Richardson v New York City Housing Authority
2005 NY Slip Op 30177(U)
November 22, 2005
Supreme Court, New York County
Docket Number: 0116084/2001
Judge: Carol R. Edmead
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SCANNED ON 11/29/2005

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD, Justice — PART 35

Richardson, Tiffany

- v -

Housing Authority

INDEX NO. 116084/01

MOTION DATE 11/14/05

MOTION SEQ. NO. 007

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for reargue

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiff for an order pursuant to CPLR 2221(d) granting leave to reargue this Court's prior decision, dated August 19, 2005 is granted, and upon reargument, the motion by defendant New York City Housing Authority for summary judgment is denied, and the complaint is reinstated; the action shall be restored; and

ORDERED that the movant shall serve a copy of this order with notice of entry upon plaintiff within 5 days of entry; and it is further

ORDERED that the parties shall report to Part 40 for trial on December 6, 2005.

This constitutes the decision and order of the Court.

Dated: 11/22/05

HON. CAROL EDMEAD, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
---X
TIFFANY RICHARDSON,

Index No. 116084-2001

Plaintiff,

-against-

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.
--- X
HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

The genesis of this case is the crime spree of the East Side rapist, whose ultimate capture and indictment bolstered Governor Pataki's call for an expansion of New York's DNA Database to include all convicted felons.

In September 1998, then 15-year old plaintiff, Tiffany Richardson, was a tenant in a building located at 20 Paladino Avenue, New York, New York (the "building") owned by defendant New York City Housing Authority ("NYCHA"). The building was situated in the Wagner Houses (or, the "complex"). At approximately 8:30 p.m., plaintiff left the building and returned at approximately 9:00 p.m. Since the entrance door was locked and plaintiff did not have the key, she waited outside the building, along with another man and her assailant Mr. Kee, subsequently identified as the East Side rapist. After a few seconds, someone exited the building, held the door open, and plaintiff, Mr. Kee, and the other individual were given access to the building and walked into the lobby. The three of them waited in the lobby for the elevator. When the elevator arrived, the three of them entered. When the elevator stopped at the sixth floor, Mr. Kee got off. Plaintiff then got off at the ninth floor and walked to her apartment. As

she was about to knock on her apartment door, Mr. Kee put a knife to her throat, and took her up through the building stairway to the sixteenth floor, pushed the roof door open, and took her to the roof where he sexually assaulted her. There was no alarm on the building's roof doors and no security camera on the roof. There was no lobby guard or security camera in the lobby, no sign-in sheet, and the intercom security system allowing tenants to unlock the door from their apartments was reported broken two months before the incident.

Plaintiff now moves for an order pursuant to CPLR 2221(d) granting leave to reargue this Court's prior decision, dated August 19, 2005, which granted summary judgment dismissing her complaint. Plaintiff argues that the Court misapprehended the facts and law regarding foreseeability, by imposing a burden upon plaintiff to establish prior notice of similar attacks at the same location of her attack. Plaintiff also contends that a prior litigation involving NYCHA establishes that prior rapes occurred on the roofs of Wagner Houses and were known to NYCHA, and that prior rapes at the complex rendered the assault on plaintiff foreseeable. Further, the Court failed to credit the unrebutted expert evidence regarding the foreseeable nature of the crime and NYCHA's failure to protect against it. Plaintiff further maintains that the Court misapprehended the fact that plaintiff would not have had to wait outside to gain access to the building and would not have been alone at the time her assailant confronted her at knifepoint. Finally, plaintiff claims that the Court disregarded the statutory violation of Dwelling Law 50-a(3), which requires that all buildings constructed before 1968 be equipped with an intercom system, giving rise to negligence *per se*. Plaintiff also argues that the testimony of plaintiff's mother regarding the family's custom and practice of entering the building was unrefuted; plaintiff stated that her mother would pick the plaintiff up at the front door and escort her upstairs

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because the hallways were dangerous.

Defendant, the New York City Housing Authority ("NYCHA") opposes the motion, arguing, *inter alia*, that the crime statistics were insufficient to impose a duty on NYCHA to provide minimal security measures or to trigger an obligation to provide an alarm lock on the roof door, and that any evidence of a crime 17 years ago is insufficient to establish foreseeability. Further, plaintiff's expert affidavit is conclusory.

In reply, plaintiff maintains that the crime statistic reports indicating numerous assaults, burglaries, grand larcenies, rapes and robberies for 1996 - 1998 in the Wagner Houses is sufficient to impose upon NYCHA the duty to provide additional security measures.

Analysis

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision " (*William P. Pahl Equipment Corp. v Kassis*,182 AD2d 22 [1st Dept 1992]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided *(Pro Brokerage v. Home Ins. Co.*, 99 AD2d 971, 472 N.Y.S.2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27, 588 NYS2d 8 [1st Dept 1992], lv. denied and dismissed 80 N.Y.2d 1005, 592 NYS2d 665 [1992], rearg. denied 81 N.Y.2d 782, 594 NYS2d 714 [1993]). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

As stated previously, although landowners are not insurers of the safety of those who use their premises (*Florman v City of New York,* 293 AD2d 120 [1st Dept 2002]), landlords have a "common-law duty to take minimal precautions to protect tenants from foreseeable harm," including a third party's foreseeable criminal conduct on the landlord's premises (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548 [1998]; *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 517; *Miller v State of New York*, 62 NY2d 506, 513 [1984]). Foreseeability determines the scope of the duty once the duty is determined to exist, and in cases arising from injuries sustained on another's property, the scope of such duty is defined by past experience and the likelihood of conduct on the part of third persons (*Ram Krishna Maheshwari v The City of New York*, 2 NY3d 288, 294 [2004]). Ambient neighborhood crime alone is insufficient to establish foreseeability (*Yuen v 267 Canal Street Corp., citing*, *Johnson v City*, 7 AD3d at 578). Therefore, in order to establish the element of foreseeability, "a plaintiff is required to present proof that the criminal conduct at issue was 'reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location *sufficiently proximate to the subject location*'" (*Yuen v 267 Canal Street Corp.*, --- NYS2d ----, 2005 WL 1703570 (NY Sup 2005) *citing Johnson v City of New York*, 7 AD3d 577, 577-578 [2d Dept 2004], *quoting Novikova v Greenbriar Owners Corp.,* 258 AD2d 149, 153 [2d Dept 1999]).[1] It is not necessary that plaintiff present proof of crimes

[1] With respect to plaintiff's failure to present evidence of prior roof crimes, plaintiff's contention that a prior litigation involving NYCHA establishes that prior rapes occurred on the roofs of Wagner Houses and were known to NYCHA, and that prior rapes at the complex rendered the assault on plaintiff's foreseeable is not properly before the Court on reargument, but constitute new information. In any event, this prior litigation is insufficient to raise an issue of fact as to foreseeability of the instant attack 10 years later. Moreover, the litigation arising from the 1988 attack involved circumstances not present here: landlord was aware that neither *the doors* to the lobbies of the buildings nor the doors to the utility rooms on the roofs were equipped with locks. The Court held that "in the circumstances, given the Authority's conceded failure to supply even the most rudimentary security-- e.g., locks for the entrances--it was error to grant summary judgment on the question of foreseeability of danger from a violent crime" (*see also Bonano v. S.Z. Realty Corp.*, 256 A.D.2d 268, 682 N.Y.S.2d 180 [1998][where plaintiff tenant

committed in the subject building, since caselaw simply requires that proof of "similar criminal activity at a location *sufficiently proximate* to the subject location."

The Wagner Houses crime statistics indicate that neighborhood crime had infiltrated the housing complex, so as to require NYCHA to provide *minimum* security measures, and it has been held that functioning door locks constitute minimal security (*see Tarter v Schildkraut*, 151 AD2d 414 [1st Dept 1989]). Here, it is undisputed that the front door lock to the building was operational on the date of the incident, and that the assailant, Mr. Kee, acquired access to the building, as did plaintiff, when another person held the door open for him. "Minimum security" may also include an intercom system, designed to limit access to the building (*e.g., Nunez v Caryl and Broadway, Inc.*, 9 Misc 3d 1103 [Sup Ct NY County 2005][the front door locks were functional on the day of the incident and there was also an intercom system to restrict access; thus, plaintiff failed to submit any evidence of a negligently-maintained entrance]; *Anzalone v Pan-Am Equities*, 271 AD2d 307, 309, 706 NYS2d 409 [locked door with functioning intercom system sufficient to discharge landlord's duty of security]). It is undisputed that the intercom system in place at the time of the incident was inoperable.

However, plaintiff may only withstand summary judgment by raising a triable issue of fact regarding whether defendant's conduct, *to wit*: failing to maintain the intercom system, proximately caused plaintiff's injuries (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544

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footnote 1 contd.

sustained injuries as a result of an assault committed by another building tenant on the roof of the building, an issue of fact existed as to whether the crime committed against plaintiff was foreseeable, *raised by evidence of criminal activity on the roof*, including vandalism and rampant drug use, during the long period of time that the alarm lock on the door to the roof was broken]). Thus, the court denies leave to reargue on the ground related to plaintiff's inability to establish notice of crimes committed on the roofs of Wagner Houses.

[1998]; *Miller v State of New York*, 62 NY2d 506, 509), and the Court previously stated that there was no basis in the record to conclude that Mr. Kee would not have entered the building in the event the intercom system was functioning, and that plaintiff's claim that her mother would have could have met plaintiff in the hallway was speculative. However, upon reconsideration of the submissions, the Court determines that issues of fact are raised as to whether NYCHA's failure to maintain the intercom system proximately caused plaintiff's injuries.

The testimony of plaintiff and the complete deposition testimony of her mother, which was referenced to but not supplied with the underlying motion[2] sufficiently raises an issue of fact as to whether the inoperable intercom system impaired plaintiff's mother's ability to meet plaintiff upon her arrival to the building. Plaintiff claims she would not have been alone at the time her assailant confronted her at knife point, as her mother would have been notified *via* the intercom system. Plaintiff's mother testified that she "never allowed [her] kids to come up in the building alone because it's dangerous," and that she and plaintiff knew that the intercom system was not working. Therefore, plaintiff's mother and plaintiff had devised an alternate method for plaintiff to reach her mother before entering the building. Plaintiff's mother testified that plaintiff "would stop [at the pay phone] and call me if she . . . had to walk home and I wasn't *downstairs* waiting for her." When asked if plaintiff ever entered the building by someone opening the door for her, plaintiff's mother testified "no because I picked them up." Plaintiff's mother also stated that when plaintiff called her in order to go to Blockbusters, to which plaintiff's mother replied "call me before you get upstairs." Plaintiff's mother expected to go

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[2] The Court solicited the actual deposition transcript of plaintiff's mother, which was cited to in plaintiff's underlying moving papers, but not provided therein.

downstairs and *let her in the building*. In light of NYCHA's failure to maintain the intercom system upon which plaintiff claims her family relied in order for plaintiff's mother to meet plaintiff upon plaintiff's entry into the building or at the ninth floor, the Court is constrained to find that issues of fact exist as to NYCHA's liability.

Consequently, it cannot be said that Mr. Kee's acts upon plaintiff were independent and so far removed from NYCHA's alleged negligence so as to constitute an intervening act breaking the causal nexus between NYCHA's alleged failures and plaintiff's injuries (*see Del Carmen Madera v New York City Housing Auth.*, 264 AD2d 579 [1st Dept 1999] [where plaintiff claimed that the front door locks, intercom and buzzer systems were inoperable, thereby allowing intruders free access to the premises, evidence that plaintiff's father had opened the apartment door at the time of push-in robbery was insufficient as a matter of law to sever the causal connection between defendant's alleged negligence and the assault of plaintiff in the apartment; there was an issue of fact as to whether reasonable security measures could have deterred the attack]).[3]

Accordingly, it is hereby

ORDERED that the motion by plaintiff for an order pursuant to CPLR 2221(d) granting leave to reargue this Court's prior decision, dated August 19, 2005 is granted, and upon

[3] Given that plaintiff testified that she waited "a few seconds" to gain entry into the building before someone exited the building, plaintiff's claim that the Court misapprehended the fact that she would not have had to wait outside to gain access to the building is insufficient to warrant reargument or denial of NYCHA's summary judgment motion. Any alleged delay in waiting to enter the building bears no connection to the alleged negligent maintenance of the intercom system or her attack.

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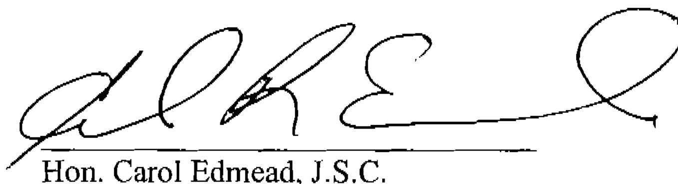
reargument, the motion by defendant New York City Housing Authority for summary judgment is denied, and the complaint is reinstated in accordance with the above;

ORDERED that the movant shall serve a copy of this order with notice of entry upon plaintiff within 5 days of entry; and it is further

ORDERED that the parties shall report to Part 40 for trial on December 6, 2005.

This constitutes the decision and order of the Court.



Dated: November 22, 2005

Hon. Carol Edmead, J.S.C.

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