STATE OF MICHIGAN

COURT OF APPEALS

CARY STEARNES,

Plaintiff-Appellant,

v

FOREST CITY MANAGEMENT, INC., WBA ASSOCIATES, d/b/a TROLLEY PLAZA APARTMENTS, and PINKERTON, INC.,

Defendants-Appellees.

UNPUBLISHED
January 13, 1998

No. 190357
Wayne Circuit Court
LC No. 95-505879-NO

Before: Smolenski, P.J., and Fitzgerald and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition in favor of defendants on his claims for negligent discharge of a voluntarily assumed duty, breach of contract, and negligence. We affirm.

Plaintiff was the victim of a criminal assault while occupying an apartment leased from defendant WBA Associates in a building managed by defendant Forest City Management, for which defendant Pinkerton provided security services. The management company left standing orders for the security guards that no persons were to be admitted into the building without the express permission of one of the residents. The protocol was for the person desiring admittance to telephone a resident. If satisfied that the person was a desired guest, the resident would then telephone the security guard and authorize admission. On the occasion in question, plaintiff claims that the security guard violated his instructions. Three young males presented themselves at the security desk and stated that they were there to visit a particular female resident. The guard telephoned the resident who, without asking for names or other identification or speaking with any of the trio, simply said, "Let them in." The guard did so. Plaintiff's theory is that these are the three men who then went to his apartment, where they shot him.

We review the circuit court's grant of summary disposition de novo to determine if defendants were entitled to judgment as a matter of law. *G&A Inc v Nahra*, 204 Mich App 329, 330; 514

NW2d 255 (1994). Although the circuit court did not specify the particular subrule underlying its decision, we apply the standards for MCR 2.116(C)(10) because the court considered matters outside the pleadings. See *Butler v Ramco-Gershenson, Inc*, 214 Mich App 521, 524; 542 NW2d 912 (1995). The documentary evidence filed in the action or submitted by the parties to the trial court, MCR 2.116(G)(5), must be considered in a light most favorable to the nonmoving party. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Further, as the party opposing the motion, plaintiff must be given the benefit of all reasonable doubt. *Bourne v Farmers Ins Exchange*, 449 Mich 193, 197; 534 NW2d 491 (1995). Defendants are entitled to summary disposition only if there is no genuine issue of material fact. *Id.*

Giving plaintiff the benefit of all reasonable doubt and resolving all reasonable inferences in his favor, we hold that the circuit court did not err in granting summary disposition in favor of defendants on the assumed-duty count. Plaintiff's theory that defendants voluntarily assumed a duty to protect him from the criminal activity of third parties and were negligent in fulfilling that duty was rejected by our Supreme Court in *Scott v Harper Recreation, Inc*, 444 Mich 441; 506 NW2d 857 (1993), where the Court held that such a theory would not extend to security services so as to be construed as guaranteeing the safety of persons from criminal activity. Absent clear contractual language pursuant to which the defendant agrees to provide bodyguard service or personal security to a specific individual, the Supreme Court held that it would not construe advertising promoting security services for particular premises or otherwise infer from circumstances or ambiguous representations such a guarantee. *Id.* at 451, n 12.

This case is distinguishable from the normal circumstances in which a tenant seeks to hold a landlord liable for a legally owed obligation to protect tenants from foreseeable criminal activities of third parties in common areas of the premises. See *Holland v Liedel*, 197 Mich App 60, 62-63; 494 NW2d 772 (1992). Because plaintiff's claim is based on the negligent discharge of a voluntarily assumed duty, we find that the principles in *Scott, supra* and *Mason v Royal Dequindre, Inc*, 209 Mich App 514; 531 NW2d 797 (1995)), aff'd 455 Mich 391; ___ NW2d ___ (1997), are instructive in analyzing the issue of duty. As noted in *Mason, supra* at 516, "merchants ordinarily are not responsible for the criminal acts of third persons," and "a merchant that undertakes safety measures for the benefits of its patrons will not be held responsible for injuries because those measures were 'less effective than they could or should have been.'" Moreover, where a merchant "employs specific practices in an effort to improve its patrons' safety, it will not be responsible for negligence simply because it may not have conformed its conduct to its usual practice." *Id.* at 517.

In the present case, there was an undertaking by defendants to control access to the building. However, we do not believe that the failure of the security guard to conform his conduct to all of the technical requirements of his instructions establishes a basis for holding either Pinkerton or the other defendants, as owners and managers of the apartment building, liable. The evidence does not show that defendants assumed a duty to ensure tenant safety, to ensure that a tenant would only approve the entry of visitors after being informed of certain identifying information, or to ensure that there would be sufficient identifying information provided to a tenant about visitors so as satisfy other tenants. See *Scott, supra* at 451, n 12.

Similarly, there is no merit to plaintiff's theory that the guard was derelict in carrying out his duties and that plaintiff can therefore sustain a negligence claim. The only dereliction of the guard was the failure to carry out his written instructions. But these written instructions did not establish an actionable duty owed to plaintiff. The applicable principle was well-articulated in *McKernan v Detroit Citizen Street Railway Co*, 138 Mich 519, 540; 101 NW 812 (1904):

> Private rules of a master regulating the conduct of his servants in the management of his own business, although designed for the protection of others, stand on an entirely different footing from statutes and municipal ordinances designed for the protection of the public. The latter, as far as they go, fixed the standard of duty towards those whom they were intended to protect, and a violation of them is negligence in law or per se. But a person cannot, by the adoption of private rules, fix the standard of his duty to others. That is fixed by law, either statutory or common. Such rules may require more or they may require less than the law requires; and whether a certain course of conduct is negligent, or the exercise of reasonable care, must be determined by the standard fixed by law, without regard to any private rules of the party.

McKernan, of course, is in this respect still good law. *Gallagher v Detroit-Macomb Hospital Association*, 171 Mich App 761, 764-765; 431 NW2d 90 (1988). Thus, the fact that the guard violated his written instructions is irrelevant. The guard was at his post and admitted the visitors only on the authority of a tenant of the complex. Plaintiff has not demonstrated the breach of a common law duty of due care.

Plaintiff's effort to show a genuine issue of material fact by utilizing a "but for" analysis is unpersuasive. The cause-in-fact element of a negligence action generally requires a showing that, but for a defendant's action, the plaintiff's injury would not have occurred. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). Moreover, the element of duty, like proximate causation, depends in part on foreseeability. *Moning v Alfono*, 400 Mich 425, 439; 254 NW2d 759 (1977). In the present case, we do not believe that the security guard could have foreseen that the visitors, who were allowed entry only after the security guard obtained approval by one tenant, would approach a different tenant's apartment to shoot him, as was claimed by plaintiff. Considering the limited scope of the voluntarily assumed duty, defendants simply owed no duty to protect plaintiff from the intentional misconduct of the visitors. *Mason*, *supra* at 517. We therefore hold that plaintiff did not establish any basis for holding defendants responsible in negligence for the visitors' alleged actions.

Plaintiff has failed to preserve for our review any argument concerning his breach of contract claim because he did not raise this issue in his statement of issues presented. MCR 7.212(C)(5); *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995). Nonetheless, we will briefly discuss its merit Plaintiff's complaint alleges that the apartments were advertised to prospective lessees as having the benefit of security services. He claims, accordingly, that he is a third-party beneficiary of the security services contract between defendant Pinkerton and Forest City Management.

To the extent that plaintiff continues to argue that he was a third-party beneficiary of the contract between defendants, his argument is without merit. The contract between Forest City Management and Pinkerton does not even mention residents of the apartment complex as persons in any way intended to be beneficially affected by the contractual arrangement. It appears to this panel that the landlord was simply protecting his property, and any benefit to residents was incidental. A third-party beneficiary theory may be pursued only when the promisor has "undertaken to give or to do or refrain from doing something directly to or for" the third party. MCL 600.1405; MSA 27A.1405. Because the Forest City/Pinkerton contract does not even mention apartment residents or tenant safety in any way, plaintiff is not a third-party beneficiary of the contract. *Rieth-Riley Construction Co, Inc. v Dep't of Transportation*, 136 Mich App 425, 430, 432; 357 NW2d 62 (1984).

Affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Hilda R. Gage