SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. LOUIS B. YORK PART 2
Justice

MARISOL DE LUNA-COLE and **JONATHAN W. COLE**,
Plaintiffs,
-against-

LAWRENCE FINK and **DIANE FINK, as** Administratrix of **THE ESTATE OF JEROME FINK**, Individually and as Co-partners, and d/b/a **DIANE FINK MANAGEMENT COMPANY**,
Defendants.

Index No. 110997/04
Motion Date _____
Motion Seq. No. 004
Motion Cal. No. ___

The following papers, numbered 1 to were read on this motion for Partial Summary Jgmt.

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

Cross-Motion: [X] Yes [ ] No

In April of 2004, upon exiting the bathroom of her business premises, plaintiff was pushed back into the bathroom by an unknown assailant and violently and sexually assaulted. Plaintiff moves for partial summary judgment and for a trial on damages on the ground that there was not adequate security for the premises. Defendants cross-move for summary judgment dismissing the action. For the reasons that follow, the Court grants the plaintiff's motion for summary judgment on liability.

Plaintiff has introduced evidence showing that at the time of the incident the entrance door to the building was held open by a rope, and that the stairway entrance to the building

was unlocked as well as the elevator. The doorman was not on duty and, as usual, no relief was assigned while he was away from the door. No one was on duty in the lobby, giving the assailant unfettered access to the building.

There was testimony from the building owner and management that there was no criminal activity in the building prior to the assault for the four prior years as shown by the fact that there were no building records establishing any reports of such activity.

To the contrary, records of the Police Department revealed that in the ten years prior to the incident, there were 13 prior crimes reported to the 1st Precinct, the precinct that had responsibility for the area in question. This sector of the precinct's responsibility had one of the highest crime rates in the 1st Precinct's area. As early as 1997, the lack of adequate security was noted in a 1st Precinct report while investigating a trespass and burglary case. In 2001, there were 904 crimes reported. For that year it had the highest number of rapes, sodomy and sexual abuse cases in the precinct's service area . In 2002, 1,027 crimes were reported and the increase in criminal activity continued in 2003 with 1,527 recorded incidents.

The Court of Appeals has stated that although landlords have a duty to mitigate foreseeable danger to their tenants, they are not insurers of their tenants' safety (***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]). In this case, it is beyond cavil that the high incidence of criminal activity at the time plaintiff was assaulted should have

made the danger to her and her fellow tenants foreseeable. Yet the building did nothing to ameliorate the "open-door" policy when the doorman was off duty for lunch or engaged in other activities causing his absence. There has been no evidence challenging the presumption and no argument to the contrary that it was precisely the unlocked and unattended entrance door, the unattended lobby and the unlocked stairway entrance or unlocked elevator that allowed the intruder to get to the bathroom and assault the plaintiff. As a result, proximate cause has been established and, also, summary judgment on liability.

Plaintiff may go forward to trial on damages.

This constitutes the Order and Decision of the Court.

Dated: 3-22-07

Enter:

Louis B. York, J.S.C.

Check one: [ ] **FINAL DISPOSITION** [X] **NON-FINAL DISPOSITION**

Check if appropriate: [ ] **DO NOT POST** [ ] **REFERENCE**