At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of April 2007.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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LISA HERIVEAUX-LOVETT, VAUGHN LOVETT, AN INFANT UNDER THE AGE OF EIGHTEEN YEARS BY HIS PARENT AND NATURAL GUARDIAN, LISA HERIVEAUX-LOVETT, KHALIF TULLOCH, AN INFANT UNDER THE AGE OF EIGHTEEN YEARS, BY HIS PARENT AND NATURAL GUARDIAN, CENDRI TULLOCH, ZARIAH TULLOCH, AN INFANT UNDER THE AGE OF EIGHTEEN YEARS BY HER PARENT AND NATURAL GUARDIAN, CENDRI TULLOCH,

Index No. 41761/04

Plaintiffs,

- against -

PRESTIGE MANAGEMENT, LLC.,

Defendant.

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The following papers numbered 1 to 6 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross-Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers Supplemental Affirmation; Supplemental Affidavit	5, 6

Upon the foregoing papers, defendant Prestige Management (defendant or Prestige) moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint of plaintiffs

Lisa Heriveaux-Lovett (Lisa Lovett or Lovett), Vaughn Lovett, Khalif Tulloch and Zariah Tulloch (collectively plaintiffs).

This action for personal injuries arises from an apartment house fire which occurred on August 30, 2004 at approximately 6:00 A.M. The four plaintiffs resided in apartment #7, on the top floor of the four-story building located 852 Classon Avenue in Kings County. The defendant owned the building.

New York City Fire Marshall Andrew DiFusco (FM DiFusco) investigated the fire and determined the origin to be "ignitable liquid" introduced and then ignited in the second floor hallway stairwell in front of apartment #3. Gas chromotography testing revealed that the ignitable fluid was of a "category consistent with diesel fuel or kerosene" and that the fire had been "intentionally and deliberately set." FM DiFusco learned through interviews that Joseph Williams, who lived with his mother in apartment #3 on the second floor, had had a heated argument with his mother during the evening before the fire, and spent the night in apartment #7 where his aunt Lisa Lovett resided. FM DiFusco classified the fire as arson, but never ascertained the identity of the arsonist.

On or about December 27, 2004 plaintiffs commenced the instant action, alleging that the defendant was negligent in failing to maintain the lock on the front door of the premises which permitted unknown person(s) to enter the premises and to start the fire, and failed to provide a sprinkler system and fire alarms. In their bill of particulars, plaintiffs further alleged that defendant and its agents failed to maintain fire-retardant materials on the walls,

ceilings and hallways of the building, but instead applied shellac or other flammable and ignitable liquids to the interior surfaces of the premises, causing the fire to spread quickly and produce black smoke; failed to install and maintain automatic, self-closing doors in the entranceway; failed to maintain an intercom system; and failed to repair the knob and locks on the front doors.

In their amended and supplemental bill of particulars, plaintiffs claim that defendant inspected the premises and therefore had actual and constructive notice of its condition, and that the defendant was negligent in failing to cover transoms, on apartments doors, with fire retardant material; and to maintain self-closing doors to each apartment.

Issue was joined with service of the defendant's answer on or about January 25, 2005. Plaintiffs filed their note of issue on or about September 6, 2006. Defendant now moves for summary judgment.

Defendant's Arguments

The defendant maintains that it is entitled to dismissal of the complaint because there is no evidence that it deliberately set the fire or created a dangerous condition which caused or contributed to the fire.

The defendant, first, argues that notwithstanding inspections following the fire by three New York City agencies — The New York City Fire Department, The Department of Buildings and The Department of Housing Preservation and Development — no summons or citation was issued for a violation which may have contributed to the fire. The defendant

points out that the only summons it received related to post-fire repairs. This summons was issued pursuant to Section 27-110 of the Administrative Code of the City of New York and included the statement "Due to circumstances beyond the owner's control, the following damage occurred . . ."

Next, the defendant argues that the evidence demonstrates that at the time of the fire the building was equipped with functioning smoke detectors. In this regard, Mr. Charles Kupferman, president of Nessco Management, defendant's managing agent, testified when deposed that he had installed smoke detectors in each of the public hallways a year after defendant purchased the building in 2001, and that smoke detectors were installed in each of the building's eight apartments prior to the fire. According to Kupferman, during the morning of the fire, after the fire had been extinguished, he heard the sounds of smoke detectors "ringing all over the place." Defendant also points to the testimony of Lovett that her apartment was equipped with a smoke detector which went off during the fire. While Lovett could not recall whether there was a smoke detector in the fourth floor hallway, she testified that there was one in the second floor hallway which was functioning.

With respect to plaintiffs' claim that the defendant was negligent in failing to maintain a sprinkler system, defendant relies upon the affidavit of Raymond Of, a certified fire inspector, who avers that prior to August 30, 2004 no code rule or regulation required the installation of a sprinkler system on the premises.

As to plaintiffs' claim that it was negligent in failing to have self-closing apartment

doors, defendant supplies an affidavit by Mr. Kupferman who avers that the doors to each of the eight apartments was self-closing, that these doors were fully functioning when the building was purchased in 2001, and that prior to the fire no complaints were received from tenants regarding their apartment door not automatically closing. As to plaintiffs' claim that the front doors to the building were not self-closing, that the lock was in disrepair and that the doorknob was not functioning, defendant asserts that these allegations are refuted by the deposition testimony of FM DiFusco. Mr. DiFusco testified that based on his interview with Firefighter Van Johnson, he learned that Van Johnson was first to arrive on the scene and "forced [open] the inner door of the vestibule." According to defendant, this indicates that the door was locked. Defendant also points to Mr. Of's averance that the inner door of the front entrance exhibited "tool marks similar with that of forcible entry tools used by firefighters." As for the allegedly broken knob on the front door, defendant maintains that it is a non-issue since there is no evidence that the lock was not working on the date of the fire.

With respect to plaintiffs' claim that defendant was negligent in failing to install and maintain an intercom system, defendant argues that there is no evidence that the building's intercom system was not working on the date of the fire and that, even if it was not, there is no evidence that this malfunction contributed to plaintiffs' injuries.

As to plaintiffs' claim regarding transoms on the apartment doors, defendant points out that in his affidavit, Mr. Kupferman avers that when the building was purchased the

transoms were completely covered with sheetrock, that they were not modified thereafter, and that no violation was ever issued with respect to these transoms.

Finally, as to plaintiffs' claim that defendant created a dangerous condition by applying polyurethane, shellac or other flammable material to the interior surfaces of the building, contributing to the spread of fire and black smoke, defendant maintains that plaintiffs cannot support this claim with any evidence. In this regard, it relies upon the affidavit of Mr. Of, wherein he avers that during his inspection he did not observe flammable material on the interior surfaces of the premises.

Plaintiffs' Opposition

In opposition to the motion, plaintiffs argue that material questions of fact as to the defendant's negligence are raised by the deposition testimony of FM DiFusco and the narrative report of Mr. William Hayden, a fire investigator and fire marshal for the Town of Babylon.[1]

In support of their claim that the apartments lacked self-closing doors, in violation of Multiple Dwelling Law § 238(1)(a),[2] plaintiffs rely upon Mr. Hayden's report which states that his inspection of February 10, 2005 revealed that "the apartment doors were not self-

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[1]An affidavit by Hayden affirms and incorporates his narrative report which is accompanied by numerous photos, a Paint Chip Measurement Data Sheet, copies of newspaper articles and other documents.

[2]Multiple Dwelling Law § 238(1)(a) provides that "[t]here shall be no transom, sash or similar opening of any kind from such stair and entrance halls to any other part of the tenement."

closing to the hallway. Door hinges were not spring loaded or if spring-loaded, [were] out of adjustment to self-close. An inspection of the hallway to apartment doorway opening on the 4th floor north, apartment # 7, revealed door hinges that were not self-closing . . ."

Defendant offers that each of the apartments was equipped with self-closing doors, that the doors were fully functional on the day of the fire, and that Mr. Kupferman, the managing agent, did not receive a complaint from any tenant that the doors were not self-closing. Although Mr. Hayden reports that the door hinges on apartment #7 were not operational, his inspection of the premises occurred more than five months after the fire, after the door to plaintiffs' apartment had been removed. Lovett testified that on the date of the fire, she was awakened by the sound of a smoke detector, and that she went to her apartment door, opened it, saw smoke, closed the door and went back into her apartment. However, FM DiFusco testified: "I asked Captain Berube, I made a note that the door to Apartment #7 where the victims were found was fully opened."[3] Captain Berube was the first firefighter to arrive at the apartment. According, a question of fact exists as to whether the automatic self-closing mechanism on the door was operational at the time of the incident.

Plaintiffs argue that the presence of transoms in the building violates Multiple Dwelling Law § 238(1)(b), which provides that "[t]here shall be no transom, sash or similar opening of any kind from such stair and entrance halls to any other part of the tenement." In support of this claim, plaintiffs point to Mr. Hayden's finding that "it appeared that several

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[3]See deposition testimony of FM DiFusco [pgs 62, 66-67, 73]; see also CPLR 4518[a]; *Zohar v. 1014 Sixth Avenue Realty*, 24 AD3d 125, 126 [2005]).

[transoms] had a single sheet of gypsum board covering the apartment-side opening but were not covered with fire-resistive material on the hall side" which "failed early in the fire, burned through and provided no fire resistive protection" and "allowed toxic products of combustion, heat and flame to enter the apartments at the level above the fire's origin . . ."

Plaintiffs also cite the testimony of FM DiFusco that the transom windows "allowed fire to extend to certain apartments." Further, plaintiffs point out that Lovett states in her affidavit that the transom on her door was "buckling," that she had shown it to Mr. Kupferman soon after defendant purchased the building, that she asked Mr. Kupferman to repair it and that defendant failed to do. Based upon the foregoing, plaintiffs conclude that the presence of the transoms directly contributed to their smoke inhalation and respiratory injuries.

An issue of fact also exists as to this claim. Mr. Hayden states that it appears that several transoms had single thickness gypsum board on one side, but were not covered with fire-resistive materials. He does not indicate whether samples were removed from transom coverings and tested for fire resistance. However, FM Difusco testified that transom windows allowed the fire to extend to certain apartments. According to FM DiFusco, as he walked through the building he noticed that "where the doors and the glass transoms above held, there was very little charring or none at all to the inside of the respective apartments." He noted that not a lot of fire entered some apartments "until we got to the top floor apartment #7 where — because the door was open as per Captain Berube [who found the

door open], byproduct combustion heat and smoke entered the apartment and you could actually see soot and the byproduct on the wall." As it is unclear as to what circumstance caused this condition in apartment #7, defendant fails to make a *prima facie* showing with respect to this claim.

It is noted that Lovett's affidavit in which she states that she asked Mr. Kupferman to fix her transom because it was buckling, contradicts her deposition testimony and thus suggests that her statement that the material on the transom was buckling was tailored to raise an issue of fact (*Irving v. Foodtown Supermarket*, 288 AD2d 345, 346 [2001]). In addition, Mr. Hayden's supplemental affidavit in which he asserts that he found "shards of glass that remained in the wooden frame of the transoms, which were noted to be heavily smoke stained which established that they were not appropriately covered with fire-resistive material," is not properly before the court. The question of whether the transoms exacerbated the fire was raised by the defendant it its moving papers, and could have been addressed in plaintiffs' opposition (see CPLR 2214; *Flores v Stankiewicz*, 35 AD3d 804, 805 [2006]; *Amodeo v Kolodny*, 35 AD3d 773, 774 [2006]).

Next, relying upon the deposition testimony of FM DiFusco, the report of its expert, and the affidavits of Lovett, Cendri Tulloch (Tulloch) and tenant Joleta Williams (sister of Lovett), plaintiffs argue that defendant violated New York City Administrative Code, Article 5, § 27-348, which sets forth requirements for interior finishes in a multiple dwelling for the "Prevention of Interior Fire Spread." Specifically, plaintiffs assert that the defendant violated

§ 27-348(e), entitled "Toxicity," which mandates that: "[n]o material shall be used in any interior location that, upon exposure to fire will produce products of decomposition or combustion that are *more toxic* in point of concentration than those given off by wood or paper when decomposing or burning under comparable conditions" (emphasis added). Plaintiffs maintain that defendant "created the condition which helped fuel the fire" in that shellac, lacquer or polyurethane was applied to the "doors, banisters, stair tread, rises, and the interior walls surfaces" of the building.

While the plaintiffs have failed to raise an issue of fact with respect to whether defendant violated § 27-348(e) of the Administrative Code, plaintiffs have raised such an issue with respect to whether the application of shellac, polyurethane or some like substance, to the interior of the building created a condition which exacerbated the fire and spread toxic fumes to the third and fourth floors.

Mr. Hayden recovered two paint samples, one from the first floor public hallway door and the other from the wall in the public stairwell between the second and third floors. These samples were tested by Doug Byron, a forensic chemist, who found that despite the absence of ignitible residue, the paint samples burned twice as fast as a comparable paper sample, and that black smoke emanated from the burning paint chip. Mr. Byron concluded that "[i]f this paint was present on the walls of a hallway or stairwell it would burn extremely fast with thick black smoke. Even though no ignitable liquid residue remains, the paint on the walls would burn as if an ignitable liquid was present." In his reply affidavit, Mr. Hayden states

that a further violation of § 27-348(e) existed in that "the interior wall covering the stairwell in the hallway produced by-products of combustion contrary to, and more toxic than, those given off by wood or paper when burning." However, as defendant's expert points out, Mr. Byron's and Mr. Hayden's opinion that § 27-348(e) was violated is based on the fact that the paint chip burned twice as fast as a comparable paper sample (flame spread) and that black smoke emanated from the paint chips (smoke density). However, § 27-348(e) does not address the rate of flame spread or smoke density. Rather, those issues are addressed by § 27-348(c) and (d), respectively. Mr. Byron states that he did not perform flame spread analysis and smoke density tests on the paint chips and, thus, no violation of § 27-348(c)[4] or (d)[5] is shown. Therefore, it is speculative to conclude that the finish on the paint samples "produce[d] products of decomposition or combustion that [were] *more toxic* in point of combustion than those given off by wood or paper when decomposing or burning under comparable conditions" (N.Y.C. Admin. Code § 27-348[e]).

However, FM DiFusco testified that he observed polyurethane, lacquer or shellac on the banister, that there was a similar finish on parts of the wall in the building, and that this finish may have "exacerbated the fire." In addition, he testified that although he did not

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[4]Section 27-348[c] provides, in pertinent part: "Requirements. Interior finishes and exposed structural or construction materials shall have a flame-spread rating not greater than that designated by the class prescribed for the various occupancy groups in which they are used, as listed in table 5-4."

[5]Section 27-348[d] provides: "Smoke density. No material shall be used for interior finish in the following locations if the material develops smoke in greater density than the rating shown, based upon a test conducted in accordance with the provisions of reference standard RS 5-5. Materials used for interior finish that cover not more than twenty percent of the aggregate wall and ceiling area of any room, space, or corridor shall be exempt from the above requirements."

know if the finish was "definitely shellac or polyurethane or varnish," "[i]n interviewing I remember an occupant telling me that the walls were lacqured." More significantly, he stated that while he did not have samples to corroborate the statements from his interviews, he "did observe a partially melted and charred finish on the banister on the stairs going from the half landing between the first floor and the second floor and in my opinion that caused the fire to raise up to the bulkhead." In addition, Lovett, Tulloch and Williams affirm that they witnessed a worker from Prestige Management applying polyurethane or shellac to the walls of the interior hallways. Defendant does not address this claim in its reply. Finally, Mr. Kupferman testified that prior to the fire, workers painted the interior of the building, and that it was possible that shellac or polyurethane was used on the banisters.

Based upon the foregoing, a question of fact exists as to whether defendant's application of shellac, polyurethane or similar material to the interior of the building created a condition which exacerbated the spread of the fire and fumes.

Plaintiffs final claim is that the defendant was negligent in failing to maintain a properly locked entrance door, which allowed an intruder to enter the building and set the fire. In support of this claim, plaintiffs rely upon the affidavits of Lovett, Tulloch and Williams, who explain that the building has two entrance doors. Double doors lead from the street into a vestibule and a second door leads into the building's interior. Lovett states that the outer doors had latch mechanisms at the top and bottom which became loose, "and when that happened the doors did not close properly." Tulloch states that "the outer doors did not

always lock when closed," that she complained about these doors to Mr. Kupferman, that they were not properly repaired, and that in the six-month period before the fire she was able to get into the building through both sets of doors without using a key. Williams adds that with respect to the inner door, if "someone slammed the door hard or pushed it with force, the door would close and lock." Tulloch states that she complained to Mr. Kupferman about the lock on the inner door because the knob was always falling off. She asserts that approximately five `months before the fire, Mr. Kupferman removed the knob, and "after that . . . the door did not lock. From that time you did not need a key to get in that door."

Plaintiffs maintain that in the years preceding the fire, there were widely disseminated news reports concerning arsonists setting fires in the early morning hours in Brooklyn apartment buildings (one incident involving the possible use of propane). Thus, argue plaintiffs, it was reasonably foreseeable that an intruder would enter their building and start a fire using an ignitable substance.

The affidavits of Lovett, Tulloch, and Williams have raised a question of fact as to whether the locks on the inner and outer doors were not functioning and as to the defendant's notice of same. However, plaintiffs have failed to raise a question of fact as to whether the fire was a forseeable consequence of this condition and whether the condition of the front door was a proximate cause of their injuries. In *Maheshwari v. City of New York*, (2 NY3d 288, 294 [2004]) the Court of Appeals stated: "We have long held that 'New York landowners owe people on their property a duty of reasonable care under the circumstances

to maintain their property in a safe condition.' . . . Although landlords and permittees have a common-law duty to minimize foreseeable dangers on their property, including the criminal acts of third parties, they are not insurers of a [tenant's or] visitor's safety (*see Burgos v. Aqueduct Realty Corp., 92 NY2d 544, 549* [*1998*]*; Jacqueline S. v. City of New York, 81 NY2d 288, 292-293* [*1993*]*, rearg. denied 82 NY2d 749* [*1993*]*; Nallan v. Helmsley-Spear, Inc., 50 NY2d 507, 519* [*1980*]). As we have noted, however, foreseeability and duty are not identical concepts. Foreseeability merely determines the scope of the duty once the duty is determined to exist (*citation omitted*). In cases arising out of injuries sustained on another's property, the scope of the possessor's duty is defined by past experience and the 'likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the [tenant or] visitor'" (2 NY3d at 294; *see also, Marr v. Seventh Day Adventist Church*, 29 AD3d 959, 960 [2006]). Here, the four newspapers articles about arsonists entering residential apartment buildings in Brooklyn and starting fires between the years 2000 and 2004 fail to raise a triable issue of fact as to whether the instant fire was foreseeable (*see Levine v Fifth Housing Co., Inc.*, 242 AD2d 564, 566 [1997] ["plaintiffs' assertion that their landlord had notice of the 'ambient criminal threat present in Flushing, New York' was patently insufficient to raise a triable issue of fact as to whether the assault (in the building's lobby) was forseeable"]; *Marr v Seventh Day Adventist Church*, 29 AD3d 959, 960 [2006], lv. to appeal den. 7 NY3d 715 [2006], [the fire (in the church) was not a forseeable result of any security breach by the church. Although the record discloses that there had been prior

acts of minor vandalism on the church's property, such acts did not give the church notice that someone would commit arson]; *Mendez v 441 Ocean Ave. Assocs.*, 234 AD2d 524 [1996] [The plaintiffs' proof of prior criminal activity in the neighborhood surrounding the defendants' building was patently insufficient to raise a triable issue of fact that defendant had notice of prior criminal activity in the building so as to make the present crime foreseeable]).

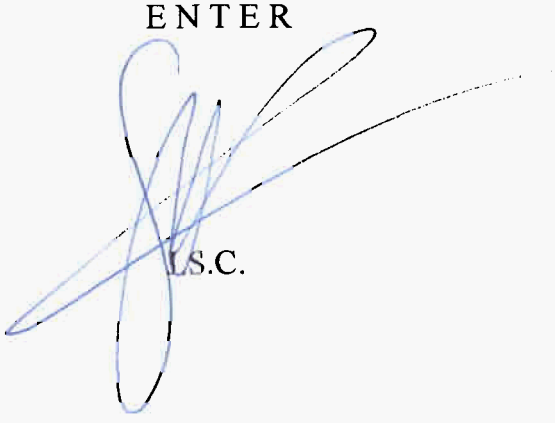
Recovery against the landlord also requires a showing that the landlord's conduct in failing to maintain locks on the front doors was a proximate cause of plaintiff's injury (*Burgos v. Aqueduct Realty Corp.*, 92 NY2d 544, 548 [1998]). "This necessary causal link can be established only 'if the evidence renders it more likely or more reasonable than not that the assailant was an intruder who gained access to the premises through a negligently maintained entrance'" (*Alvarez v. Masaryk Towners Corp.*, 15 AD3d 428, 429 [2005], citing *Burgos v. Aqueduct Realty Corp.*, 62 NY2d at 551). Here, plaintiffs fail to raise an issue of fact as to whether the fire was set by an intruder (*see Lester v. New York City Housing Authority*, 292 AD2d 510 [2002]; *Cobb v. New York City Housing Authority*, 251 AD2d 362, 363 [1998]; *Hunter v. Creative Housing Ltd.*, 254 AD2d 460 [1998], lv. to appeal den. 93 NY2d 809 [1999]). Lovett testified that she did not witness unauthorized persons entering the building through the front entrance door when it was forcibly closed and Joleta Williams affirms that when pushed with force the door would close and lock. Moreover, the findings of the Fire Marshals' investigation suggests that the fire was started by one of the building

residents. Accordingly, it is

ORDERED, that the motion for summary judgment is granted to the extent indicated herein and otherwise denied; and it is further

ORDERED, that the matter be over-ridden to the Jury Co-ordinating Part in due course.

ENTER



J.S.C.