NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 1333

JENNIE WALDROP

VERSUS

THREE FORTY THREE OAKS, LTD., OAKS OF KINGSBRIDGE APARTMENTS, GIL BRATTEN, STEVE BRATTEN, CABLEWORKS, INCORPORATED, A & H CABLE TV CONSTRUCTION, INC., AND BLADMIR ANTONIO "TONY" OROZCO

Judgment Rendered: February 12, 2010

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 548,285

The Honorable Timothy E. Kelley, Judge Presiding

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**BEFORE: WHIPPLE, HUGHES AND WELCH, JJ.**

**WHIPPLE, J.**

This matter is before us on appeal by the plaintiff, Jennie Waldrop, from a judgment of the trial court granting summary judgment in favor of defendants, Rigoberto Alvarez d/b/a A & H Cable TV Construction, Penn America Insurance Company, and Israel Hernandez, and dismissing plaintiff's claims against these defendants with prejudice. For the following reasons, we reverse and remand for further proceedings.

## FACTS AND PROCEDURAL HISTORY

At approximately 5:00 a.m. on Monday, November 21, 2005, defendant Bladmir Antonio "Tony" Orozco broke through the window of Jennie Waldrop's apartment at the Oaks of Kingsbridge Apartment Complex in Baton Rouge armed with a knife and violently beat and raped her. Waldrop resided in apartment 1031 and Orozco resided in nearby apartment 1030. Orozco, an illegal immigrant from Mexico, resided in one of two apartments (1027 and 1030) at the complex leased and paid for by his employer, A & H Cable TV Construction (hereinafter "A & H").[1] Orozco had no vehicle of his own and traveled to and from the job site by a truck and driver provided by A & H.

The record reveals that in the months leading up to the attack, Orozco repeatedly harassed, intimidated, and verbally assaulted Waldrop from his apartment when she passed by to enter her apartment.[2] After Waldrop registered numerous complaints of Orozco's offensive behavior with the apartment manager, Ms. Nicole "Nikki" Davis, Ms. Davis posted a letter on the door of

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[1]Orozco testified that he entered the United States from El Salvador illegally when he was 14 years old. After he was arrested on immigration charges and threatened with deportation, he was given an opportunity to apply for a social security card and employee authorization card or "work permit." Orozco obtained an employee authorization card, which expired on September 9, 2002. Although A & H gave him a check to renew his permit before it expired, Orozco testified that he cashed the check and spent the money on alcohol in a nightclub instead, allowing his permit to expire.

[2]There were six or more employees of A & H, and, at times, their families, living in apartment 1030, which was a three-bedroom apartment.

apartments 1027 and 1030 advising the tenants that they were violating the terms of the lease and warning them that their behavior towards Ms. Waldrop and other female tenants had to cease or they would be evicted. Ms. Davis also spoke to Mr. Carlos Ventura, a supervisor with A & H who also resided in apartment 1030, and advised him that they had received complaints that his employees in apartment 1030 were sitting on the patio all day and night, and were drinking, "barking," and whistling at women and making sexual gestures and crude remarks to women making them feel uncomfortable as they traveled to and from their apartments. Mr. Ventura assured Ms. Davis that he would speak to his employees and that this would not happen again.

Orozco, who candidly admitted that he had serious addictions to alcohol and drugs, testified that he was confronted by his boss and co-owner of A & H, Israel Hernandez, who also resided with him in apartment 1030, about his drug use and was told that if he did not quit using drugs, he would be fired.[3] Approximately a week before the rape, Hernandez also confronted Orozco concerning reports and complaints from Ms. Davis of excessive drinking on the apartment patio and of his constant harassment of Ms. Waldrop. Hernandez told Orozco that his behavior towards Ms. Waldrop had to stop.

Orozco testified that throughout the entire weekend before he raped Ms. Waldrop, he drank alcohol and beer and smoked crack cocaine in his apartment. He also stated that he was high and had not slept for three days before he raped Ms. Waldrop. On the morning of the rape, Orozco exited the rear door of his apartment under the cover of darkness while Mr. Hernandez and his other co-workers were sleeping and headed to Ms. Waldrop's bedroom window. After he broke through her window and raped Ms. Waldrop, Orozco returned to the apartment where everyone was still asleep. He then grabbed his bottles of beer,

[3]Rigoberto Alvarez, the other co-owner of A & H is married to Orozco's sister.

cigarettes, crack pipe, and knife, and ran to a nearby park where he smoked crack cocaine and drank beer until he eventually fell asleep. He was subsequently apprehended by law enforcement and criminally charged for the above offenses.

On October 11, 2006, Ms. Waldrop filed a petition for damages arising from the assault and rape against: Orozco; the Oaks of Kingsbridge Apartments and its owners, management, and insurer; Cableworks, Incorporated; A & H and its owners, Rigoberto Alvarez and Israel Hernandez, and insurers, Penn America Insurance Company ("Penn America") and St. Paul Insurance Company; and Inner Parish Security Corporation and its insurer, First Mercury Insurance Company.

On October 10, 2008, A & H, Penn America, Rigoberto Alvarez, and Israel Hernandez (hereinafter collectively referred to as the "A & H defendants") filed a motion for summary judgment, contending that they were not liable herein as the rape had no "relationship" with Orozco's employment, and that Ms. Waldrop's claims against them should be dismissed. In support of their motion for summary judgment, the A & H defendants presented a copy of Ms. Waldrop's petition, the affidavit testimony of Israel Hernandez, excerpts of the deposition testimony of Orozco, Ms. Waldrop's response to defendant's second set of request for production of documents, excerpts of the deposition testimony of Rigoberto Alvarez, and a copy of Orozco's social security card and employment authorization card.

The matter was heard before the trial court on December 15, 2008, at which time the trial court granted the A & H defendants' motion for summary judgment. A judgment dismissing Ms. Waldrop's claims against the A & H defendants was signed by the trial court on January 14, 2010.

Ms. Waldrop now appeals, contending that the trial court erred in granting summary judgment where there are numerous questions of fact concerning: (1)

whether or not the A & H defendants, as provider of housing for their employees, breached their duty by failing to properly supervise their employees and in failing to require that such employees refrain from engaging in unlawful or immoral conduct against other residents of the complex; (2) whether or not the A & H defendants' conduct contributed to Ms. Waldrop's rape by continuing to provide employment-related housing to Orozco, when defendants knew or should have known of his flagrant, open and continuous alcohol and illegal drug abuse; (3) whether or not the A & H defendants violated LSA-R.S. 22:992 and 8 U.S.C.A. Sec. 1324 by continuing to house and employ Orozco, when they knew as of September of 2002, that Orozco's work authorization card had expired, rendering him an illegal immigrant; and (4) whether or not the A & H defendants were negligent in hiring Orozco, knowing that he would work and live in close proximity with the public and had a serious prior criminal record.

**DISCUSSION**

A motion for summary judgment is a procedural device used to avoid a full-scale trial, where there is no genuine factual dispute. Sanders v. Ashland Oil, Inc., 96-1751 (La. App. 1st Cir. 6/20/97), 696 So. 2d 1031, 1034, writ denied, 97-1911 (La. 10/31/97), 703 So. 2d 29. It should be granted only if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966.

The summary judgment procedure is designed to secure the just, speedy and inexpensive determination of every action and is now favored. LSA-C.C.P. art. 966(A)(2). The initial burden continues to remain with the mover to show that no genuine issue of material fact exists. If the moving party points out that there is an absence of factual support for one or more elements essential to the

adverse party's claim, action or defense, then the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. LSA-C.C.P. art. 966(C)(2). If the nonmoving party fails to do so, there is no genuine issue of material fact and summary judgment should be granted. LSA-C.C.P. arts. 966 and 967; Berzas v.OXY USA, Inc., 29,835 (La. App. 2nd Cir. 9/24/97), 699 So. 2d 1149, 1153-1154.

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. Bezet v. Original Library Joe's, Inc., 2001-1586, 2001-1587 (La. App. 1st Cir. 11/08/02), 838 So. 2d 796, 800. Because it is the applicable substantive law that determines materiality, whether or not a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. Rambo v. Walker, 97-2371 (La. App. 1st Cir. 11/6/98), 722 So. 2d 86, 88, writ denied, 98-3030 (La. 1/29/99), 736 So. 2d 840.

**Duty of Employer to Protect Against Harm Caused by Employee[4]**

The determination of whether to impose liability in a negligence case under LSA-C.C. art. 2315 usually requires proof of five separate elements: duty, breach of duty, cause-in-fact, scope of liability or scope of protection, and damages. Pinsonneault v. Merchants & Farmers Bank and Trust Company, 2001-2217 (La. 4/3/02), 816 So. 2d 270, 275-276. The threshold question in any duty-risk analysis is whether the defendant owed a duty to the plaintiff. Whether a duty is owed is a question of law. Pinsonneault v. Merchants & Farmers Bank and Trust Company, 816 So. 2d at 276. The particular facts and circumstances of each individual case determines the extent of the duty and the resulting degree of care necessary to fulfill that duty. Moore v. Safeway, Inc.,

[4]For brevity, we will address the assignments of error urged by Ms. Waldrop in one discussion.

95-1552 (La. App. 1st Cir. 11/22/96), 700 So. 2d 831, 846, writs denied, 97-2921, 97-3000 (La. 2/6/98), 709 So. 2d 735, 744.

A claim against an employer for the torts of an employee based on the employer's alleged direct negligence in hiring, retaining, or supervising the employee generally is governed by the same duty-risk analysis used for all negligence cases in Louisiana. Griffin v. Kmart Corporation, 2000-1334 (La. App. 5th Cir. 11/28/00), 776 So. 2d 1226, 1231. Generally, there is no duty to protect others from the criminal activity of third persons. However, when a duty to protect others against such criminal conduct has been assumed, liability may be created by the negligent breach of that duty.[5] Smith v. Orkin Exterminating Company, Inc., 540 So. 2d 363, 366 (La. App. 1st Cir. 1989).

Moreover, when an employer hires an employee who, in the performance of his duties, will have a unique opportunity to commit a crime against a third party, he has a duty to exercise reasonable care in the selection of that employee. Kelley v. Dyson, 2008-1202 (La. App. 5th Cir. 3/24/09), 10 So. 3d 283, 287. The question of whether reasonable care was exercised in each case is difficult to resolve and will depend on the facts and circumstances of the case. Lou-Con, Inc. v. Gulf Building Services, Inc., 287 So. 2d 192, 198-199 (La. App. 4th Cir.), writs denied, 290 So. 2d 899 and 290 So. 2d 901 (La. 1974).

In the instant case, Ms. Waldrop contends that the trial court erred in granting summary judgment where questions of fact remain as to whether A & H assumed or owed a duty to act to protect other tenants from its employees'

[5]See and compare Moore v. Safeway, Inc., 95-1552 (La. App. 1st Cir. 11/22/96), 700 So. 2d at 846, where this court held that if a person undertakes a task which he has no duty to perform, he must perform that task in a reasonable and prudent manner and that a negligent breach of a duty, which has been voluntarily or gratuitously assumed may create civil liability.

behavior in the apartment complex, when it provided housing, transportation, and paid the expenses of its employees in the apartment.

Specifically, Ms. Waldrop cites the testimony of A & H owner, Rigoberto Alvarez, where he: stated that the company had established rules prohibiting employees from using illegal drugs, and that anyone caught violating these rules would be terminated immediately; recognized that his employees residing in the company apartment and housed in close proximity with other residents had a duty to maintain a standard of behavior consistent with consideration necessary to provide reasonable safety, peace and quiet to other residents in the apartment complex; stated that the owner Israel Hernandez had the responsibility to oversee the employees and make sure that they maintained an appropriate standard of behavior in the apartment complex; acknowledged that there was a rule that the employees were prohibited from engaging in any unlawful or immoral activities in the apartment complex; and further acknowledged that any employees using illegal drugs or excessively drinking alcohol in the apartment should have been terminated from their employment with A & H, pursuant to company policy.

Ms. Davis testified that Alvarez and Hernandez were issued a "warning" from the management of the apartment complex and were thus advised that their employees residing in apartment 1030 were violating the terms of the lease. Thus, Alvarez and Hernandez were aware of the numerous complaints of excessive drinking at all hours on the apartment patio, littering the area near the apartment with beer cans and bottles, and of Orozco's continued harassment and verbal abuse of Ms. Waldrop.

Orozco testified that he was confronted by Israel Hernandez about his illegal drug use while he lived in A & H's apartment in Baton Rouge. Orozco was repeatedly told by his supervisor that if he did not conform to the rules

established by A & H, and he continued to use illegal drugs, he would be fired. Orozco further admitted that one of his co-workers was fired because he drank too much. Nonetheless, although Hernandez knew that Orozco drank 12 to 24 beers every day and that he was using illegal drugs along with his co-workers every day in the company apartment, Orozco was allowed to contain his employment and to reside in the company's apartment. On one occasion, Hernandez transported Orozco to a hospital in Baton Rouge when Orozco, after having "done a lot of drugs that day," was blinded when something fell into his eye as he was lighting his crack pipe. Orozco testified that he was reprimanded by Hernandez for this incident, but was not terminated from his employment, despite clearly violating the established company rule that employees were not allowed to use illegal drugs, because he was a good worker. Orozco testified that he did not pay for the rent of the apartment and was not named on the apartment lease. The apartment was provided by A & H and the rent was paid by his employer, Rigoberto Alvarez. Orozco further testified that Hernandez was aware of his prior improper behavior towards Ms. Waldrop. Indeed, prior to the brutal rape, Israel Hernandez admonished Orozco on at least five occasions to stop harassing Ms. Waldrop. However, as reflected in the record, despite having knowledge of Orozco's illegal acts and escalating conduct, no further action or steps were undertaken by A & H to adequately supervise, or monitor its employees or to discharge Orozco for his misconduct and violations of policies enacted for the safety of its employees and the public.

On review, we find that the above testimony shows that material facts exist as to whether A & H assumed a duty for the conduct of its employees in the housing that it provided for its employees and further as to whether A & H breached this duty. See Smith v. Orkin Exterminating Company, Inc., 540 So. 2d at 367 (where this court stated that the employer's special responsibility may

arise because he is in a position to control the dangerous person, or is in some other unique position to prevent the harm, and so may be held to have an obligation to exercise reasonable care to do so).

We also note, that considering the above testimony of Orozco's extensive criminal arrest history involving, among other charges, immigration charges, as well as his known addiction to and continued use of illegal drugs and alcohol, genuine issues of material fact remain as to whether A & H was negligent in hiring Orozco and in maintaining his employment given that his work authorization card permitting him to remain in the United States had expired on September 9, 2002, approximately three years prior to ongoing acts of misconduct and his eventual attack and rape of Ms. Waldrop. Thus, we find that issues of material fact remain as to whether A & H exercised reasonable care in the selection and retention of Orozco, which preclude the grant of summary judgment.

Moreover, we find that questions of material fact remain, considering the unique situation created by the fact that the A & H defendants provided housing and transportation for their employees, the majority of whom did not speak English (including Orozco), and further housed them without supervision in a confined living space in close proximity to the public, as to whether a special duty was owed by the A & H defendants. Further, issues of material fact remain as to whether this duty assumed by the A & H defendants was breached, given the prior notice to its employees of the departures from the level of conduct expected of tenants in the apartment complex.

On review, we find that the record as a whole is replete with conflicting and unresolved material issues of fact regarding both the duty owed and assumed by the A & H defendants to Ms. Waldrop and whether there was breach herein. Accordingly, this matter is inappropriate for resolution on

summary judgment. See O'Quinn v. Power House Services, Inc., 93-0277 (La. App. 1st Cir. 12/29/93), 633 So. 2d 707, 712. Accordingly, we find the trial court erred in granting summary judgment in favor of the A & H defendants and in dismissing Ms. Waldrop's claims against them.

## CONCLUSION

For the above and foregoing reasons, the January 14, 2009 judgment of the trial court granting summary judgment and dismissing plaintiff's claims against Rigoberto Alvarez d/b/a A & H Cable TV Construction, Penn America Insurance Company, and Israel Hernandez, is hereby reversed and this matter is remanded to the trial court for further proceedings. Costs of this appeal are assessed against the appellees, Rigoberto Alvarez d/b/a A & H Cable TV Construction, Penn America Insurance Company, and Israel Hernandez.

**REVERSED AND REMANDED.**