FIFTH DIVISION
MCFADDEN, P. J.,
BRANCH and BETHEL, JJ.

June 27, 2017

NOT TO BE OFFICIALLY REPORTED

In the Court of Appeals of Georgia

A17A0537. BURGESS v. EDGEWATER APARTMENTS-ATLANTA, LLC et al.

BRANCH, Judge.

After plaintiff Darryl Burgess was stabbed by a trespasser on the grounds of his apartment complex, he sued Edgewater Apartments Atlanta, LLC, as well as the property's management company and manager ("defendants"), alleging that they had failed to keep the premises safe. On appeal from the trial court's grant of summary judgment to defendants, Burgess argues that the grant was in error because genuine issues remain as to whether defendants had superior knowledge of the danger posed by the trespasser and whether Burgess exercised ordinary care for his own safety. We find no error and affirm.

> To prevail at summary judgment under OCGA § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact

> and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. OCGA § 9-11-56 (c). A defendant may do this by showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of plaintiff's case.

Lau's Corp. v. Haskins, 261 Ga. 491 (405 SE2d 474) (1991).

Thus viewed in favor of Burgess,[1] the record shows that late on the evening of October 7, 2011, Burgess visited a nightclub. At around midnight, Burgess inadvertently answered a cell phone call from his former girlfriend, Rasheeda Poindexter. During this call, Poindexter overheard Burgess speaking to another woman. In the four hours that followed, Poindexter repeatedly called and texted Burgess, including a message that "I know u see me calling u[;] u probably with one of your bitches."

[1] Many of Burgess's citations do not correlate to the appellate record, in violation of Rule 25 (a) (1) and (c) (2) (i). Id. ("Record and transcript citations shall be to the volume or part of the record or transcript and the page numbers that appear on the appellate record or transcript as sent from the trial court"; "[e]ach enumerated error shall be supported in the brief by specific reference to the record or transcript. In the absence of a specific reference, the Court will not search for and may not consider that enumeration").

When Burgess did not respond to Poindexter's calls or texts, Poindexter drove to Edgewater Apartments in Decatur, where Burgess lived on the third floor with a second woman, the mother of Burgess's child, in order to "expose" Burgess. Accompanying Poindexter was Craig Salters, whom Burgess remembered from a previous meeting in New Jersey as Poindexter's "cousin." Between 4:01 and 4:04 a.m., Poindexter or Salters made three calls from the visitor's gate call box, but Burgess did not receive any of these calls. Although Poindexter and Salters were denied entry by the call box, they gained access through an open or malfunctioning gate.

Burgess left the club at around 4:30 a.m. and entered the Edgewood property at 5:01 a.m. As Burgess walked toward his apartment building, he saw and heard Poindexter standing on the staircase, "[s]creaming and yelling to the top of her lungs." Burgess continued to walk toward the apartment breezeway and stairs, at which point he encountered Salters and asked who he was. When Burgess asked Salters to leave, Salters responded, "I don't know why she brought me out[;] I don't have anything to do with this." Burgess asked Poindexter to come down to the parking lot, but she replied that they were going to "do this at your f***king door." Burgess then climbed three flights of stairs to reach Poindexter, who exclaimed, "Oh,

you want to leave me? You want to play me like this? Oh, we going . . . out with a bang!" Poindexter also knocked on a number of doors in an effort to locate Burgess's apartment. When Burgess turned and began walking back down the stairs, Poindexter followed him down to the second story, at which point Burgess became angry, turned to face Poindexter, and called her a "stupid bitch." Poindexter later testified that Burgess hit her in the face and chest during the altercation. Burgess admitted that he made intentional contact with Poindexter when he slapped her hand away from him.

At this point, and without warning, Salter began stabbing Burgess, causing serious and permanent injuries. Salter had apparently come up the back staircase as Burgess had gone up the front. Poindexter begged Salters to "stop" during the attack and apologized to Burgess immediately afterward. At no point before the stabbing did Burgess call the police or anyone else for assistance.

In exchange for immunity in the criminal prosecution against Salters that followed, Poindexter testified that she had no involvement in the stabbing. She also stated that the visitor's gate had been open at the time she entered the property, and a police officer arriving on the scene just after 4:30 a.m. testified that an entry gate was stuck in the open position at that time. Evidence also showed that Edgewater was located in an area with a high crime rate, with nearby hotels frequented by prostitutes

and drug users. Trespassers from an adjacent property complex, Creekside Vista, had damaged Edgewater's gates and fences and committed crimes there including burglaries and car thefts. A Dekalb County police officer, who served as Edgewater's courtesy officer in exchange for free rent, testified that she had informed an Edgewater property representative of the violent crimes, including armed robberies and assaults, occurring at Creekside.[2]

In July 2015, Burgess brought this action against defendants, alleging inter alia that they had been negligent in failing to maintain the premises, in failing to warn its residents of "criminal activity in and around" the premises, and in failing to implement "adequate security policies," as a proximate result of which Burgess suffered injury, including medical expenses of $260,000. The complaint also sought punitive damages and attorney fees. The trial court later granted defendants' motion for summary judgment on the grounds that (1) Burgess had superior knowledge of any danger posed by Poindexter and Salter by virtue of his private relationship with Poindexter, (2) defendants had no actual or constructive knowledge of any similar criminal activity on the property, and (3) Burgess had failed to exercise ordinary care

[2] The courtesy officer had walked the property at around 11:15 p.m. the previous evening and arrived home from her part-time job soon after the attack.

when he voluntarily engaged with Poindexter and Salters rather than notifying the police or management of their unauthorized presence.

1. Burgess first argues that a genuine issue of fact remains as to whether defendants had superior knowledge of the threat posed by Salters. We disagree.

The legal principles applicable to this case are well-established:

> Under OCGA § 51-3-1, an owner or occupier of land has the duty to exercise ordinary care to keep its premises safe. Despite this duty, a property owner is not an insurer of an invitee's safety, and an intervening criminal act by a third party generally insulates a proprietor from liability unless such criminal act was reasonably foreseeable. Even if an intervening criminal act may have been reasonably foreseeable, however, the true ground of liability is the *superior knowledge* of the proprietor of the existence of a condition that may subject the invitee to an unreasonable risk of harm.

Cook v. Micro Craft, 262 Ga. App. 434, 437-438 (1) (585 SE2d 628) (2003) (citations and punctuation omitted; emphasis in original). Thus "a property owner or occupier is not liable for a plaintiff's injuries caused by a dangerous condition if the plaintiff had equal or superior knowledge of the danger and failed to exercise ordinary care to avoid the danger." Id. at 438 (1) (citation omitted). In the specific context of criminal assault against an invitee such as Burgess, this Court has held that a property owner

is "under no duty to anticipate" such an assault unless that owner "has reasonable grounds for knowing that such a criminal act would be committed." *Reid v. Augusta-Richmond County Coliseum Auth.*, 203 Ga. App. 235, 237 (1) (416 SE2d 776) (1992) (citation omitted). "In order to prove that the owner had advance notice of the danger of such an assault, evidence is admissible to show a pattern of prior substantially similar criminal assaults on the premises creating a known dangerous condition for which the owner may be held liable." Id.

Consistent with these principles, this Court has repeatedly held that a plaintiff injured in an attack by a person with whom the plaintiff has a "specific private relationship" has, as a matter of law, knowledge of the risks posed by that attacker superior to that of the property owner. *Griffin v. AAA Auto Club South*, 221 Ga. App. 1, 3 (1) (470 SE2d 474) (1996); see also *Cook*, 262 Ga. App. at 439 (1) (plaintiff and decedent had superior knowledge as to attacker's violent history and his threat to kill decedent on the day of her death); *Johnson v. Holiday Food Stores*, 238 Ga. App. 822, 823-824 (1) (520 SE2d 502) (1999) (plaintiff had superior knowledge as to an impending attack by her fiancé at her job as a result of her knowledge of the fiance's personality and temperament as well as the extent to which they had argued that day).

Even assuming that Burgess had little information as to Salter's motives, it is indisputable that Burgess possessed more information than defendants did as to the violent propensities of both Poindexter and Salter because Salter visited the property at the invitation of Poindexter, with whom Burgess had a specific private relationship, and because Salter attacked Burgess immediately after Burgess became violent with Poindexter. In other words, Burgess actually knew that Poindexter was extremely angry and should have known, to a much greater and more specific extent than any of the defendants, of any dangers posed by getting into an altercation with her under such circumstances. See *Griffin*, 221 Ga. App. at 2-3 (1) (even after a plaintiff had advised a property guard of a threat posed by her boyfriend, plaintiff's movement toward her car without requesting an escort because she thought her attacker had "calmed down" "removed any foreseeability" on the part of the property owner); *Porter v. Irvin Residential Dev. Corp.*, 294 Ga. App. 828, 833 (2) (670 SE2d 464) (2008) (affirming grant of summary judgment to landowner when assault against plaintiff "arose from a personal dispute between the parties, which accordingly was not part of any pattern of generally foreseeable assaults against which the landowner was obligated to protect") (citation omitted). Further, there is nothing in the record to show that any of the property crimes previously committed on the property were

"substantially similar" to the attack at issue such that defendants could be held liable for the consequences of not foreseeing that attack. See *Doe v. Prudential-Bache/A. G. Spanos Realty Partners*, 222 Ga. App. 169, 171-172 (1) (a) (474 SE2d 31) (1996) (affirming summary judgment in favor of property owner when the undisputed evidence showed that "no prior violent criminal attacks, sexual or otherwise, occurred on persons prior to" plaintiff's rape; evidence of property crimes was insufficient).

In short, Burgess's speculation as to what defendants could have done to prevent the attack cannot overcome the undisputed evidence that Burgess's knowledge of any possible harm was superior to that of the property owner or manager. *Johnson*, 238 Ga. App. at 824 (1) (speculation as to what property owners "could have done" to prevent plaintiff's injury at the hands of a person known to plaintiff could not raise a question of fact as to any causal link between appellees' conduct and the injury). Defendants did not have constructive or actual notice that an attack like that perpetrated by Salters was likely to occur on the property, and Burgess had knowledge superior to that of any defendant as to the foreseeability of such an attack because of his preexisting personal relationship with Poindexter.

2. Burgess also argues that a genuine issue of fact remains as to whether he exercised ordinary care for his own safety. We disagree.

"Although the issue of a plaintiff's exercise of due diligence for his own safety is ordinarily a question for the jury, it may be summarily adjudicated where the plaintiff's knowledge of the risk is clear and palpable." *Cook*, 262 Ga. App. at 438 (1) (citation and punctuation omitted). It follows that when a plaintiff voluntarily remains near or engages with trespassers or aggressors after learning of their presence on a property, that plaintiff will be held as a matter of law not to have taken ordinary care for his own safety. In *Howell v. Three Rivers Security*, 216 Ga. App. 890 (456 SE2d 278) (1995), for example, this Court held that a plaintiff was barred from recovering for injuries sustained from an attack in a bar when he knew that persons hostile to him were present and knew or should have known that remaining close to a security guard "would not totally neutralize the known risk to him of remaining on the premises." Id. at 892. As we noted, "[t]o ignore th[e] consequence" of that plaintiff's own actions "would be tantamount to making [the property owners] the insurer[s] of [plaintiff's] safety." (citation omitted). In *Reid*, supra, we likewise noted that "[a] proprietor is not liable for a plaintiff's injuries caused by a dangerous condition on the premises if the plaintiff had equal or superior knowledge of the danger, and could have by the exercise of ordinary care, avoided the danger," such that a plaintiff with "knowledge of the danger" of an attack failed to exercise ordinary

care to avoid that attack by remaining on the premises. 203 Ga. App. at 239 (2) (citation omitted).

Here, Burgess made a conscious decision to climb three flights of stairs to engage with an obviously irate Poindexter rather than to call management or police as to any threat posed by her or Salters, whom he had also seen on the property, and Salters began his attack only after Burgess and Poindexter became involved in a physical altercation in the course of a confrontation lasting several minutes. Under such circumstances, we must conclude as a matter of law that Burgess did not exercise ordinary care for his own safety. *Cook*, 262 Ga. App. at 439 (1) (affirming grant of summary judgment to employer when plaintiff who was attacked at plant where she worked knew of employer's "security protocol or lack thereof," but nonetheless "made a conscious decision to go to the plant instead of to a police station or sheriff's office," where she was attacked); *Howell*, 216 Ga. App. at 892 (affirming grant of summary judgment to defendant bar owners); *Reid*, 203 Ga. App. at 237 (1) (when an assault arose from "pre-existing personal animosity" between plaintiff and the attacker, there was "no evidence the attack was part of a pattern of foreseeable assaults for which advance security measures should have been taken," such that summary judgment was properly granted to defendants).

For both of these reasons, the trial court did not err when it granted summary judgment to these defendants.

Judgment affirmed. McFadden, P. J., and Bethel, J., concur.