IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR THE NEW CASTLE COUNTY

MICHAEL R. BUYSE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N10C-08-012 JRS
	)	
	)	
COLONIAL SECURITY SERVICE, INC. and DORSET CONDOMINIUM ASSOCIATION,	)	
	)	
	)	
Defendants.	)	

Date Submitted: June 4, 2012
Date Decided: July 19, 2012

Upon Consideration of
Defendant Colonial Security Service, Inc.'s Motion for Summary Judgment.
DENIED.

Kelley M. Huff, Esquire, and Roger D. Landon, Esquire. MURPHY & LANDON, Wilmington, Delaware. Attorneys for Defendant Colonial Security Service, Inc.

Timothy A. Sullivan III, Esquire, and Barbara A. Fruehauf, Esquire. WILBRAHAM LAWLER & BUBA, Wilmington, Delaware. Attorneys for Defendant Dorset Condominium Association.

Nicholas M. Krayer, Esquire, and Gary S. Nitsche, P.A., Esquire. WEIK, NITSCHE & DOUGHERTY, Wilmington, Delaware. Attorneys for Plaintiff.

SLIGHTS, J.

I.

Defendant, Colonial Security Service, Inc. ("Colonial") has moved for summary judgment on the ground that it owed no legal duty to the plaintiff, Michael R. Buyse ("Buyse").[1] For the reasons that follow, Colonial's motion for summary judgment must be **DENIED**.

II.

This case arises from an incident in which Buyse, a tenant of the Dorset Condominiums ("the Dorset") located in the Trolley Square area of Wilmington, was shot and injured in the rear parking lot of the complex. At the time of the May 24, 2009 incident, Colonial had been retained by the Dorset to provide unarmed security guards to the condominium. The contract between Colonial and the Dorset ("the Service Agreement") provided in relevant part that: "[Colonial] ... agrees to provide Unarmed Security Officer service to Brite Reality Services;"[2] "[Colonial] will assist [the Dorset] in developing and implementing policies and procedures for the protection of premises and assets and carry out duties prescribed by [the Dorset];"[3]

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[1] *See* Del. Super. Ct. Civ. R. 56.

[2] *See* Def's Mot. To Dismiss ("MTD") at Ex. A. Brite Reality Services, Inc. of Exton, Pennsylvania, was the building management company that managed the Dorset prior to the Dorset Condominium Association. After Brite Reality ceased to manage the building, the Dorset Condominium Association continued to use Colonial based on the Brite Reality contract.

[3] *Id.*

and "[Colonial] will use reasonable efforts to protect the assets, interests, and employees of [the Dorset]."[4]

Buyse alleges in his complaint that he suffered injury as a proximate result of Colonial's negligent failure to warn him, failure properly and reasonably to supervise its employees, failure properly and reasonably to train its employees, and failure properly and reasonably to respond in an emergency.[5] Buyse seeks compensatory and punitive damages.[6]

III.

Defendant Colonial has moved for summary judgment on the ground that it did not owe Buyse a legal duty.[7] Specifically, Colonial argues that: (1) the Service Agreement between Colonial and Dorset did not create a legal duty owed by Colonial to Buyse because neither Buyse nor the residents of the Dorset are mentioned in the Service Agreement; and (2) its own conduct in the performance of the Service Agreement did not give rise to a legally cognizable duty. In support of its contention that it had no contractual obligation to Buyse, Colonial argues that the "Entire

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[4] *Id.*

[5] Compl. at ¶10 (a)-(d).

[6] Compl. at ¶¶13,14.

[7] Defense Supplemental Brief ("Def. Supp.") at 1.

Agreement" section of the Service Agreement stipulated that the agreement was for the express benefit of the signatories to the agreement, and that the clause explicitly rejects any contemplated duty to a third party.

At the conclusion of oral argument, the Court requested that the parties address certain ambiguous language in the Service Agreement in supplemental briefing. In its submission, Colonial explains that under Delaware law the meaning of ambiguous contractual terms is a question of fact for the ultimate fact-finder, unless the moving party offers uncontested evidence as to the proper interpretation of the term, and the non-moving party fails to rebut that interpretation.[8] Interestingly, Colonial elected not to attempt to provide or argue extrinsic evidence of the proper interpretation of the ambiguous term. Instead, Colonial concedes that, in the light most favorable to the plaintiff, the ambiguous phrase in question, "[Colonial] will use reasonable efforts to protect the assets, interests and employees of the [Dorset]," could "reasonably include guests and tenants of the Dorset."[9]

Rather than arguing over the meaning of the contractual language, Colonial stakes its ground around the argument that it owed no duty to Buyse even if the Service Agreement is interpreted to mean that it committed to the Dorset to protect

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[8] Def. Supp. at 3.

[9] *Id.*

the Dorset's tenants. First, Colonial argues that it's undertaking vis-a-vis the Dorset - - including both contract *and* conduct - - did not contemplate the physical protection of third parties. Second, Colonial argues that even if the undertaking did contemplate the physical protection of Dorset tenants: (1) none of Colonial's actions increased the risk of harm; (2) Colonial did not undertake to perform the duty of care owed by the Dorset to the plaintiff; and (3) the evidence in the record shows that neither the Dorset nor the plaintiff relied upon the undertaking to the detriment of the plaintiff.[10]

In response, Buyse argues that: (1) the Service Agreement did, in fact, reflect a contractual undertaking on the part of Colonial to protect the plaintiff as reflected in the language that Colonial "[would] use reasonable efforts to protect the assets, interests and employees of the [Dorset];" and (2) Colonial's conduct in performance of the Service Agreement gave rise to a legally cognizable claim because Colonial employees had previously rendered assistance to a tenant who was being robbed.[11]

IV.

The standard of review on a motion for summary judgment in Delaware is well-settled. The function of the court when considering a party's motion for summary

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[10] *See* RESTATEMENT (SECOND) OF TORTS § 324A (discussing duties to third parties arising from an undertaking to act for their protection).

[11] Buyse initially argued in response to Colonial's motion to dismiss that Colonial owed him a duty pursuant to Restatement Second § 323. *See* Pl. Ans. Brief ("Pl. Ans.") at 4.

judgment is to determine whether genuine issues of material fact exist, but not to render decisions on those issues.[12] The court will grant summary judgment if, after viewing the record in the light most favorable to the non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[13] If an issue of material fact exists, or if the record has not been sufficiently developed to allow the court to apply the law to the factual record, then summary judgment will be denied.[14] The initial burden of demonstrating that the undisputed facts support its claims or defenses falls upon the moving party.[15] When the moving party meets its burden, the non-moving party must then show that there are material issues of fact for resolution by the fact-finder.[16]

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[12] *In re Asbestos Litigation*, 2007 WL 2410879, at *2 (Del. Super. 2007) (citing *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (internal citations omitted)); *Oliver B. Cannon & Sons, Inc. v. Door-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).

[13] Del. Super. Ct. Civ. R. 56.

[14] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[15] *Moore v. Sizemoore*, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole*, 180 A.2d at 470).

[16] *See Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

V.

A. The Effect of Ambiguous Contract Language

Under Delaware law, the Court must give "priority to the parties' intentions as reflected in the four corners of the agreement" when interpreting a contract.[17] Whether a contract or contractual term is ambiguous is a question of law for the Court to decide.[18] Where the Court finds that a contract or contractual term is ambiguous, the meaning of the contract or of the term at issue becomes a question of fact to be decided by the fact finder.[19] Summary judgment may still be appropriate, however, if the "moving party's record is not *prima facie* rebutted so as to create material issues of fact."[20] In other words, "[i]n cases involving questions of contract interpretation, a court will grant summary judgment under either of two scenarios: when the contract in question is unambiguous, or when the extrinsic evidence in the record fails to

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[17] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012) (citing *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009)).

[18] *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 286 (Del. 2001).

[19] *GMG Capital Investments, LLC*, 36 A.3d 776, 779 (Del. 2012) (citing *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997); Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI.-KENT L.REV. 859, 862 (2004); *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 841-842 (Del. Ch. 2007)).

[20] *GMG Capital Investments, LLC*, 36 A.3d at 784.

create a triable issue of material fact and judgment as a matter of law is appropriate."[21]

The Court has determined that the contractual provision which states that Colonial will "use reasonable efforts to protect the assets, interests and employees of the [Dorset]," is ambiguous insofar as it is unclear whether or not the term "interests" was intended to include the protection of the Dorset's tenants. Colonial concedes that, in the light most favorable to the plaintiff, the parties could have intended the term "interests" to include the protection of the Dorset's tenants.[22] In light of Colonial's concession, it would be inappropriate for the Court, *sua sponte*, to launch a full-scale review of the extrinsic evidence with an eye towards reaching a contrary construction of the contractual provision at issue.[23]

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[21] *GRT, Inc. v. Marathon GTF Technology, Ltd.*, 2012 WL 2356489, at *4 (Del. Ch. June 21, 2012) (internal citations omitted).

[22] Def. Supp. at 3.

[23] Pursuant to *GMG Capital Investments, LLC*, the Court ordinarily would have the authority to interpret the instant contract on summary judgment if Colonial's record was not *prima facie* rebutted so as to create material issues of fact. By conceding that the contractual term "interests" could include the tenants of the Dorset, however, Colonial has effectively prevented the Court from pursuing the contractual analysis further and, instead, has compelled the Court to proceed under the assumption, for purposes of summary judgment, that the term "interests" was in fact contemplated to include the tenants of the Dorset. 36 A.3d at 784.

B. Restatement Second of Torts § 324A

1. The Undertaking

A plaintiff seeking to invoke Restatement Second of Torts § 324A ("Section 324A") must first establish that the defendant has undertaken to render services to another which contemplates the "protection of a third person."[24] "It is the scope of the undertaking, as defined in the contract, which gives shape to the independent contractor's duty in tort."[25] While it is undisputed that Colonial agreed contractually to provide security services to the Dorset, there is disagreement between the parties regarding whether or not the contract represents an undertaking that contemplated the protection of a third person. Buyse argues that the clause within the Service

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[24] RESTATEMENT (SECOND) OF TORTS § 324A. Restatement Second § 324A states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
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> (a) his failure to exercise reasonable care increases the risk of such harm,or
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> (b) he has undertaken to perform a duty owed by the other to the third person, or
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> (c) the harm is suffered because of the reliance of the other or the third person upon the undertaking.

[25] *Brown v. F.W. Baird, L.L.C.*, 956 A.2d 642, at *3 (Del. 2008) (TABLE) (quoting *Thompson v. F.B. Cross & Sons, Inc.*, 798 A.2d 1036, 1040 (Del. 2002) (internal citations omitted)).

Agreement that states Colonial will "use reasonable efforts to protect the assets, interests and employees of the [Dorset]," indicates that Colonial did undertake to protect the Dorset's tenants.[26] Colonial counters that, while the term "interests" may reasonably be interpreted to refer to the tenants of the Dorset, the phrase "reasonable efforts to protect" does not extend to the protection of tenants against the criminal acts of third parties.[27] Furthermore, Colonial argues that the "Entire Agreement" section of the Service Agreement, which states that the "agreement represents the entire agreement" and that it "is intended only for the benefit of the parties who are signatories to this agreement," indicates that the tenants of the Dorset were not contemplated to be third-party beneficiaries of the contract. If this is the only reasonable construction of the agreement, then no duty in tort under § 324A was contemplated.[28]

Because Colonial concedes that, in the light most favorable to plaintiff, the contractual language "protect the ... interests ... of the Client" may refer to the protection of the Client's tenants,[29] and because the scope of the undertaking, as

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[26] Pl. Supp. at 3.

[27] Def. Supp. at 3.

[28] *Id.* at 4.

[29] *Id.* at 3.

defined in Colonial's contract with the Dorset, will determine Colonial's duty in tort, there is simply no room for Colonial to argue that the Service Agreement, as matters of undisputed fact and law, did not reflect an undertaking to protect the Dorset's tenants. This disputed issue of material fact must be resolved by the fact finder.

2. The Increased Risk of Harm

Having determined that, in the light most favorable to the plaintiff, the facts may show that defendant Colonial engaged in an "undertaking" within the contemplation of § 324A, the Court must next consider the remaining elements of § 324A(a) through (c).[30] The first inquiry is whether the defendant's failure to exercise reasonable care in the undertaking "increase[d] the risk of [ ] harm" to the plaintiff.[31] The test "is not whether the risk was increased over what it would have been if the defendant had not been negligent. Rather, a duty is imposed only if the risk is increased over what it would have been had the defendant not engaged in the undertaking at all."[32] Here, the record fails to support Buyse's contention that Colonial's undertaking increased the risk of harm to plaintiff, *i.e.*, that the risk was somehow increased over what it would have been had Colonial never agreed to

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[30] *Jane Doe 30's Mother*, 2012 WL 1647849, at *14.

[31] *Id.*

[32] *Id.* at *15 (quoting *Myers v. United States*, 17 F.3d 890, 903 (6th Cir. 1994)).

provide security at all.[33] Thus, no duty may be imposed upon Colonial pursuant to § 324A(a).

3. The Assumption of Another's Duty

If Colonial undertook "to perform a duty owed by [the Dorset] to [the plaintiff]," then § 324A(b) would support the imposition of a duty upon Colonial to take reasonable measures to protect Buyse.[34] In *Frederick v. TPG Hospitality, Inc.*,[35] the court found that, where a security agreement did not specify the duties to be performed by security guards, and where the operator of the hotel determined how many guards it wanted at a particular time and instructed those guards regarding their duties, the defendant security company had not assumed the hotel operator's duty to protect hotel guests. On the other hand, the court in *Cunningham v. District of Columbia Sports and Entertainment Commission, et al.*,[36] determined that, where a contract delineated particular duties assigned to security guards, the security company had assumed a duty to the third party for the purpose of § 324A(b). In *Cunningham*,

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[33] Buyse's expert testified that the "minimal level of deterrence [provided by Colonial] was an open invitation to dangerous security risks." Pl. Supp. at 5. Buyse's expert also acknowledges, however, that nothing Colonial did or did not do increased the risk of harm to Buyse because there are always inherent risks without any security at all. Def. Supp. at 8.

[34] RESTATEMENT (SECOND) OF TORTS § 324A.

[35] *Frederick v. TPG Hospitality, Inc.,* 56 F. Supp. 2d. 76 (D.D.C.1999).

[36] *Cunningham v. District of Columbia Sports and Entertainment Commission, et al.*, 2005 WL 3276306 (D.D.C. Nov. 30, 2005).

the security agreement contained provisions that made the security company solely responsible for "crowd control," gave them partial responsibility for access control and contraband inspection, and required them to provide additional personnel in response to emergency situations.[37] The court found that because the defendant security company had contracted for its guards to perform specific duties, they had undertaken a duty to "act reasonably so that attendees of the concert would be protected from foreseeable risks."[38]

The meaning of the contractual terms between Colonial and the Dorset is significant when determining the manner and extent to which the parties may have divided the duty reasonably to protect Dorset tenants.[39] Because Colonial concedes that, in the light most favorable to the plaintiff, the contractual language, "protect the ... interests ... of the Client," may refer to the protection of the Dorset's tenants, it follows that Colonial's contract with the Dorset may have been intended to supplant all or at least some part of the Dorset's duty as landowner reasonably to protect Buyse. If the Court was to consider the extent of those duties now, based on the

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[37] *Id.* at *8.

[38] *Id.*

[39] *See Handler Corp. v. Tlapechco*, 901 A.2d 737, 747 (Del. 2006) (holding under § 324A, that a party need not undertake *all* of another's duty to satisfy § 324A(b); "whatever duty [the defendant] did assume, it had to carry out reasonably").

extrinsic evidence in this record (which suggests that the Dorset maintained substantial control of the security operations), the Court would be interpreting ambiguous contractual language, a role, under these circumstances, reserved for the fact finder.[40] For the purposes of summary judgment, Colonial's concession creates a genuine issue of material fact with regard to this issue.

4. Reliance Upon The Undertaking

If an undertaking for the purposes of Restatement Second § 324A is established, and the Court can conclude that either the person to whom the defendant's undertaking was made or the third party whose protection is the subject of the undertaking suffers harm as a result of "reliance ... upon the undertaking," then a duty may be imposed upon the defendant.[41] Buyse's contention that the harm he suffered resulted from his reliance upon Colonial's undertaking is unsupported by the factual record.[42] Likewise, the unrebutted extrinsic evidence[43] makes clear that the

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[40] *GMG Capital Investments, LLC*, 36 A.3d at 783.

[41] RESTATEMENT (SECOND) OF TORTS § 324A(c).

[42] In his deposition testimony, Buyse admitted that the Colonial security guards were "typically older folks" who would "essentially, just sit at the front desk all day and read newspapers, whatever. They would kind of greet you when you came in. That was about it." Def. Supp. at Ex. C 49:2-6. This indicates that Buyse did not rely upon Colonial's guards for physical protection.

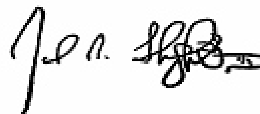
[43] The Court's reference to extrinsic evidence here is not with the intent to interpret the contract. The question of whether the Dorset relied upon Colonial's undertaking does not depend on contract interpretation. *See Patton v. Simone*, 626 A.2d 844, 851 (Del. Super. 1992) ("[T]here must be proof of actual reliance on a contractual undertaking . . . .").

Dorset did not rely upon Colonial to provide security.[44] Therefore, the Court is satisfied that Colonial does not owe a duty to Buyse under § 324A(c).

VI.

Colonial has conceded that, in the light most favorable to plaintiff, the contractual language, "protect the ... interests ... of the Client," may refer to the protection of the Dorset's tenants. Consequently, the Court must find that Colonial may have owed a duty to take "reasonable actions to protect" Buyse. Accordingly, Defendant Colonial's motion for summary judgment is **DENIED**.

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary

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[44] *See* Pl. Supp. at Ex. A (Dorset condominium association president calls Colonial staff "desk personnel" (8:10), says "the name 'security' bothers him" because they serve "like a concierge," (10:15-23) says that the main duties of Colonial guards is to "monitor the video monitors," "keep[] the logbook," "answer[] questions to people who come in," and "tak[e] deliveries for FedEx or UPS" (20:1-11)); MTD at Ex. C (Dorset building manager says that the Dorset uses another company other than Colonial for security camera work and has shopped out that work in the past (41:19-44:16), patrolling is not a function of the guards (89:20) and the "function of the guards is to... monitor[] who is coming in and leaving the building ... [and to] make sure that visitors are signing in and signing out properly (89:22-90:7)).