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COURT OF APPEALS

STATE OF NEW YORK

ESTATE OF MURPHY,

Appellant,

-against-

NO. 37

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

20 Eagle Street
Albany, New York
April 19, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Xavier Austin Reyna
Official Court Transcriber



1 CHIEF JUDGE WILSON: We'll next hear State of
2 Murphy v. NYCHA.

3 Counsel?

4 MR. PECORARO: Good afternoon. My name is Steven
5 Pecoraro on behalf of the appellant, the
6 appellant-plaintiff.

7 I'd like to reserve four minutes, please, for
8 rebuttal.

9 CHIEF JUDGE WILSON: Yes. You may.

10 MR. PECORARO: So we're here today because the
11 First Department encroached into the jury's role in being
12 the trier of fact.

13 JUDGE GARCIA: Counsel, is that the rule you
14 want, that no security measures at all would've prevented
15 this attack?

16 MR. PECORARO: Absolutely. That no security
17 measures would have prevented the - - -

18 JUDGE GARCIA: Yeah.

19 MR. PECORARO: - - - the attack?

20 JUDGE GARCIA: Aren't you essentially asking to
21 be an insurer?

22 MR. PECORARO: No, absolutely not.

23 JUDGE GARCIA: So what's the rule you want?

24 MR. PECORARO: The rule that I want is reasonable
25 security measures should be in place, and a working door

1 lock is not so much to ask, as Mr. Shoot pointed out. So -
2 - -

3 JUDGE GARCIA: So would you accept that there are
4 circumstances where as a matter of law, the defendant could
5 come in and show that those types of security measures
6 would not have prevented the attack?

7 MR. PECORARO: There is certain circumstances.
8 It would be very tough to imagine - - - in automobile
9 accident cases, if you're stopped - - -

10 JUDGE GARCIA: What about the perpetrator with
11 the battering ram?

12 MR. PECORARO: Well, if there were working locks
13 a perpetrator had a battering ram and was able to go
14 through the locked front doors - - -

15 JUDGE GARCIA: But it's open.

16 MR. PECORARO: - - - hypothetically, that could
17 break the link; that could break the link certainly.

18 Here in this case, when a court encroaches on the
19 jury's role as a trier of fact, often times the court just
20 describes their encroachment as the facts rather than a
21 question of fact. Here in this case surprisingly, the
22 Appellate Division spelled out that they were deciding a
23 question of fact.

24 Their last paragraph - - - the Appellate
25 Division's last paragraph in its decision states, "It does

1 not take a leap of the imagination to surmise that
2 Cartagena and Brockington would have gained access to the
3 building by following another person in or forcing such a
4 person to let them in". This is their rationale for saying
5 a working door lock wouldn't have made a difference. And
6 they use the word "leap of imagination to surmise;" they
7 might as well have said speculation.

8 JUDGE RIVERA: Why - - - isn't that right? Given
9 the video that there's another person who walks into that
10 building oblivious to what is going on - - -

11 MR. PECORARO: Well, that's correct.

12 JUDGE RIVERA: - - - she herself - - - they
13 could've followed her in or asked her to hold the door.

14 MR. PECORARO: That's correct. That happened
15 before the killers - - -

16 JUDGE RIVERA: Correct.

17 MR. PECORARO: - - - came in.

18 JUDGE RIVERA: Correct.

19 MR. PECORARO: This happened 4 o'clock in the
20 morning. So the First Department is saying, well, maybe if
21 somebody else came five minutes later or ten minutes later
22 - - - it's 4 o'clock in the morning - - - or an hour later,
23 it wouldn't have made a difference. They're not saying
24 maybe; they're saying it wouldn't have made a difference,
25 ignoring the fact that in those five minutes or fifty

1 minutes or two hours, Tayshanna Murphy would've been safe
2 in her apartment.

3 Now - - -

4 JUDGE RIVERA: Well, the video does suggest
5 otherwise since they kept running back to the door to look
6 through the window to see if these people were getting in
7 the building, right?

8 MR. PECORARO: That's correct. And as soon as
9 they found out - - -

10 JUDGE RIVERA: So they're not really running - -
11 -

12 MR. PECORARO: - - - that they were coming - - -

13 JUDGE RIVERA: They're not immediately running -
14 - -

15 MR. PECORARO: - - - they scattered.

16 JUDGE RIVERA: they're not immediately running to
17 an apartment for safety - - -

18 MR. PECORARO: That's correct.

19 JUDGE RIVERA: - - - they're actively hanging
20 around?

21 MR. PECORARO: But once they saw them coming,
22 they ran for safety.

23 So if - - - now the two killers, they didn't have
24 a bag with them. There's no evidence to suggest that they
25 had that battering ram or they had burglar's tools. They

1 were just walking in like they owned the world.

2 And if they had to wait ten minutes or twenty
3 minutes, who's to say Tayshanna wouldn't have been in her
4 apartment safe and sound behind a locked door; and who's to
5 say that they wouldn't end up finding somebody like Steven
6 Reynoso or Eric Pierce who actually were involved in the
7 altercation with them? The First Department, I suppose,
8 they're concluding that if they shot one of those, they
9 would've still kept on going and - - - and tried to get
10 Tayshanna Murphy.

11 JUDGE TROUTMAN: So your argument is if - - -

12 MR. PECORARO: And they wouldn't have been caught
13 - - -

14 JUDGE TROUTMAN: Counsel?

15 MR. PECORARO: - - - and they wouldn't have
16 gotten twenty years for - - -

17 JUDGE TROUTMAN: So your argument is these were
18 all questions for the jury to have decided?

19 MR. PECORARO: Absolutely, absolutely.

20 JUDGE CANNATARO: Was there a factual record
21 about this question of the delay created at summary
22 judgment, how long it would've taken them to get into the
23 building at there been a lock?

24 MR. PECORARO: No, no there isn't. But in this
25 case, we have the video, and we see that they didn't have

1 burglar's tools on them; they didn't have any bags or
2 anything like that; and they weren't able to get through
3 that first door, and that's why they tried the - - - what's
4 - - - all the - - - the deposition witnesses referred to it
5 as a side door, and it's clear that it was broken. It was
6 bouncing in the door frame, and they walked right through.
7 They walked right through.

8 The First Department would have you believe if
9 there was a five or ten minute delay and they came in, they
10 would've either not shot any of the other five of the
11 group, or if they did shoot them, they'd still try to get
12 Tayshanna Murphy, and they wouldn't have been arrested for
13 those murders, and they wouldn't have gotten twenty-five to
14 life, and twenty-five years later, they would've come up
15 still gunning for Tayshanna Murphy. It's frankly shocking
16 that the First Department highlighted the multiple
17 conclusions of fact that they - - - that they came to.

18 CHIEF JUDGE WILSON: Thank you, Counsel.

19 MR. PECORARO: Sure.

20 MR. LAWLESS: Good afternoon. May it please the
21 court. Patrick Lawless for the defendant-respondent, New
22 York City Housing Authority.

23 The First Department properly affirmed the order
24 granting NYCHA's motion for summary judgment based upon the
25 evidence in this case and correctly applying the correct

1 standard. In this case, you know, there was some
2 discussion before about what would be the burden on summary
3 judgment. In this case, NYCHA provided evidence not just
4 that this was a targeted attack, but that minimal security
5 provisions would not have prevented the attack.

6 CHIEF JUDGE WILSON: Well, this one seems a
7 little tougher to describe as a targeted attack, no? Could
8 you address that?

9 MR. LAWLESS: It is a targeted attack because
10 this was the result of an earlier altercation. There was a
11 longstanding animosity in this case - - -

12 JUDGE TROUTMAN: Do you have to have a particular
13 individual to be the target, or can it be a group of people
14 who could be the target?

15 MR. LAWLESS: In this case, the target was a
16 group of the specific six individuals who were involved in
17 the earlier altercation. The unrefuted testimony shows
18 that the victim in this case was present at the earlier
19 altercation and participated in chasing down Mr. Cartagena.
20 She was known to Mr. Cartagena's girlfriend. This isn't a
21 case where these are all strangers to one another. They
22 all - - - they were all intimately familiar with another,
23 and - - -

24 JUDGE CANNATARO: Did the evidence - - - did the
25 evidence show that the perpetrators knew where to find the

1 victim once they gained access to the building?

2 MR. LAWLESS: There is no evidence of that.

3 Obviously the perpetrators knew exactly what building to go
4 to. Ms. Murphy is - - -

5 JUDGE CANNATARO: They know what apartment to go
6 to?

7 MR. LAWLESS: There's - - - that's not in the - -
8 - that's not in the record, but obviously they knew what
9 building to go to.

10 And further support that in this case, the victim
11 was targeted is the video evidence where there's other
12 people congregated outside the building, and there's a
13 young lady walking into the building with her keys.
14 They're completely unconcerned about everything else that's
15 going on, and it's only these specific individuals,
16 including the victim, that keep on running out, looking out
17 the door, and then running back up the stairs. So they
18 know that they're targeted.

19 JUDGE SINGAS: Wait, so now it's their issue - -
20 - they have to appreciate that they're being targeted?

21 MR. LAWLESS: No. It's just further - - - it's
22 further evidence, and it's born out by the - - - excuse me,
23 by the criminal case against Mr. Cartagena about the
24 testimony in that case. They all said that they knew they
25 were coming after them. They all said that they

1 participated in the earlier altercation and that there was
2 bad blood between them. So that - - - that's the evidence.

3 JUDGE SINGAS: And they're all interchangeable;
4 every gang member is interchangeable in that building? So
5 whoever was shot and killed - - -

6 MR. LAWLESS: It's not every - - - every single
7 gang member; it's just the specific members that were
8 participating in that earlier altercation. They didn't - -
9 -

10 JUDGE SINGAS: So how many of them were there,
11 seven?

12 MR. LAWLESS: No, there was six.

13 JUDGE SINGAS: Okay.

14 MR. LAWLESS: There were six that were involved
15 in that earlier altercation and that - - - and participated
16 in that.

17 And as further proof - - -

18 JUDGE CANNATARO: So - - - I'm sorry. To go back
19 to Judge Wilson's question, does that make this a targeted
20 since there's - - - you know, there's a group of
21 candidates, targets of opportunity almost, that they're
22 willing to go after. Does that still fall within what
23 these cases are talking about when they say targeted
24 attack?

25 MR. LAWLESS: Absolutely. My colleague had

1 referenced the Rivera case earlier. In that case, the
2 brother was targeted, and the sister wound up being the
3 victim; She happened to live with him. And in that case,
4 they found that that was still a targeted case.

5 This is a - - -

6 JUDGE GARCIA: What if somebody has a vendetta
7 against a landlord, and they just want to hurt someone in
8 the building; is that a targeted attack?

9 MR. LAWLESS: It depends on the facts and the
10 circumstances, and the degree of planning, and who they're
11 going to get. but in this case, they knew exactly - - -

12 JUDGE GARCIA: Anyone, but they just have to live
13 in the building.

14 MR. LAWLESS: If it's that broad, I would - - - I
15 would argue probably not, but in this case, it's not that
16 broad. It's - - - it's limited to specific individuals
17 that were involved in an altercation.

18 CHIEF JUDGE WILSON: What if six people live in
19 the building?

20 MR. LAWLESS: I'm sorry?

21 CHIEF JUDGE WILSON: What if six people live in
22 the building?

23 MR. LAWLESS: If they were involved in an
24 altercation, and if they had a personal animus with - - -
25 with the individuals against them, I would say yes.

1 JUDGE GARCIA: I think we're - - - I'll speak for
2 myself. I'm somewhat struggling with the idea of how is it
3 - - - what's the relevance of the targeted attack to this
4 analysis?

5 And as I think I understood counsel in the prior
6 case, this - - - if you come forward on a summary judgment
7 motion and - - - put aside what targeted means. But you
8 say, okay, there's a targeted attack, one person in the
9 building. That gets you over your burden to show that
10 minimal security measures wouldn't have prevented this
11 attack, which now goes to the plaintiff to show that - - -
12 the burden now is on the plaintiff to show that they would
13 have made a difference. Do you agree with that?

14 MR. LAWLESS: That you just - - - I just want to
15 understand what you're - - - what you're asking.

16 JUDGE GARCIA: I'm not articulating it very well,
17 so.

18 MR. LAWLESS: Are you - - - are you just saying
19 it's limited to one individual?

20 JUDGE GARCIA: No, no, no. Forget how many.

21 So as I understand this targeted attack, how it
22 factors into the analysis at a summary judgment motion is,
23 the defendant can come in, the burden to get summary
24 judgment, and say this was a targeted attack. That gets
25 you over your burden to show that minimal security measures

1 wouldn't have prevented this. Now that burden shifts to
2 the plaintiff to show the opposite or create an issue of
3 fact as to the opposite. Is that your understanding of how
4 this works?

5 MR. LAWLESS: I would agree with that. But I
6 would also add in this particular case, whatever standard
7 is used, NYCHA met it because it wasn't just that they said
8 that this was a targeted attack and we met our burden,
9 that's it, but they also submitted an affidavit of a
10 security expert, Mr. Cunningham, who reviewed all of the
11 evidence, and his area of expertise is security management
12 in threat assessment. He reviewed all the evidence, viewed
13 the video tape, and said minimal security provisions would
14 not have prevented this accident.

15 That wasn't refuted in the court below.
16 Plaintiff's counsel now attacks Mr. Cunningham on this
17 appeal, but there's nothing in his opposition papers that
18 even address that. The only citation to Mr. Cunningham in
19 his opposition papers is that Mr. Cunningham agrees with
20 him that the door wasn't working at that time.

21 And in addition to the - - - to that evidence,
22 NYCHA also and Mr. Cunningham also established that NYCHA's
23 security measures were reasonable, and there's evidence
24 that the door lock was working on the morning of - - - at
25 least on the morning of September 10th - - -

1 CHIEF JUDGE WILSON: I'm still having - - -

2 MR. LAWLESS: - - - and that it wasn't working
3 the fourteen, fifteen hours later.

4 CHIEF JUDGE WILSON: I'm still having the
5 following problem, which is that suppose that the expert is
6 correct, right? The minimal security efforts wouldn't have
7 prevented the attack. What difference does targeted make,
8 then, if we're thinking about this in terms of proximate
9 cause? As - - - if it's - - - if it wasn't a targeted
10 attack, your expert presumably would have said exactly the
11 same thing.

12 MR. LAWLESS: Well, I think the significance of
13 the targeted attack has to do with foreseeability - - -

14 CHIEF JUDGE WILSON: Right.

15 MR. LAWLESS: - - - because this court has held
16 that landlords have a duty to provide minimal security
17 provisions - - -

18 CHIEF JUDGE WILSON: But I mean, but isn't - - -

19 MR. LAWLESS: - - - or reasonable security - - -

20 CHIEF JUDGE WILSON: But I take it it's
21 foreseeable that if you have an unlocked door, somebody
22 might - - - who's a bad person might go through the
23 unlocked door and hurt somebody, right? Just stay there
24 for a second.

25 MR. LAWLESS: Uh-huh.



1 CHIEF JUDGE WILSON: Does that seem reasonable?

2 MR. LAWLESS: It's reasonable, but what - - -
3 what the First Department and all the decisions going back
4 to Tarter - - -

5 CHIEF JUDGE WILSON: Yeah.

6 MR. LAWLESS: - - - say is that a pre-meditated,
7 pre-planned attack that would have overcome security
8 measures is not foreseeable - - -

9 CHIEF JUDGE WILSON: Well, why - - - wait, wait.

10 MR. LAWLESS: - - - and the landlord's not an
11 insurer of the - - -

12 CHIEF JUDGE WILSON: Why is it less foreseeable
13 that somebody in a gang who is, you know, confronted with
14 somebody from another gang is going to track that person
15 down rather than a stranger walking down the street seeing
16 an unlocked door, and happens to have a gun, decides to go
17 in and hurt somebody? I mean, one of those - - - it seems
18 also reversed to me in terms of foreseeability.

19 MR. LAWLESS: I think the foreseeability is
20 you're getting into, again, cases that are - - - or
21 instances like this that are pre-meditated where there's
22 planning.

23 This - - - this particular attack took time and
24 planning. They didn't - - - it wasn't just a spur of the
25 moment thing. They went to an associates to get the gun,

1 then they went to the building. There was no cooling off
2 period. They knew exactly what they wanted to do, they
3 were determined, as opposed to just a crime of opportunity.
4 So - - -

5 CHIEF JUDGE WILSON: But the - - - I guess what
6 I'm trying to say is it seems to me as a general matter
7 that crimes of opportunity are in some ways less
8 foreseeable than a crime perpetrated by a - - - you know,
9 an ex-romantic partner in a domestic violence situation.

10 MR. LAWLESS: But then you're putting - - - but
11 that is, I think, putting the burden on NYCHA and other
12 landlords - - -

13 CHIEF JUDGE WILSON: To have a locked door.

14 MR. LAWLESS: Not just to have a locked door, but
15 to outwit and outthink any - - - any - - -

16 CHIEF JUDGE WILSON: No. I mean, if you had a
17 locked door, would we have a case here at all?

18 MR. LAWLESS: Well, again the evidence in this
19 case shows that the door - - - the door lock was working.
20 So this is - - -

21 CHIEF JUDGE WILSON: But then you would win.

22 MR. LAWLESS: I'm sorry?

23 CHIEF JUDGE WILSON: But then you would win.

24 JUDGE CANNATARO: You're saying the evidence
25 shows that the lock - - -

1 MR. LAWLESS: No, I'm not - - - I'm not agreeing,
2 but I'm saying that even if it - - - no. At the time, it
3 wasn't working, but it wouldn't have mattered because the
4 locked door wouldn't have prevented these individuals from
5 entering the building.

6 CHIEF JUDGE WILSON: I understand that; I just -
7 - - I'm struggling with how that relates to foreseeability.

8 MR. LAWLESS: Well, I - - - again, I think it
9 relates to foreseeability in this way, and it's related to
10 duty as well, is that - - -

11 CHIEF JUDGE WILSON: Well, I thought - - - well,
12 maybe it's the other case. I thought duty was not at issue
13 here.

14 MR. LAWLESS: Well, if you apply - - - if you
15 adopt, which plaintiff's counsel in this case is requesting
16 - - - if you adopt the Scurry rationale, then duty is an
17 issue because then the duty isn't just that - - - to
18 provide minimal security, but it's - - - it's asking
19 landlords such as NYCHA, which is responsible for almost
20 300 developments and 400,000 tenants, to outwit and
21 outthink any potential criminal conspiracy just as this.

22 JUDGE TROUTMAN: Is that what providing minimal
23 security is?

24 MR. LAWLESS: It's not saying not to provide
25 minimal security. The minimal security is for a

1 foreseeable crime, and pre-planned attacks - - - I just
2 don't know understand how a pre-planned attack is
3 foreseeable. How - - - unless - - -

4 JUDGE TROUTMAN: How is it not foreseeable that a
5 person would enter - - - a person seeking to do harm would
6 enter an unlocked door and cause harm to whomever is behind
7 that door?

8 MR. LAWLESS: It's not foreseeable that someone
9 who would be entering the building would be - - - would be
10 determined to defeat any minimal security measures no
11 matter what. And again, I go back to the evidence in this
12 case shows that - - - the unrefuted evidence by the expert
13 shows that minimal security would not have deterred these
14 particular individuals.

15 And on top of that, the evidence also shows that
16 NYCHA did provide minimal security, and the prior case law
17 as it's cited in our brief is - - -

18 JUDGE RIVERA: Well, I mean, even - - - even the
19 video shows that they did try one door - - - because
20 there's two doors.

21 MR. LAWLESS: Uh-huh.

22 JUDGE RIVERA: They try the one door, that one's
23 locked, and then they went to the one that's unlocked. So
24 if the second one was locked, at a minimum they're slowed
25 down. I mean, that's just common sense that way, right?

1 MR. LAWLESS: But the - - - but the evidence also
2 shows that there were other people outside, and they
3 could've easily gained access, especially given that they
4 were armed. And that's the conclusion that the expert - -
5 - but on top of that, NYCHA also provided - - - the point I
6 was just trying to make is NYCHA also provided minimal
7 security. So what is being asked of NYCHA is to provide
8 twenty-four hour security.

9 JUDGE SINGAS: How did NYCHA provide minimal
10 security if the door was not working?

11 MR. LAWLESS: The door was - - - the evidence
12 shows that the door was working.

13 JUDGE SINGAS: The evidence in the video shows
14 the door was not working.

15 MR. LAWLESS: At 4 - - -

16 JUDGE SINGAS: If it was working, they wouldn't
17 have been able to open it.

18 MR. LAWLESS: Excuse me. The door was not
19 working at 4 a.m., but it was working when it was checked
20 by NYCHA maintenance personnel. NYCHA's maintenance
21 personnel - - - on weekends, their shift is from 8:00 a.m.
22 until 1:30.

23 JUDGE RIVERA: That sounds like an excellent
24 argument to give to the jury.

25 MR. LAWLESS: But that's - - - but that is also -

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JUDGE RIVERA: An excellent argument for why they met the minimal duty, because it was working for a reasonable period of time. Not your fault that it - - - that it got broken. You couldn't have corrected this broken, malfunctioning lock at a point in time to have prevented the crime. It sounds like a great argument for the jury.

MR. LAWLESS: But that is placing an untenable duty on NYCHA then to provide twenty-four hour security. So what you're saying is if a door is working at - - - during the day, and all NYCHA maintenance personnel go home, and then someone interferes or tampers with that lock at 4 a.m., then NYCHA somehow has to be liable or they have to prove to a jury - - -

JUDGE RIVERA: No, the point was that - - -

MR. LAWLESS: - - - that it's not liable.

JUDGE RIVERA: - - - the jury could have considered that.

MR. LAWLESS: That's - - -

CHIEF JUDGE WILSON: But that's a question of fact for summary judgment on breach, that's not on foreseeability. You're not raising a completely - - - you could do that. You could move.

MR. LAWLESS: It's not - - - it's not different.



1 It was in - - - it was in the court below. The supreme
2 court found on both basis that there was no notice and that
3 it was a targeted case. The First Department only
4 addressed the targeting issue, but it still - - - it was
5 still raised in the court below. It was still raised in
6 the appeal brief, and it - - - and it's referenced in my
7 brief as an alternative grounds for affirmance in this
8 case.

9 Unless the panel has any further questions, I'll
10 rest on my brief. Thank you.

11 MR. PECORARO: I'd like to just respond to two or
12 three points that my adversary attempted to make.

13 First, with respect to the "unreasonable burden"
14 that would be put upon the Housing Authority if the court
15 finds them responsible for the broken lock at the time of
16 this incident, that's not the case. Defense counsel brings
17 up the fact that presumably the lock was checked the day
18 before the murder. What he fails to tell you is that the
19 same standard form the day after the murder says that the
20 lock was properly functioning too. And this is in a whole
21 - - - a number of suspect records that I brought out in my
22 brief.

23 So they're claiming the lock was working fine the
24 day before the incident. Our video shows that it clearly
25 was not working at the time of the murder, but yet the day

1 after, the lock's working fine again.

2 JUDGE CANNATARO: Counsel, I don't necessarily
3 disagree with anything that you've just said, but isn't - -
4 - isn't your adversary right that we're sort of shifting
5 the argument now - - - or maybe it was the chief who said
6 this, we're now talking about whether the duty was
7 breached.

8 We could have a factual dispute over whether they
9 provided adequate maintenance in the building and kept
10 everything working appropriately to a reasonable level, and
11 maybe a jury would find that since it was working - - - I
12 don't know when he said - - - fourteen hours earlier that
13 was good enough, or maybe they say it wouldn't. But that's
14 distinct from this other rule that seems to have been
15 crafted that an intentional, criminal assault in a building
16 breaks the chain of causation because it's not foreseeable
17 as a matter of law, right? Those are two - - -

18 MR. PECORARO: Right, right.

19 JUDGE CANNATARO: - - - completely different
20 things.

21 MR. PECORARO: I agree with you entirely.

22 The First Department is an aberration with
23 respect to their view of the -- of the targeted victim
24 defense. They say once somebody's targeted, we're not
25 responsible. In dicta, Mr. Shoot mentioned, they seemed to

1 say no, there are - - - there can be some circumstances
2 where essentially the - - - the landlord gets off the hook.
3 But then - - -

4 JUDGE CANNATARO: Basically there's a blanket
5 rule?

6 MR. PECORARO: - - - they rule that here the
7 landlord gets off the hook.

8 JUDGE GARCIA: What about this breach issue
9 though? The supreme court decided as an ultimate basis for
10 summary judgment there was no breach?

11 MR. PECORARO: In terms of the notice issue?

12 JUDGE GARCIA: Yeah.

13 MR. PECORARO: Okay. If you're talking about the
14 trial court - - -

15 JUDGE GARCIA: Uh-huh.

16 MR. PECORARO: - - - the - - - there was oral
17 argument, which is part of the decision, and virtually - -
18 - if it was forty pages long, thirty-nine and a half or
19 thirty-nine and three quarters, involved the issue of the
20 targeted victim defense, and the court concluded at the end
21 since plaintiff was a targeted victim - - - decedent was a
22 targeted victim, there is no liability, and by the way, we
23 find that there's no notice.

24

25 JUDGE CANNATARO: So does the - - -



1 MR. PECORARO: It really wasn't discussed.

2 JUDGE GARCIA: And the Appellate Division never
3 reached that because they went on - - -

4 MR. PECORARO: Absolutely.

5 JUDGE GARCIA: So what do we do with that issue
6 with the supreme court?

7 MR. PECORARO: Well, the - - - my record is clear
8 that there was a breach with respect to the locks. I
9 submitted an affidavit by a locksmith. He examined the
10 door, unlike what's alleged in the respondent's papers - -
11 -

12 JUDGE RIVERA: Maybe the question is should it go
13 back to the Appellate Division - - -

14 JUDGE GARCIA: Right.

15 JUDGE CANNATARO: Right.

16 JUDGE RIVERA: - - - to get decide the issue that
17 they had not addressed, the question of the notice?

18 MR. PECORARO: I think on the record you could
19 conclude that there is a question of fact as to notice,
20 which can go to the jury.

21 JUDGE CANNATARO: But you didn't - - - you didn't
22 take that issue to the Appellate Division, the alternative
23 grounds for a summary judgment? That wasn't decided
24 directly below; was it?

25 MR. PECORARO: I believe the language of the

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Appellate Division's decision was that they did not have to address the issue of negligence. The - - -

JUDGE RIVERA: But you briefed it to them?

MR. PECORARO: But it - - - but it was raised, yes. And the record is extensive about the questionable - - the reliability of the Housing Authority's records. They claim the lock was fixed five months or six months earlier, but it was established that the name, the supposed handyman or electrician, was not working the entire month where - - - when he supposedly fixed the lock. And other records are missing.

Briefly on the issue of the respondent's expert. His affidavit is so speculative and conclusory that it should be discounted, and I submit that it was responded to by the videos themselves. The videos show that if they lock was working, there would've been a delay, and who know what would have happened.

CHIEF JUDGE WILSON: Thank you, Counsel.

MR. PECORARO: Thank you.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Xavier Austin Reyna, certify that the foregoing transcript of proceedings in the Court of Appeals of Estate of Murphy v. NYCHA, No. 37 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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