NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3928-14T3

IKEEM HIGGINS, RICHARD
HOYTE and CORDERO RUSSELL,

Plaintiffs-Appellants,

v.

HOLIDAY INN AND CONFERENCE
CENTER and CLARENCE FRANCIS,[1]

Defendants-Respondents.

Argued December 7, 2016

Before Judges Higbee and Manahan.

Telephonically reargued March 22, 2017 – Decided April 4, 2017

Before Judges Accurso and Manahan.[2]

---

[1] Raritan Hospitality d/b/a Holiday Inn was improperly plead as Holiday Inn and Conference Center.

[2] Hon. Carol E. Higbee participated in the panel before whom this case was argued. The opinion was not approved for filing prior to Judge Higbee's death on January 3, 2017. Pursuant to R. 2:13-2(b), "Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge determines that an appeal should be determined by a panel of 3 judges." The presiding judge has determined that this appeal shall be decided by two judges. The appeal was telephonically reargued before the captioned judges.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-1835-12.

Matthew R. Eichen argued the cause for appellants (Eichen Crutchlow Zaslow & McElroy, LLP, attorneys; Mr. Eichen, of counsel; Edward McElroy, on the brief).

Richard J. Mirra argued the cause for respondents (Hoagland Longo Moran Dunst & Doukas, LLP, attorneys; Mr. Mirra, of counsel and on the brief; Edward F. Ryan, on the brief).

PER CURIAM

Ikeem Higgins, Richard Hoyte, and Cordero Russell (collectively plaintiffs) appeal from an order granting summary judgment in favor of Raritan Hospitality d/b/a Holiday Inn (defendant) and an order denying reconsideration. We affirm.

We discern the following facts from the motion record, viewed in a light most favorable to plaintiffs as the non-moving parties. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Between February and July 2010, Clarence Francis (Francis), in his capacity as a disc jockey, hosted and performed at a weekly "Caribbean Night" event held at the Holiday Inn (Inn) located in Edison. On July 11, 2010, plaintiffs attended the event at the Inn. At approximately 3 a.m., plaintiffs were outside the Inn smoking when an unidentified, masked gunman approached and shot them; wounding them in their legs.

In March 2012, plaintiffs filed a one-count complaint alleging defendant was negligent in failing to provide security during the event. Thereafter, plaintiffs filed an amended complaint. After defendant filed an answer, it moved for and was granted leave to file an amended answer and third-party complaint naming Francis as a third-party defendant. Plaintiffs then moved for and were granted leave to file a second amended complaint to name Francis as a direct defendant. Francis defaulted after failing to file a responsive pleading. A judgment for default was thereafter entered against Francis.[3]

During the discovery phase of the litigation, information relating to criminal activity at the Inn was obtained from a search of the Edison Police Department's Computer Aided Dispatch (CAD) report. The search encompassed a ten-year period from July 2, 2000 to the date of the incident. The search revealed no reports of shooting incidents at the Inn. The search did produce other types of reported crimes at the Inn in the two-year period preceding the incident.[4] These reported crimes included: a July 2008 report of a fight involving multiple unarmed parties in the

[3] Subsequent to a proof hearing, judgment was entered in favor of the plaintiffs and against Francis in varying amounts.

[4] There is no explanation in the record for why this timeframe was selected.

hotel lobby; a June 2009 report of an assault in a hotel room resulting in no injuries; a June 2010 report of an non-violent assault and theft of a victim's car keys and cell phone in defendant's parking lot; a February 2009 report of a non-violent, unarmed robbery of a victim's handbag near the hotel entrance; a September 2008 report of a rape; and a June 2010 prostitution call relating to a police sting operation.

At the close of discovery, defendant filed a motion for summary judgment. The court held oral argument and granted defendant the relief sought by its motion. Plaintiffs' filed a motion for reconsideration, which was subsequently denied. This appeal followed.[5]

Plaintiffs raise the following argument on appeal:

POINT I

DEFENDANT'S MOTION SHOULD BE DENIED BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE.

In plaintiffs' reply brief, they also raise the following point:

POINT I

DEFENDANT'S MOTION SHOULD BE DENIED BECAUSE THE HOLIDAY INN HAD A DUTY TO PROVIDE SECURITY FOR THE CARIBEEAN NIGHT EVENT BASED ON A FORESEEABLE RISK OF HARM TO THE PLAINTIFFS.

[5] The appeal was initially held in abeyance pending a proof hearing on the default.

When determining a motion for summary judgment, the trial court must decide whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540. Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). When reviewing an order granting or denying summary judgment, we apply the same standard used by the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608, 713 (1998).

In granting summary judgment in favor of defendant, the court found that there were "no facts in this case to show that there was anything inherent about the Caribbean Night, which could have put [defendant] on notice." Further, the court noted that there "had not been one single reported dispute at the Caribbean Night in the previous nineteen times," despite evidence of some other criminal activity at the hotel in the past.

On appeal, plaintiffs contend that fairness and public policy dictate that defendant should have consulted security personnel or the Edison Police Department prior to the event. Plaintiffs argue that circumstances involving the prior criminal activity at the Inn, the late hour, and the festive environment of the Caribbean Night event should have caused defendant to anticipate "loitering, under-age drinking, drugs and fights." Plaintiffs further argue that when these circumstances are considered together, they imposed upon defendant a heightened duty to take precautions against criminal acts of third parties; including the shooting that caused their injuries.

Traditionally, courts are charged with the responsibility to determine the scope of tort liability. Kelly v. Gwinnell, 96 N.J. 538, 552 (1984). Thus, the issue of whether a defendant owes a legal duty, as well as the scope of the duty owed, are questions of law for the court to decide. Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 572 (1996); Kelly, supra, 96 N.J. at 552; Clohesy v. Food Circus Supermarkets, Inc., 149 N.J. 496, 502 (1997); D'Alessandro v. Hartzel, 422 N.J. Super. 575, 579 (App. Div. 2011). "The imposition of a duty to exercise care to avoid a risk of harm to another involves considerations of fairness and public policy implicating many factors." Olivo v. Owens-Illinois, Inc., 186 N.J. 394, 401 (2006) (citing Carvalho, supra, 143 N.J.

at 572). This inquiry has been described as one that "turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993) (citing Goldberg v. Hous. Auth., 38 N.J. 578, 583 (1962)).

When determining an owner's liability to prevent third-party criminal conduct on the premises, our Supreme Court adopted a "totality of the circumstances" analysis, as set forth in the Restatement (Second) of Torts § 344 comment f (1965). Clohesy, supra, 149 N.J. at 507-08, 514. This standard encompasses all matters considered by "a reasonably prudent person" id. at 508, and incorporates fairness considerations for imposing a duty, the foreseeability of the third-party conduct, and "whether the premises owner exercised reasonable care under the circumstances." Estate of Desir ex rel. Estiverne v. Vertus, 214 N.J. 303, 318 (2013).

In adopting the totality of circumstances analysis, the Court held that foreseeability was a crucial, although not dipositive, element, which "[subsumes] many of the concerns we acknowledge as relevant to the imposition of a duty: the relationship between the plaintiff and the tortfeasor, the nature of the risk, and the ability and opportunity to exercise care." Clohesy, supra, 149

N.J. at 502 (alteration in original) (citation omitted). The Court instructed that when using the concept of foreseeability to determine the existence of a duty, a court should assess:

> the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care.
>
> [Id. at 503 (quoting Hill v. Yaskin, 75 N.J. 139, 144 (1977)).]

Clohesy involved the abduction and murder of a seventy-nine-year-old woman from a shopping center parking lot. Id. at 500. The Court held it was sufficiently foreseeable that an individual would enter the parking lot and assault a customer, given that there were approximately sixty criminal incidents on or near the premises over a two-and-one-half-year period preceding the abduction, the criminal incidents were escalating in nature, and the high crime statistics associated with parking lots nationwide. Id. at 503-04. See also Butler v. Acme Markets, Inc., 89 N.J. 270, 274, 280-82 (1982) (where there were seven muggings on the premises in the prior year, five of which occurred in the evening during the four-month period preceding the incident, the store owner owed a duty to provide adequate security protection to patron attacked in the store's parking lot).

In Pequero v. Tau Kappa Epsilon, 439 N.J. Super. 77 (App. Div. 2015), we distinguished the Court's foreseeability assessment in Clohesy and held it was not reasonably foreseeable that an unknown third-party would shoot a guest during a social gathering at a fraternity house in the absence of a previous pattern of criminal conduct on or near the premises. Id. at 92-93. Assessing the totality of the circumstances, we found "the relationship of the parties and the shooter was transitory, and there [was] no proof that the fraternity defendants had any particular knowledge of the unknown assailant." Id. at 93. Moreover, in contrast to the significant statistical proof of prior criminal activity presented in Clohesy, we found the record was devoid of any alarming data relating to prior instances of criminal incidents at or around the house, or an escalation of crime in the area. Id. at 95-96.

In accord with these precepts and in viewing the evidence in a light most favorable to plaintiffs, we are unpersuaded that the totality of the circumstances presented gave rise to a duty on the part of defendant to take reasonable precautions to protect them from the incident; a random act of violence perpetrated outside the Inn.

We note, as did the motion judge, that during the nineteen prior Caribbean Night events there were no criminal incidents.

For a prior ten-year period, there were no reported shootings at the location. And while we do not overlook the reported criminal activity for the prior two years, unlike in Clohesy and Butler, that activity was not so "alarming" or "escalating" that it would be reasonably predictive that attendees at the event could be exposed to the unfortunate fate suffered by plaintiffs.

Stated succinctly, there is no sufficient, credible evidence in the discovery record that supports that defendant could have reasonably foreseen what occurred. In the absence of reasonable foreseeability and in comportment "with notions of fairness and sound public policy," we hold the defendant neither owed nor breached a duty to plaintiffs. See Clohesy, supra, 149 N.J. at 515.

Plaintiffs also appeal from the trial court's denial of their motion for reconsideration. We review the court's denial of reconsideration only for abuse of discretion. Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996). Such applications are addressed to "the sound discretion of the court, to be exercised in the interest of justice." Id. at 384 (quoting D'Atria v. D'Atria, 242 N.J. Super. 392, 400 (App. Div. 1990)). Reconsideration is designed for the limited purpose to seek review of a prior order when the judge has overlooked critical information or misapprehended information in the record or has overlooked

relevant authority. Ibid. (quoting D'Atria, supra, 242 N.J. Super. at 401-02). A litigant should not use reconsideration simply "to re-argue the [underlying] motion that has already been heard for the purpose of taking the proverbial second bite of the apple." State v. Fitzsimmons, 286 N.J. Super. 141, 147 (App. Div. 1995). In application of these principles, we conclude the court did not abuse its discretion in denying the motion for reconsideration.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION