

TRENDS IN REAL ESTATE AND TITLE INSURANCE

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Safety First, But How Much?

Commercial landlords grapple with standard of liability over security measures.

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'Landlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person.' *Mason v. U.E.S.S. Leasing Corporation*, 730 N.Y.S.2d 770 (Ct. App. 2001).

This apparently simple sentence set forth in a memorandum opinion of the New York State Court of Appeals succinctly sets forth the law of the State of New York governing the liability of landlords to tenants for third-party acts. The Appellate Division, First Department, has "quoted" this standard to include a duty to "visitors" as well as tenants, *Gross v. Empire State Building Associates*, 773 N.Y.S.2d 354, 355 (1st Dept. 2004). Whether a harm is "foreseeable," and what constitutes "minimal precautions" are fact-driven inquiries. However, it seems inevitable that it is only a matter of time before a commercial landlord is found to have failed to discharge its duty to provide minimal precautions against foreseeable harm to its tenants and visitors, and be found liable in damages.

Given the possibility of terrorist acts (whether politically motivated acts of

foreigners serving a "cause," or inexplicable acts of U.S. residents with no apparent motivation) harming or killing hundreds and even thousands of people in a single moment, the amount of damages for which a landlord might find itself liable in any such situation is almost without limit.

What Is Foreseeable?

As stated, whether a harm is "foreseeable," and what constitutes "minimal precautions" are fact-driven inquiries. What third-party acts a landlord should have foreseen as reasonably possible occurrences, and therefore taken precautions against, is the customary first line of inquiry.

The injured plaintiff alleges that the act of which the plaintiff is a victim should have been foreseeable by the landlord. The landlord defends by arguing to the contrary. Often these cases are in the context of violent crimes occurring in large residential housing projects. That was precisely the case in *Mason*. Courts look at the history of violent or criminal acts within the building or the surrounding area of which the landlord knew or should have known and make a case-by-case determination as to whether the act being scrutinized is sufficiently similar to that history so as to be considered foreseeable by the landlord.

The line of inquiry is the same in cases involving incidents in commercial

tenancies. However, it appears from a couple of recent cases, *Gross* and *In the Matter of World Trade Center Bombing Litigation*, 776 N.Y.S.2d 713 (Sup. Ct. New York Co. 2004), that in our post-9/11 world, establishing that an act of violence, no matter how extreme or absurd, as a matter of law, is not reasonably foreseeable (thus avoiding giving that inquiry to the trier of fact) is becoming more and more difficult, if not impossible. (Ironically it might be easier to establish that the inexplicable isolated violent act is less foreseeable than the mass murder caused by an act of terrorism.)

In *Gross*, a Palestinian, on Feb. 23, 1997, went to the observation deck of the Empire State Building and "with a semi-automatic pistol indiscriminately shot at tourists, killing one man and injuring five others, before using the pistol to kill himself." 2/27/2003 N.Y.L.J. 21 (col. 2). There were only two reported muggings or assaults noted in the building from 1995 to 1997. But during that period there were 14 incidents of robbery with a gun or knife occurring in the commercial stores located in the building or on the abutting sidewalks, as well as 20 bomb threats against the building.

The trial court noted there had been "only a minimal showing of actual violent criminal activity within the [Empire State Building]" but went on to observe:

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“However, the violent criminal activity in the building’s stores and abutting sidewalks, combined with the 20 bomb threats to the building...does raise a factual issue as to foreseeability...”

The First Department reversed, and ruled as a matter of law that, given the historical level of criminal activity in the building, i.e. only two muggings from 1995 to 1997, and also noting there had never been a shooting in the 65-year history of the building, this act of violence was not foreseeable. However, the First Department also observed that “...it simply cannot be said that in 1997, when, as defendants aptly note, metal detectors were much less prevalent than today, [the landlord] could reasonably have foreseen the events of February 23, 1997 and be held to the duty urged by plaintiff, namely the use of x-ray machines, metal detectors and scanners together with armed security guards and the inspection of all bags and packages.”

It is not entirely clear from this opinion whether the court was implying that “the events of February 23, 1997” would have been deemed foreseeable in 2004 when the opinion was written, but it is clear the court recognizes that the world is an ever changing, and seemingly ever more dangerous, place. The amount of precedential value this case has for landlords who want to rely on it for the proposition that random acts of violence are not foreseeable in 2005 and beyond seems, at best, questionable.

Lending further support to the conclusion that it will not be easy for landlords to have cases dismissed on motion due to the lack of foreseeability of violent acts is *In the Matter of World Trade Center Bombing Litigation*. This case, involving various consolidated actions against the World Trade Center arising out of the 1993 garage bombing (and having nothing to do with 9/11), contains a very complete discussion of the history of the WTC’s efforts to study the possible implications of terrorist acts (which, interestingly, began no later than in the 1980s).

Throughout the 1980s the WTC commissioned a series of reports all of which

concluded the WTC, and particularly the garage areas, were vulnerable to attack, and in several instances which the court describes as “eerily accurate,” predicted vulnerability to a vehicle bomb in the garage. Yet the opinion indicates the WTC, citing such reasons as inconvenience to tenants, lost revenues, cost, lack of deterrence to terrorists, and impracticality did very little to implement any of the security measures recommended in these reports. Interestingly, in defending this case, and notwithstanding that the reports it commissioned specifically discussed the vulnerability of the WTC garage and the possibility of a car bomb, the WTC argued that the actual existence of a car bomb was not, as a matter of law, reasonably foreseeable. The WTC took the position that reports discussing theoretical events did not constitute a basis for it to be charged with foreseeability of actual events.

The court, in rejecting this argument, and ruling the question of foreseeability was for the trier of fact, states “...a landlord does not need to have a past experience with the exact criminal activity, in the same place, and of the same type, before liability can be imposed for failure to take reasonable precautions to discover, warn, or protect.” The court provides an in-depth review of a number of precedents, which it weaves together to conclude that foreseeability includes both what a landlord knows and reasonably should have known, that there is a duty to exercise reasonable care to discover that harmful acts are being done or are likely to be done, and that there is a duty to give adequate warning or otherwise protect visitors. As indicated above, the court also makes clear that a landlord can be charged with such knowledge notwithstanding the lack of a prior substantially similar occurrence at the same location. And the court states: “Whether a risk is foreseeable under particular circumstances has traditionally and soundly been left to the trier of fact to resolve, even where the facts are essentially undisputed.”

‘Minimal Precautions’

Assuming in any given case the harm suffered by a tenant or visitor is determined

by the trier of fact to have been foreseeable, the critical inquiry becomes whether the landlord employed “minimal precautions” to protect its tenants. This phrase cannot be read literally. Undoubtedly there will be instances where the landlord will have taken some act in the name of security, i.e. taken “minimal precautions,” which will be determined to be inadequate as a matter of law.

Although the cases are clear that a landlord is not an insurer against all possible events, how much must be done in any given circumstance is not clear. Again, although the courts might look at the facts of a particular case and determine that as a matter of law the landlord has (or has not) done enough in the way of providing security, whether the landlord has met its burden will be viewed as a question of fact in many instances. But the standard to be used in this review is not as sharply delineated as it might be.

There is very little specific guidance available in the cases. A landlord might attempt to truly make its building “safe” by employing atypical methods, such as armed guards on every floor and fingerprinting every person in and out of the building. But such measures, in all likelihood, would be cost prohibitive and render a building uncompetitive in the marketplace. And perhaps more importantly, at some point security measures are viewed by tenants as intrusive and overbearing. In the Supreme Court opinion in *Gross* it is stated: “At one point after the 1993 [WTC] bombing, [landlord] commenced checking bags of those entering the building, but that program was discontinued as a result of tenant protest against making the [Empire State Building] an ‘armed camp.’”

And in *Cipriani Fifth Avenue, LLC v RCPI Landmark Properties, LLC*, 782 N.Y.S.2d 522 ((Sup. Ct. New York Co. 2004), the tenant/operator of the Rainbow Room actually sued its landlord for injunctive relief to forestall the landlord from installing metal detectors subjecting its clientele to unreasonable

delays or from searching their person and property. The plaintiff argued such procedures would damage its business and damage its reputation.

The court, although appearing sympathetic to the plaintiff's concerns that the imposition of metal detectors and the frisking of guests "is not only inappropriate, and ill advised, but also rather ineffective security," denied the request for injunctive relief due to a lack of showing of the likelihood of success on the merits. The court was persuaded by a lease provision that reserved to the landlord the right to make all changes to the "Building Systems," which term was expressly defined to include building security systems. So the landlord prevailed, but if it had lost it might have been in the position of not being permitted to follow its own judgment as to the appropriate level of security and then, if an injury-causing act occurred, of being sued for not properly protecting tenants and guests from foreseeable acts.

What to Do?

So what's a landlord to do? Too little security might lead to liability for failure to protect against foreseeable events. Too much security might lead to unbearable expense, and even tenant lawsuits. So how much security is "just right"? At this moment there is no definitive answer. However, presumably, determining what is standard, or, perhaps more accurately, what is typical, in the current marketplace in buildings on a par with the building being considered, and installing that level of security, would be a logical step.

By documenting what "the competition" is doing, perhaps with the guidance of outside security consulting firms and vendors, and then implementing a materially similar program, a landlord should be competitive in the marketplace both in terms of offering competitive services, charging competitive Common Area Maintenance (CAM) for security related procedures, and meeting the

obligation to provide "minimal precautions." As in *Cipriani*, landlords should have lease provisions that provide the landlord the right to implement and modify security systems and procedures.

They should also consider including an express acknowledgment in the lease form to the effect that the world is a dangerous place, and that it is impossible to prevent all third-party acts, but that if the landlord undertakes and maintains a security program with certain specified minimum components and such other components as landlord in its sole discretion determines from time to time to be appropriate, the landlord will be deemed to have met its obligation to provide minimal precautions, and that the maintenance of the described program shall constitute an absolute defense against any suit brought due to the injurious actions of a third party. (A lease form could simply include an absolute release of the landlord, but such a provision might not be accepted in the marketplace, and might not be enforced as written.)

Also, landlords should contemplate carefully worded signage to be strategically placed (perhaps on security station desks and in elevator cabs) to state something to the effect that management has implemented reasonable security procedures to attempt to protect against foreseeable events, but that management cannot and does not purport to protect visitors from each and every potential occurrence which might arise and that each person's decision to remain in the building constitutes an acknowledgment of this reality and a release of management from liability for such events.

Signage of this nature might not create a defense which will be recognized, but it might. And signage of this nature might be viewed, initially, as problematic. But like with so many other warning labels on products and securities offerings and other items, the public will probably come to accept same. And of course, landlords should review their insurance policies, to make sure they have the appropriate

coverage. They should review their leases to make sure landlords can pass through their insurance premiums as part of the common area maintenance.

Conclusion

The state of the law is in flux as to the scope of events for which a landlord can be held liable for the damages suffered by its tenants or guests caused by a third party. What events are deemed foreseeable and therefore events for which landlord is responsible is more often than not a question of fact. What precautions the landlord must take to meet its burden to protect against these foreseeable acts is undefined, and determining what actions should be taken to protect the landlord from potential liability must be weighed against the possibility of angering existing tenants and putting off potential new tenants with overbearing and costly requirements.

Until the evolving case law provides clearer guidance it is suggested that landlords review and document the level of security maintained in competitive buildings, look at that level as a benchmark against which to determine the appropriate level of security for their respective buildings, and modify their leases to acknowledge the difficulty of the situation, i.e., that tenants cannot be protected from all potential occurrences, to make clear that the landlord maintains control over the security procedures and equipment to be installed and utilized from time to time, that tenants cannot be protected from all potential occurrences, and to define with specificity a level of care which will be sufficient to relieve landlords from liability for any third-party acts.



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