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COURT OF APPEALS
STATE OF NEW YORK

SCURRY ET AL,

Respondents,

-against-

NO. 36

NEW YORK CITY HOUSING AUTHORITY,

Appellant.

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: Good afternoon, everyone.
2 The first matter on today's calendar is Number 36, Scurry
3 v. NYCHA.

4 Counsel?

5 MR. WATKINS: John Watkins for the Appellant, New
6 York City Housing Authority. I'd like to reserve three
7 minutes for rebuttal.

8 CHIEF JUDGE WILSON: Certainly.

9 MR. WATKINS: I'd like to also begin by
10 congratulating Your Honor on your confirmation.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. WATKINS: The two questions before you today
13 - - - the question before you today is whether the Second
14 Department rightly denied the Appellant's motion for
15 summary judgment. To answer that question involves
16 answering two distinct inquiries. First, what the correct
17 standard is to apply in such a case. And second, how that
18 standard applies to these facts. I'd like to begin by
19 addressing the standard itself, which is framed for this
20 court's review.

21 There's no dispute here that as a landlord,
22 NYCHA, owed a duty to take minimal security pre-cautions.
23 And it's also not disputed on this appeal that there's an
24 issue of fact as to whether that duty was executed or not.
25 And there's conflicting evidence in the record as to

1 whether the locking mechanism for the apartment building
2 actually functioned on the day of the attack. I'm - - -
3 that's not a concession. It's just - - - that's what's on
4 the record. So for purposes of this motion today, I have
5 to take it as true. I'm not conceding that it is true.

6 The question is therefore whether there is a
7 causal link, a proximate causal link, between this alleged
8 malfunctioning lock and the ultimate attack. There is not.
9 There is ample jurisprudence for the position that a
10 targeted attack, which by its nature will overcome the
11 minimal security pre-cautions that are the sole duty that a
12 landlord owes in the situation - - -

13 JUDGE SINGAS: Are you arguing that the targeted
14 attack also extended to the son who was injured?

15 MR. WATKINS: Yes, we are, Your Honor. That's
16 correct.

17 JUDGE SINGAS: How?

18 MR. WATKINS: The Rivera case, also has held from
19 the First Department, that when a by standard is collateral
20 damage to - - - in a targeted attack, it's nevertheless a
21 targeted attack because it's a targeted attack against the
22 primary victim.

23 JUDGE TROUTMAN: Can you have more than one
24 proximate cause?

25 MR. WATKINS: Yes, of course. There's no



1 question that the jurisprudence is clear that you can have
2 more than one proximate cause.

3 Nevertheless, there's also ample jurisprudence
4 that in some cases, there is a cause that intervenes and
5 supersedes, and that's what the jurisprudence that the
6 First Department has been following for the past several
7 decades.

8 JUDGE TROUTMAN: And even if we were to accept
9 that a targeted attack is sufficient here to grant you the
10 relief you've requested, what evidence was presented that
11 minimal standards had been met by the defendant?

12 MR. WATKINS: As I said, there was in fact
13 evidence in the record that the lock was functioning at the
14 time of the attack, which would constitute our evidence
15 that minimal standards had been met. But I - - - as I also
16 just conceded - - -

17 JUDGE TROUTMAN: And it was actually functioning
18 when he entered?

19 MR. WATKINS: Yes, there is evidence in the
20 record reflecting that. Correct, Your Honor.

21 However, there's also contrary evidence. And so
22 in this procedural posture, I have to acknowledge that
23 that's an issue of fact. My hands are tied. So - - -

24 CHIEF JUDGE WILSON: So how would you - - - how
25 would you have a - - - over here, sorry. How would you

1 have us define targeted attack?

2 MR. WATKINS: The case law uses a lot of language
3 on that, Your Honor. Pre-meditated is one term that's
4 frequently used. Another is when there's multiple parties
5 involved, they talked about an intentional criminal
6 conspiracy. Here, there was one party.

7 But I don't think there's any question that
8 however you define intentional, or pre-meditated, targeted,
9 this meets that standard, and the evidence is overwhelming.
10 This is a former romantic partner - - -

11 JUDGE TROUTMAN: So the view is that because he
12 was an abuser, and he was intent on abusing her, she didn't
13 get the protection of the - - - the lock wouldn't make a
14 difference. Is that basically your argument?

15 MR. WATKINS: The - - - the way you rephrased it
16 now that the lock wouldn't have made a difference, yes,
17 that is the argument.

18 JUDGE GARCIA: Counsel, can I - - - can I just
19 ask you something so I'm clear on this rule of targeted
20 attack? So it's - - - you know, the attacker. There's an
21 - - - an ex-partner lives in the building. They show up
22 with a battering ram. They go up to the door; doors open;
23 and they walk through. They go and they carry out this
24 attack that they had pre-planned. And under the targeted
25 attack rule, I'm assuming that would break the causal

1 chain, right?

2 MR. WATKINS: Yes, that would.

3 JUDGE GARCIA: Let's say it's a random
4 perpetrator who shows up with a battering ram, walks
5 through the door, goes to the first apartment, knocks on
6 the door, and attacks the person in there. Does that break
7 the causal chain also, or no?

8 MR. WATKINS: I believe it would, Your Honor.
9 But it would be - - -

10 JUDGE GARCIA: So what do we need a targeted
11 attack for? Why isn't the issue really just, is the door
12 make a difference?

13 MR. WATKINS: That's a fair question. I think
14 that the answer to your question is that a targeted attack
15 in the jurisprudence that we're addressing from the First
16 Department throughout the briefing - - -

17 JUDGE GARCIA: Assumes a battering ram.

18 MR. WATKINS: Right. A battering ram - - -

19 JUDGE GARCIA: But why?

20 MR. WATKINS: - - - would be just as good. I'm
21 agreeing with you.

22 Similarly, proof that the assailant had a good
23 and could've overwhelmed the lobby attendant who was in the
24 restroom at the moment that he entered, that would also
25 suffice. There's a large number of things that could

1 suffice.

2 JUDGE GARCIA: But why does this targeted nature
3 of the attack make the difference as to whether the minimal
4 security measures would have made the ultimate difference
5 in the case? Because if I have a battering ram, I'm
6 getting through no matter if I'm just somebody who wants to
7 attack a random person in the building or I want to attack
8 someone I had a relationship with, right? So why do we
9 need the targeted part of the analysis?

10 MR. WATKINS: You don't. The targeted part of
11 the analysis is a subset of any kind of showing that's
12 sufficient to demonstrate that minimal security
13 pre-cautions would not have prevented the attack.

14 CHIEF JUDGE WILSON: That statement seems to undo
15 some of our settled case law, no? That is if somebody is
16 simply walking down the street and not intending to kill
17 anyone, sees an open door, happens to have a gun, goes in
18 and shoots a resident of one of your buildings, you know,
19 the proximate causation there is broken by that intentional
20 act.

21 MR. WATKINS: No, I disagree with that, Your
22 Honor, and if you can allow me to parse out that
23 distinction.

24 CHIEF JUDGE WILSON: Sure.

25 MR. WATKINS: What you just described is an



1 attack of opportunity, where the person has seen an open
2 door, and with no pre-meditation to go through that open
3 door, but they do have a gun, they have selected that
4 opportunity because it's a soft spot and because it's an
5 open or unguarded door. That is an attack of opportunity
6 where, had there been a closed or locked door, the attacker
7 would've had to go somewhere else.

8 CHIEF JUDGE WILSON: So - - -

9 MR. WATKINS: This case is a case that involves a
10 pre-meditated target. The target was Bridget Crushshon.
11 She was being targeted no matter what. The assailant in
12 question, Walter Boney, had left death threats; he had
13 stalked her; he had assaulted her at her workplace
14 previously. The evidence is pretty heavy on the record
15 that he had stolen her car. He had left multiple
16 threatening messages.

17 JUDGE SINGAS: But he also tried to get into the
18 house at some point, right? I mean, she was behind a
19 locked door, and he couldn't get in, and then he left. So
20 why isn't that an issue for a jury to decide in this case?

21 MR. WATKINS: That's the locked door of her
22 apartment, right? And then the - - -

23 JUDGE SINGAS: Correct.

24 MR. WATKINS: - - - previous occasion he was in
25 the building.

1 JUDGE SINGAS: He didn't know where she lived.
2 He was knocking on every single door; no door opened.

3 MR. WATKINS: I think the evidence is clear that
4 he did at the time of the attack know exactly where she
5 lived because he was waiting for her to emerge.

6 JUDGE TROUTMAN: But he wasn't - - - this isn't
7 in her apartment that he entered a broken lock on her
8 apartment. The manner in which she was attacked, you're
9 saying it doesn't - - - even if he was bent on hurting her,
10 the manner in which she was harmed here was facilitated by
11 the fact that that door was open. She didn't have an
12 opportunity to go - - - to retreat from him - - -

13 MR. WATKINS: I - - - I - - - I would disagree -
14 - -

15 JUDGE TROUTMAN: - - - arguably.

16 MR. WATKINS: - - - with that. He could have
17 easily just attacked her, as we say on our papers, at the
18 threshold of the apartment complex. So - - -

19 JUDGE CANNATARO: So is the rule - - -

20 JUDGE SINGAS: But that's different, if they were
21 outside at the threshold of the apartment building, any
22 number of things could've happened. A passerbyer could've
23 helped her. She could've run away. She could've rolled
24 around the floor. I mean, there's evidence in the record
25 that - - - that she - - - she had no where to go and

1 neither did her son because the hallway was engulfed in
2 flames. Like any number of scenarios could have happened
3 had he - - - had that door been locked, right?

4 MR. WATKINS: I disagree - - -

5 JUDGE SINGAS: I - - - my - - - fundamentally,
6 my question is why are targeted victims not afforded the
7 same rights and protections as non targeted victims? In
8 your - - - in your case, a woman, a domestic violence in
9 Brooklyn will always be a targeted victim. She's never
10 allowed the protections, and she's never allowed to go to a
11 jury to argue that if that door had been locked, I wouldn't
12 have been hurt.

13 MR. WATKINS: I - - - I think I have - - - I
14 think there are three question there that I'd like - - - if
15 - - - if you can afford me the time - - -

16 CHIEF JUDGE WILSON: Of course.

17 MR. WATKINS: - - - I'd like to address them.
18 And I may struggle because it was a compound question.

19 JUDGE SINGAS: I'll remind you.

20 MR. WATKINS: No, I think that a domestic
21 violence victim obviously is entitled to the same rights as
22 anyone else. However, when a domestic victim, for a
23 example, cohabitates with or has their romantic partner as
24 a frequent guest, and that I think is the norm in domestic
25 violence cases, it's very difficult to make a cause of

1 action against the landlord for not excluding a resident
2 from their own premises.

3 JUDGE TROUTMAN: He didn't - - - here. He was
4 not living with her at that particular address. So in your
5 estimation, if you've ever lived with a person, you are
6 subject to being attacked. There's nothing anyone can do
7 is your assertion?

8 MR. WATKINS: No, I - - - Judge Troutman, I
9 didn't say there's nothing anyone can do, nor did I say
10 those were the facts to my case. I answered the
11 hypothetical that Judge Singas posed to me by saying that
12 the landlord can't exclude another lawful resident. In
13 fact, the case - - - the case law is legion - - -

14 JUDGE TROUTMAN: Right. So - - -

15 MR. WATKINS: - - - and plaintiffs have actually
16 agreed.

17 JUDGE TROUTMAN: Is your answer the same if it's
18 not a lawful resident? That's what I'm asking.

19 MR. WATKINS: No - - - the analysis is different,
20 but - - -

21 JUDGE TROUTMAN: Okay.

22 MR. WATKINS: - - - I'm answering the framed
23 question as best I can. And no, of course we're not saying
24 that people who are the victims of targeted attacks have no
25 rights and have no recourse.

1 The question is whether their injuries are the
2 result proximately caused by the landowner's breach of the
3 duty to provide minimal security. As the First Department
4 held in Estate of Murphy, one of the other cases before you
5 today, there is no duty under the jurisprudence of the
6 state of New York for a landlord to outwit or outthink a
7 determined attacker who - - -

8 JUDGE SINGAS: But why isn't that a jury issue?

9 MR. WATKINS: You're - - - you know - - - it
10 isn't a jury issue because it hasn't been a jury issue, and
11 because the issue of duty and the extent of a duty is
12 always an issue of law for the courts.

13 JUDGE CANNATARO: Your rule seems to suggest that
14 any time it is a "targeted attack", it will consistently
15 supersede - - - it's intervening, and it will supersede the
16 duty that exists to provide a minimal amount of security.
17 Am I - - - am I phrasing that correctly, or can you
18 envision circumstances where there can be a targeted attack
19 and still a breach of the duty as you describe it?

20 MR. WATKINS: Both - - - both are brief, and the
21 First Department in Estate of Murphy rejected that
22 interpretation. And we - - - we're very clear that we
23 rejected that interpretation. So no, I have to disagree
24 with the way you phrased it.

25 Rather, the showing that the attack was targeted

1 and that the attacker was of such a kind that he was able
2 to overcome the minimal security measures shifts the burden
3 and puts in on plaintiff; it becomes incumbent on plaintiff
4 to introduce via admissible evidence that minimal security
5 measures would have actually made a difference in the case.
6 That's what the First Department

7 JUDGE TROUTMAN: So you - - - you are saying - -
8 -

9 MR. WATKINS: - - - said in Estate of Murphy.

10 JUDGE TROUTMAN: - - - that even the minimal - -
11 - you don't have to - - - if you're moving as the movant,
12 you don't even have to meet a minimal standard of
13 establishing that the minimal safety requirements were met;
14 it's incumbent on the plaintiff. Is that what you're
15 saying?

16 MR. WATKINS: No. What - - - what I'm saying is
17 that the showing that the attacker had targeted the victim
18 creates the presumption that the determined attacker would
19 have overcome the bare minimal security measures that are
20 the duty of the landlord to provide, and that presumption
21 is rebuttable by the introduction of admissible evidence,
22 the contrary by the opponent of the motion.

23 JUDGE CANNATARO: Why - - -

24 MR. WATKINS: And that actually does bring me - -
25 - if I may? I'll stop.

1 JUDGE CANNATARO: Why do we have to shift that
2 burden? Why can't we leave the burdens where they are?
3 They - - - you know, you established that minimal security
4 measures were taken, and possibly leave it as a question of
5 fact to determine whether or not the targeted attack
6 proximately - - - you know, was an intervening proximate
7 cause?

8 MR. WATKINS: Well, Judge, we're talking about
9 two different elements of the - - - of the tort, right?
10 You are - - - you just asked my why it's not my obligation
11 to establish that minimal security measures were taken,
12 that goes to breach. We're saying we can raise - - - we
13 can carry our burden as to the element of proximate cause
14 by showing that the attacker would have overcome minimal
15 security measures in any case. That's a totally different
16 - - -

17 JUDGE CANNATARO: Doesn't showing minimal
18 security measures go to whether or not you met your
19 responsibility, your duties with respect to the plaintiff?

20 MR. WATKINS: I think that's what I just said.
21 That goes to breach as opposed to - - -

22 JUDGE GARCIA: I'm sorry, Counsel. Maybe - - -
23 can I just ask a clarifying question? So are you saying
24 it's your burden to show that even if there were minimal
25 security measures in place, they wouldn't have made a

1 difference; or is your burden only to show this was a
2 targeted attack, and then the shift goes over to the other
3 party to say, you know, that it would have made a
4 difference?

5 MR. WATKINS: I'm saying that the jurisprudence
6 that we're relying on, that we relied on in 2017 when this
7 was briefed and that we relied on here when we briefed it
8 for you, from the First Department has long held that those
9 two are the - - - those two things are two sides of the
10 same coin, that a - - - the target - - - the targeting
11 itself, the pre-meditation itself by a determined attacker,
12 is sufficient to overcome minimal security measures because
13 minimal security measures are easily overcome, which I
14 think is fact of common lived experience.

15 JUDGE RIVERA: Let's say we agree with you; we
16 adopt this framing of the duty and the burdens. What, if
17 any, impact does that have on the policy issues related to
18 incentivizing landlords to provide adequate security? Even
19 though if it's a minimal standard, I understand that. Does
20 it have any impact on them?

21 MR. WATKINS: It certainly doesn't have the
22 dramatic impact that plaintiff suggest in their brief
23 because that has been the rule in the First Department and
24 in the Second Department up until this decision that we're
25 appealing from - - - before you today came down. And so

1 that has been the status quo.

2 If there's a need to change that status quo, we
3 think that that should have been addressed by the
4 legislature, but we - - - I understand that I'm before a
5 policy-making court now. The Second Department is not
6 supposed to be a policy-making court. It's not supposed to
7 be taking that decision into its own hands, and certainly
8 it didn't do so on an informed basis looking at facts and
9 figures and statistics that showed it was necessary.

10 This court could, of course, clarify whatever
11 rule it wants to - - - wants to clarify. And it could, of
12 course, reject my exact - - - the exact contours of my
13 proposed rule, but nevertheless reverse the Second
14 Department and to coordinate to summary judgment on the
15 facts and record of my case.

16 I did want to try to connect my answer to Justice
17 Cannataro's question to, I think, the first part of Judge
18 Singas's question. However, I have totally forgotten what
19 that first part was. If you're able to remind me, I'll do
20 my best.

21 But I - - - I believe that the fundamental point
22 that we were making is because I was talking about the
23 shifting - - - and it's coming to me - - - because I was
24 talking about the shifting burdens, I wanted to address
25 your initial question by pointing that - - - by saying I

1 disagree, as I started to say, with your characterization
2 of the record here. You said that there are a lot of facts
3 in the record that suggest that this attack could have only
4 been carried out where it was carried out. I disagree with
5 that; I think there's no facts in the record that suggest
6 that.

7 Plaintiff tried to make that showing with an
8 expert affidavit from his security expert. I would urge
9 the court to look at that expert report. It's eight pages
10 long. It's twenty-one numbered paragraphs, the first
11 nineteen describe the buildings, the parties, and the
12 incident itself. The twentieth paragraph issues the
13 conclusion with a reasonable sense of certainty that the
14 malfunctioning locks were - - - constituted a breach of the
15 duty to provide a minimal security measure. So far so
16 good. The twenty-first and final paragraph simply states
17 in a conclusory fashion that therefore, this was a
18 proximate cause of the attack. That's all there is.

19 If we - - - if we had a different record, because
20 of the question I was asked about how does the plaintiff
21 raise an issue of fact, or are they right out as Judge
22 Garcia asked me - - - if we had a different record, I
23 think we would - - - we would have a different case. If we
24 had an expert who said, and a functioning lock would have
25 presented this accident, and here's how, that would've been

1 - - -

2 JUDGE TROUTMAN: But again, for - - -

3 JUDGE RIVERA: That's not - - - because you can
4 have more - - - as I think Judge Troutman or one of the
5 sisters to my right has said, the reality is that you can
6 have more than one proximate cause. So it actually isn't
7 that you have to show that but for this lock, this is the
8 only reason, right, for this injury. It can be one of - -
9 -

10 MR. WATKINS: Of - - - of course.

11 JUDGE RIVERA: - - - the reasons for the injury.

12 MR. WATKINS: It can be a reason that is an
13 actual reason fairly applied in law, a proximate cause; not
14 - - - not merely a cause - - -

15 JUDGE RIVERA: But it does seem obvious if they
16 can't get through the door, at a minimum, he would've been
17 slowed down, at a minimum; even if he eventually got
18 through the door, and those precious seconds might've made
19 a difference.

20 MR. WATKINS: There's no evidence for that
21 whatsoever in the record - - -

22 JUDGE RIVERA: But that's for the jury, right?
23 That's the - - -

24 MR. WATKINS: No - - -

25 JUDGE RIVERA: argumentation to the jury.



1 MR. WATKINS: I disagree.

2 JUDGE SINGAS: I'm doing to disagree with you on
3 the there's no evidence. On the Murphy case, we can
4 actually see on the video tape when the assailant entered
5 in, and I think if they had been slowed down, or at least
6 there's an argument to make to a jury if they had been
7 slowed down - - - they tried the first door, it was locked.
8 They get to the second door, it swings open; they run in.
9 Maybe an extra minute or two would've enabled her to get
10 into her apartment, and they wouldn't have known where she
11 was. And - - - and just on that though, is the victim in
12 Murphy the same targeted victim that you see - - - or
13 you're describing in Scurry? Do you see any difference
14 with that? Because again, like where does opportunity come
15 in?

16 MR. WATKINS: I have to defer to my learned
17 friend, Mr. Lawless, to discuss the particulars of the
18 Murphy case because it's not my case.

19 JUDGE SINGAS: Okay.

20 MR. WATKINS: But even if there's admissible
21 evidence in the Murphy case that a second might've made a
22 difference, there is no such evidence on this record
23 because as plaintiff - - -

24 JUDGE RIVERA: But it is common understanding
25 that they would have at least been slowed down? Whether or

1 not it would have been enough time, that's the jury issue.

2 MR. WATKINS: This case - - -

3 JUDGE RIVERA: But there can't be a dispute that
4 there would've been some amount of slowing him down if he
5 can't open the door, even if it's seconds. Maybe the jury
6 would not have found that seconds is enough, but
7 nevertheless, it sounds like a jury question.

8 MR. WATKINS: I have to disagree. This isn't a
9 case of someone getting chased, so there is no issue of
10 seconds. This is a case of someone who entered the
11 building and lay in wait - - -

12 JUDGE RIVERA: Laid in wait.

13 MR. WATKINS: - - - for an ambush. So a second
14 or a minute here or there, there's no evidence that would
15 make a difference whatsoever.

16 CHIEF JUDGE WILSON: Thank you, Counsel. You
17 have your rebuttal.

18 MR. WATKINS: Thank you.

19 MR. SHOOT: May it please the court. Brian
20 Shoot, I represent the Scurry plaintiffs.

21 I'm at a loss as to which argument to respond.

22 JUDGE RIVERA: You're right, because it's a
23 question of someone laying in wait, but it really doesn't
24 matter if the door - - - even the door would have slowed
25 them down, because they eventually would have gotten in and

1 then just waited; as they did here.

2 MR. SHOOT: We're talking about the Murphy case
3 there? Yes, it would have made a difference, and yes, who
4 knows what difference it would have made in that case.

5 I'm at a loss as to which argument to respond.
6 The argument that the defendant made in both of the lower
7 courts, which had nothing to do with burden of proof - - -
8 their argument was targeted plaintiffs lose, period. It
9 doesn't matter what you prove, it doesn't matter what I
10 prove, if they're targeted, they lose. Or the argument now
11 in this court, which is it flips the burden of proof. Be
12 that as it may - - -

13 JUDGE TROUTMAN: Whose responsibility is it when
14 you're a movant for summary judgment?

15 MR. SHOOT: Obviously, Your Honor, and I take it
16 the - - - the - - - it is the burden of the party moving
17 for summary judgment; probably a hundred cases of this
18 court say just that.

19 JUDGE TROUTMAN: And does it make a difference
20 that someone is targeted? Does that change that rule?

21 MR. SHOOT: The position is threefold, Your
22 Honor.

23 First, both the lower courts, the First
24 Department and the Second Department, Scurry and Murphy, I
25 think were correct in rejecting the notion that there's a

1 special anti-tenant rule in premises security - - - that
2 there's a special rule of causation just for these cases.

3 The - - - Justice Dillon's decision on behalf of
4 the unanimous panel rejected that. The First Department
5 decision disowned that principle. And I think closer to
6 the - - - what Judge Garcia was suggesting, the issue
7 ultimately is, when you consider all the facts, not fact,
8 all of the facts, did the absence of security make a
9 difference? And of course, on a motion for summary
10 judgment - - -

11 JUDGE GARCIA: Your adversary seems to be saying,
12 as I understand it, that they meet their burden on that
13 issue, that no reasonable security - - - minimal security
14 measures would've made a difference by just saying
15 targeted.

16 MR. SHOOT: There's absolutely no - - - no
17 decision of this court that ever says it - - - that's said
18 that. The First Department - - -

19 JUDGE GARCIA: Do you think that's inaccurate - -
20 -

21 MR. SHOOT: - - - which actually literally had
22 said that in some cases, just disowned it in Murphy. We
23 didn't mean that; what we really meant was you consider all
24 the facts. There is no special rule.

25 What's more, this court in Burgos rejected the

1 notion that there should be a special anti-tenant rule in
2 premises security cases because the court reasoned to do so
3 would place an impossible burden on tenants and would
4 "undermine the deterrent effective tort law on negligent
5 landlords, diminishing their incentive to provide and
6 maintain the minimally required security for their
7 tenants".

8 JUDGE RIVERA: Well, how so on that? Because I
9 did press a little bit here, and we didn't quite get to
10 this. How so on that? Because this, regardless of whether
11 it's a tenant or a non tenant, someone otherwise is
12 lawfully on the premises, they do have to worry about the
13 non targeted tenant, right? They've got to provide the
14 security otherwise. It's not like they're going to leave
15 the door open thinking they're in a better position to
16 avoid tort liability.

17 MR. SHOOT: Yes. Yes, of course. That should be
18 a concern. Here's a short answer, a longer answer, and I
19 think an ultimate answer to this entire appeal here.

20 Here's the very short answer. The movant's paper
21 you'll find at pages 19 to 36, their moving affirmation of
22 the record. Not only is there no evidence of the kind this
23 court deemed it admissible in Price v. Housing Authority to
24 the effect that the - - - a working door would've made the
25 difference. There is no contention in their moving

1 affidavit that it would have made any - - - made a
2 difference.

3 What is more, when you look at the reply papers
4 in this case, specifically pages 21 to 44 to 21 to 45,
5 after we come up with our proof to the effect that yes, the
6 door made a difference; yes, it was one of the causes of
7 this; their response is that is beside the point, and our
8 discussion of whether that door was a proximate cause was
9 simply intended to distract because according to the lower
10 court - - -

11 JUDGE RIVERA: So it your position that on the
12 motion for summary judgment, their burden was to show that
13 it was not a cause at all; not that it was not the most
14 significant cause, but just not a cause at all?

15 MR. SHOOT: Absolutely, Your Honor, as in every
16 single other tort case. And - - - premises liability in
17 any - - -

18 JUDGE RIVERA: Well, there is an outer limit to
19 causation too - - -

20 MR. SHOOT: I'm sorry? I missed that.

21 JUDGE RIVERA: - - - right? I mean, there is an
22 outer limit to causation too - - -

23 MR. SHOOT: Sure.

24 JUDGE RIVERA: - - - right?

25 MR. SHOOT: And duty defines a boundary.

1 JUDGE RIVERA: So why isn't this on that outer
2 limit given that the duty is minimal in terms of the
3 security device we're talking about here?

4 MR. SHOOT: Why is it - - - because their duty is
5 not much, which gets me, I think, to what I was going to
6 say is the ultimate issue. Their burden, Your Honors, is
7 so small: provide a working lock, provide minimal security;
8 just do that. If you do that, then there are no
9 hypothetical questions of whether the assault would have
10 occurred if you had a working lock because you would have
11 had a working lock.

12 CHIEF JUDGE WILSON: There's not a question that,
13 I think for this appeal, that they had a duty, and they
14 breached a duty, right? The question really turns on
15 proximate cause.

16 And at least as I see it, and correctly me if you
17 think differently, the question really is whether what
18 they're calling a targeted killing in some case, or in
19 this, or in any case, could ever be such - - - could ever
20 be the sole proximate cause, so that even though the breach
21 of the duty in the absence of this targeted killing would
22 render them liable. Something happened that - - - that - -
23 - in this case, the targeted killing, that is the sole
24 proximate cause. That's, I think, what they're arguing.

25 MR. SHOOT: And yet, that's of course utterly

1 inconsistent with this court's decision in Nallan, where it
 2 was a "would-be assassin" who committed the murder in the
 3 lobby of the building, and with most of the cases cited in
 4 my brief where they were all intentional torts. In both
 5 Gomez, which was the case combined with - - - with Burgos,
 6 in Jacqueline S., all of these are crimes that are
 7 intentional; every single one.

8 JUDGE CANNATARO: Is that the choice here? Is -
 9 - - is the question we're being asked to answer whether a
 10 targeted attack will always be the sole superseding cause,
 11 or can't - - - or won't always be, or is there some middle
 12 ground where a defendant seeking summary judgment - - - or
 13 defending against summary judgment could show that the
 14 causal chain has been overcome - - - the burden has been
 15 overcome?

16 MR. SHOOT: You seem to be asking what their
 17 contention is, and their contention - - - that was their
 18 contention in the lower courts. It seems to be no longer
 19 their contention in this court. But it's inconsistent with
 20 number - - - numerous decision by this court, that that's a
 21 - - - that's intervening or - - - or a superseding cause,
 22 and it makes no sense.

23 And it - - - there's a statement that then
 24 Justice Lippman made in the Nash v. Port Authority case,
 25 that was the World Trade Center bombing case, on an issue



1 which this court didn't consider because it didn't have to.
2 But the argument there was that's - - - these are the
3 terrorists who bombed the World Trade Center. They're
4 going to do it, or they're going to do something terrible
5 no matter what you do, the defense argued.

6 And writing for a unanimous panel of the First
7 Department, Justice Lippman said, it will always be
8 possible to hypothesize the circumvention of security
9 pre-cautions, particularly those of the sort so frequently
10 described as minimal, but the fact remains that such
11 pre-cautions must be supposed to provide some margin of
12 security or the landlord's duty would be routinely excused
13 as futile and render nugatory.

14 Here, it is so little that they have to do to
15 maintain their buildings. And it's wonderful that the
16 concession is that there's some proof that they failed to
17 do so. For example, their own records say that of the 103
18 days preceding this incident, according to their records,
19 that lock was functional on 10 of them; their records,
20 pages 1810 to 1914 of the record.

21 The longer answer, if the court would like - - -
22 CHIEF JUDGE WILSON: Of course.

23 MR. SHOOT: The facts of this case and why - - -
24 I shouldn't even have to address this because the short
25 answer is there was no prima facie face - - - case of a

1 summary judgment.

2 But let's talk about the facts of this case and
3 how that door mattered. This is not a person with a gun
4 who shoots the plaintiff. He's got a can of gasoline.
5 What are his odds on waiting outside the door patiently
6 with his can of gasoline dousing her there, and that no
7 one's going to see it; no one's going to intervene? She's
8 not going to be able to roll; she's not going to be able to
9 run. What's the odds of him being able to complete it
10 then, his plan of dousing her with gasoline and setting her
11 afire?

12 He has her in a place - - - a perfect place. He
13 can get in without being seen; the door's broken. He has
14 her trapped in a hallway, and even though he had her
15 trapped in her hallway, she was almost saved. Her son,
16 coming from behind a locked door, pulled them apart seconds
17 too late. He managed the - - - the perpetrator managed
18 throw the match and set them aflame. If he, the son, had
19 been ten seconds, twenty seconds earlier, this would not
20 have happened. And there's no argument - - - not - - - no
21 proof certainly that indeed, the same thing would have
22 happened outside of the building, or on some street corner
23 at her workplace that she - - - he would have been able to
24 complete this crime of dousing her with gasoline and
25 setting her aflame without being interrupted.

1 CHIEF JUDGE WILSON: But the rule of the tort
2 plaintiff is going to die later because of some other cause
3 doesn't really seem to find a place in any jurisprudence I
4 know of.

5 MR. SHOOT: Absolutely. And again, that was also
6 considered, Your Honor, in - - - in the Nash case, where
7 the First Department noted it was unprecedented. In no
8 other context do we consider, well, if there wasn't a crash
9 at this intersection, it could have been the next
10 intersection, or the next day; maybe the injuries would've
11 been worse at the hypothetical accident that didn't occur
12 because this one did. That's never a defense. If it were
13 a defense, there'd be no causation in tort law. It's never
14 been a defense.

15 Does the court have any - - -

16 CHIEF JUDGE WILSON: Thank you.

17 MR. SHOOT: Thank you.

18 CHIEF JUDGE WILSON: Counsel?

19 MR. WATKINS: Thank you, Your Honors. I'm just
20 going to go quickly through a couple of points, unless you
21 have further questions.

22 First of all, my learned friend just made a point
23 regarding the arguments we made below, and he said that our
24 argument below was completely about severing the causal
25 link as a matter of law, and that there was no address of



1 the shifting of burdens. That's not correct. The language
2 he uses in his brief to support that is from a preliminary
3 statement. In fact, both arguments were advanced below in
4 the alternative. The issue is certainly preserved for
5 review.

6 I want to turn to this issue about the burden. I
7 just heard my learned friend talk about how the burden is
8 so low on us, all we have to do is establish that we
9 complied and that we weren't negligent. That's about one
10 element. I think the questions directed at him were - - -
11 were cogent in that they highlighted the fact that the rule
12 proposed by plaintiffs here and the rule proposed by the
13 Second Department is effectively that a landlord in a case
14 such as this can never carry his burden on summary judgment
15 as to the element of causation, and that's wrong.

16 To your point, Judge Rivera, there is a limit to
17 causation. Even this court in the Hain case said that when
18 there are - - - when there are acts that are so abnormal
19 that they attenuate the link between the initial negligence
20 and the ultimate result, that can entitle someone to
21 summary judgment on proximate cause.

22 Even if my framed rule, the framed rule we have
23 placed before you in these briefs, is not to this court's
24 liking, the rule adopted in plaintiff's brief and by the
25 Second Department that the only way to carry the burden on

1 proximate cause is to show that no level of security could
2 have possibly prevented the attack is effectively to say
3 that a landlord's duty is not to have minimal security
4 provisions, but is in fact greatly expanded. I don't think
5 that's called for on these facts. I don't think this case
6 is the case to make that change, and I don't think that
7 that - - - I don't think there's any reason to expand
8 liability in that matter.

9 I want to address another point about causation.
10 Judge Wilson, I agree with something that you just asked
11 about this not finding a rule in our jurisprudence. In the
12 Tarter case, in fact, the First Department did state that
13 because the attacker who, like in this case, was the
14 plaintiff's former lover, was bound and determined to do
15 her violence and was stalking her from place to place in
16 order to do so, it would be inequitable to hold the
17 landlord of the place in which the attack was actually
18 carried out to be a co-tortfeasor because of the
19 happenstance of where the pounce occurred.

20 That is the rule that we urge that the court
21 consider today. We urge that the court consider that when
22 an attack is targeted and bound and determined to occur
23 sooner or later in one place or another, it is inequitable
24 to treat the particular landlord on whose premises it
25 occurred as an insurer of the loss.

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If there are no further questions, we rest in our
briefs.

CHIEF JUDGE WILSON: 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 Scurry v. NYCHA, No. 36 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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