doe 2.

On March 26, 2010, the Mall filed a motion for summary judgment on the grounds that it did not owe plaintiff a duty of care to protect against the unanticipated criminal acts of a third person, and its conduct was not a substantial factor causing Green’s injuries. On October 21, 2010, Del Valle filed notice of joinder in the motion. In support of their motion, defendants offered, inter alia, the investigative materials subpoenaed from the Rialto Police Department, excerpts from the deposition of plaintiff, the declaration of Jim Sang Kim, the owner of the Mall, and copies of surveillance video and still photographs from the video.

Plaintiff opposed the motion for summary judgment on January 12, 2011. In her opposition, she argued that because Del Valle had observed a “suspicious group of seven or eight young men wander its premises and observed the same group engage in a verbal

altercation with [decedent] and his companion . . . [¶] . . . the physical altercation which ended in the shooting of [decedent] was foreseeable.” In support of her opposition, she submitted excerpts from the depositions of security guard Ruano, Mall owner Kim, and Lucio Valle, owner of Del Valle, along with the Rialto Police Department’s Log of Emergency Calls from November 29, 1999, through December 31, 2007.<sup>1</sup>

Following a hearing on the motion, the trial court found that “‘a property owner owes a duty to protect patrons from foreseeable criminal acts with foreseeability defined by a history of such incidents. There is a high degree of proof. Plaintiff[’]s evidence presented by the “Call Log” is hearsay, not properly authenticated, does not show that it relates to outside of the [M]all or inside incidents, is not substantiated and cannot be used for the truth of the matters reported, and finally, does not show conveyance to the property owner to establish any notice. The court finds that any further measures than those provided, [i.e.]: security guards, needed to prevent this incident would be unduly intrusive and beyond those required of a property owner.’” Accordingly, the trial court granted summary judgment in favor of the Mall and Del Valle on February 28 and March 25, 2011, respectively. Plaintiff appeals.

## II. STANDARD OF REVIEW

Summary judgment is proper where there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) To prevail on a summary judgment motion, the moving defendant has the

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<sup>1</sup> The trial court found this Log of Calls to be hearsay and not properly authenticated. Plaintiff does not challenge this ruling on appeal.

initial burden to show a cause of action has no merit because an element of the claim cannot be established or there is a complete defense to the cause of action. (Code Civ. Proc., § 437c, subd. (o); *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) To satisfy this burden, the defendant must present evidence which either conclusively negates an element of the plaintiff's cause of action, or which shows the plaintiff does not possess, and cannot reasonably obtain, needed evidence. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 855.) Once the defendant has made this showing, the burden shifts to the plaintiff to set forth specific facts which show a triable issue of material fact exists. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

On appeal, we review the trial court's decision de novo, considering all the evidence presented by the parties (except evidence properly excluded by the trial court) and the uncontradicted inferences reasonably supported by the evidence. (*Merrill v. Navegar, Inc., supra*, 26 Cal.4th at p. 476.) The evidence is viewed in the light most favorable to the plaintiff, liberally construing the plaintiff's submissions while strictly scrutinizing the defendant's showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor. (*Saelzler v. Advanced Group 400, supra*, 25 Cal.4th at p. 768.)

### III. ANALYSIS

A successful negligence claim requires the plaintiff to show that the defendant owed the plaintiff a legal duty, which he breached, causing plaintiff's damages or injuries. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, overruled in part on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5.) Here,

the key element is duty, the existence of which is a question of law for the court.

(*Ann M.*, *supra*, at p. 674.)

“It is established that business proprietors such as shopping centers, restaurants, and bars owe a duty to their patrons to maintain their premises in a reasonably safe condition, and that this duty includes an obligation to undertake ‘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.’ [Citations.]” (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 229 (*Delgado*)). However, “‘the scope of a landowner’s duty to provide protection from foreseeable third party [criminal acts]. . . is determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed. [Citation.] ‘‘[I]n cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. [Citation.] On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required.’ [Citation.]” [Citation.] . . . [D]uty in such circumstances is determined by a balancing of “foreseeability” of the criminal acts against the “burdensomeness, vagueness, and efficacy” of the proposed security measures. [Citation.]’ [Citations.]” (*Tan v. Arnel Management Co.* (2009) 170 Cal.App.4th 1087, 1095-1096.)

When a plaintiff is unable to produce sufficient evidence of heightened foreseeability in the form of prior similar incidents or other indications of reasonably foreseeable risk of violent criminal assault on defendant’s premises, there is no obligation on defendant’s part to provide any guard, or additional guards, to protect against third

party assaults. (*Delgado, supra*, 36 Cal.4th at p. 245.) However, “the absence of heightened foreseeability . . . merely signifies that defendant owed no special-relationship-based duty to provide guards or undertake other similarly burdensome preventive measures; it does not signify that defendant owed no *other* special-relationship-based duty to plaintiff, such as a duty to respond to events unfolding in its presence by undertaking reasonable, relatively simple, and minimally burdensome measures.” (*Ibid.*)

According to plaintiff, “since criminal activity was unfolding in front of defendant’s security guards, defendant’s guards had a duty to take reasonable steps to intervene and not simply stand by and watch as events unfolded.” In support of her contention, plaintiff argues that “rather than simply watch as an assault unfolded before their eyes, the guards could have merely walked over and intervened by separating the group or escorting one of the groups off the property[,] [or] . . . attempted to diffuse the situation.” Plaintiff primarily relies on *Delgado*. In that case, the bar employed two “bouncers,” one inside the bar and the other positioned outside. (*Delgado, supra*, 36 Cal.4th at p. 230.) The inside bouncer noticed “hostile stares” between the plaintiff and other bar patrons. Believing a fight was imminent, the bouncer asked the plaintiff to leave, but did not escort the plaintiff to his car. While in the parking lot, the plaintiff was accosted by the other bar patrons. (*Id.* at p. 231.) The Supreme Court reiterated that “only when ‘heightened’ foreseeability of third party criminal activity on the premises exists . . . does the scope of a business proprietor’s special-relationship-based duty include an obligation to provide guards to protect the safety of patrons. [Citations.]” (*Id.*

at p. 240.) However, given the facts in *Delgado*, the court concluded that “because defendant had actual notice of an impending assault involving . . . plaintiff, its special relationship-based duty included an obligation to take reasonable, relatively simple, and minimally burdensome steps to attempt to avert that danger.” (*Id.* at p. 250.) Those simple steps may have included the bouncer (1) attempting to maintain the separation between plaintiff and the other bar patrons, (2) attempting to dissuade the other patrons from following plaintiff (who the bouncer had asked to leave the bar), or (3) confirming that the outside bouncer was at his post and could help maintain the desired separation between plaintiff and the other patrons. (*Id.* at pp. 246-247.)

Relying on *Delgado*, plaintiff asserts that Ruano’s subjective understanding that there might be trouble or harm from the group of seven established a duty to intervene. We disagree. First, in contrast to the facts in *Delgado*, neither Ruano nor the other security guard intervened in the altercation between the two groups which later turned into a shooting. Second, plaintiff’s claim that there is “clear evidence that Ruano understood it was likely there would be physical violence” is misplaced. According to Ruano’s deposition testimony, he originally watched the group of seven males because he believed “they were either going to steal something or they were going to do something that wasn’t right.” However, customers told Ruano they were yelling. The security officers observed the two groups engage in a verbal altercation and then separate. Ruano thought the two males were going to leave, but they came back. At that point, Ruano told Borja to “[b]e careful, these guys, they don’t come with good intentions.” Immediately thereafter, a fistfight erupted. No more than “one minute or one minute and a half”

passed from the initial verbal confrontation to the physical confrontation. Ruano never thought “their paths were going to cross again” before the physical altercation began. One of the seven males threw two punches and then pulled out a gun. Clearly, there was insufficient warning of what was going to happen and neither security guard suspected someone would fire a gun.

The only duty defendants had under the facts in this case was to call 911. Our Supreme Court has noted that “placing a 911 call is a well recognized and generally minimally burdensome method of seeking assistance.” (*Morris v. De La Torre* (2005) 36 Cal.4th 260, 277 (*Morris*)). In *Morris*, a restaurant patron was stabbed by a gang member who had seized a knife from the restaurant. (*Id.* at pp. 266-267.) The restaurant employees watched without calling for help. (*Id.* at p. 267.) The Supreme Court recognized “there may be situations in which the response that is ‘appropriate and reasonable under the circumstances’ includes *not* making such a call—as when doing so unreasonably would increase the danger to a patron, invitee, employee, or anyone else legally upon the premises . . . .” (*Id.* at p. 277.) However, in *Morris*, the court could not “conclude as a matter of law that defendant’s employees acted reasonably in declining to place a 911 call or undertake any other minimally burdensome measure on plaintiff’s behalf. That disputed issue must be resolved by a jury in connection with its determination of whether defendant breached his duty to plaintiff.” (*Id.* at p. 278.)

This case presents the situation where defendants’ duty, if any, was to provide aid by calling 911. It is unreasonable to assume the security guards could have anticipated a fatal shooting. Moreover, we decline to impose a duty to physically intervene in an

ongoing criminal attack. Where the police cannot win the war on crime, it is illogical to assume a property owner could by imposition of a duty. “Police protection is, and in our view should remain, a governmental and not a private obligation. Landowners in high-crime areas ought not to be forced out of the area or out of business altogether by an imposition of liability to the victims of violent crimes which the police have been unable to prevent. [Citation.]” (*Nola M. v. University of Southern California* (1993) 16 Cal.App.4th 421, 437-438.)

For the above reasons, the trial court properly granted defendants’ motions for summary judgment.

IV. DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

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HOLLENHORST

Acting P. J.

We concur:

RICHLI

J.

KING

J.