At an IAS Term, Part 8 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 26th day of September, 2008.

P R E S E N T:

HON. BERT A. BUNYAN,

Justice.

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SVETLANA SUHINA, et ano.,

Plaintiffs,

- against -

Index No. 4744/03

780 EAST 2ND STREET COMPANY, LLC,

Defendant.

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The following papers numbered 1 to 8 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 4
Opposing Affidavits (Affirmations)	5 - 7
Reply Affidavits (Affirmations)	8
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, in this action by plaintiffs Svetlana Suhina (Suhina) and the Public Administrator, Kings County, as the administrator of the estate of Nikolajs Aulovs (Aulovs) (collectively, plaintiffs) to recover damages for personal injuries and wrongful death, defendant 780 East 2nd Street Company, LLC (defendant) moves for summary judgment dismissing plaintiffs' complaint as against it.

On November 1, 1993, Lubov Yakobishvili (Ms. Yakobishvili) executed a lease for apartment J in a 48-unit building, located at 780 East 2nd Street, in Brooklyn, New York. The apartment building was owned by defendant. In approximately 1997, Svetlana Khanis (Khanis) moved into apartment J with Ms. Yakobishvili's son, whom she was dating. Khanis and Ms. Yakobishvili's son moved out in the spring of 1998. At that time, Suhina, who was a friend of Khanis, moved into apartment J with her 28-year-old son, Aulovs. Although lease renewals were executed and Suhina and Aulovs were living in apartment J, the lease to apartment J remained in Ms. Yakobishvili's name, as the tenant.

At approximately 11:45 P.M. on June 24, 2002, a fire broke out in apartment J. The New York City Fire Department responded, and firefighters arrived at the building at approximately 11:50 P.M. The firefighters had to force open the door to apartment J because it was being obstructed by Aulovs' body. Suhina was found to the right of the door, lying on her back. Suhina and Aulovs were removed by a firefighter and taken to the hospital. Suhina sustained second degree burns on 50% of her body, and remained hospitalized for approximately 10 weeks. Aulovs sustained third degree burns on 60% of his body and, on May 18, 2003, he ultimately died from his injuries.

Immediately after the fire was extinguished, Battalion Chief James Heal (Chief Heal) went into apartment J since it was his job to look at the apartment in order to check for the smoke alarm and to find the cause of the origin of the fire (Chief Heal's Dep. Transcript at 58-59). Chief Heal observed that the couch in the living room was totally burned to its springs

and, based upon the damage and burn patterns, he concluded that the fire originated on the couch and was a rapidly extending fire (*Id.* at 58, 123, 136). In addition, when Chief Heal checked for smoke detectors, he observed a white smoke detector on the floor and the smoke detector bracket in the area above it (*Id.* at 63, 149, 159-160, 175). Chief Heal concluded that high-pressured water used by the firefighters likely knocked the smoke detector from the wall, which, he asserted, is a common occurrence (*Id.* at 63). According to Chief Heal, firefighters at the scene, who arrived there before him, told him that the fire alarm was sounding when they arrived (*Id.* at 141-142).

Chief Heal prepared a BF-24 report, which documented his investigation gathered from his visual observations (*Id.* at 17-19). The BF-24 report indicates that the fire originated in the living room and was not an electrical fire. The BF-24 report also states that an operational smoke detector with a battery power source was present, which operated in the room of the fire.

That evening, approximately 45 minutes after the fire was extinguished, Fire Marshal Joseph Cusumano (Marshal Cusumano) also arrived at the apartment to inspect it in order to determine the cause and origin of the fire (Marshal Cusumano's Dep. Transcript at 57, 59, 85). Marshal Cusumano concluded that the fire originated on the couch (*Id.* at 87-89). He also found cigarettes and a lighter inside of the apartment (*Id.* at 56-57) and indicated the presence of the cigarette and lighter on a list prepared by him of the items found in the apartment. Marshal Cusumano also interviewed neighbors in the building, who informed

him that the tenants were smokers (*Id.* at 54). After the completion of his investigation, Marshal Cusumano concluded that careless smoking had caused the fire (*Id.* at 86-87, 95). Marshal Cusumano prepared a Fire and Incident Report (the FAI Sheet), which detailed the findings of his investigation. The FAI Sheet indicates that the cause of the fire was "smoking (Cigarette/Cigar)" and, specifically, careless smoking, and that the fire originated on the couch in the living room. Along with the FAI sheet, Marshal Cusumano prepared an Interview Sheet, which stated that the fire began in the corner of the living room on a couch, and that smoking materials were found throughout the apartment.

On the night of the fire, subsequent to its extinguishment, a firefighter member of the photo unit of the Fire Department, under Marshal Cusumano's supervision, took numerous photographs of the apartment and the debris contained in the apartment (Marshal Cusumano's Dep. Transcript at 40). One of the photographs depicts a cigarette lighter with a pack of Marlboro cigarettes.

On June 28, 2002, approximately three and a half days after the fire, defendant's expert fire investigator, Peter M. Rincones (Rincones) of P.M.R. Fire & Explosion Consultants, a firm that investigates the cause and origin of fires, inspected and photographed the subject apartment. Rincones determined that the fire originated at the north end of a couch located in the northwest quadrant of the living room in apartment J, and he concluded that the tenants' careless use of smoking materials caused the fire. Rincones also observed a smoke detector and its wall bracket in the apartment (Rincones' Dep. Transcript at 76, 79-

80). Rincones took a photograph depicting the smoke detector on the floor and the wall bracket for the smoke detector on the wall.

On February 7, 2003, plaintiffs commenced this action against defendant, seeking to recover monetary damages for personal injuries and wrongful death. Plaintiffs allege that defendant was negligent in its ownership and maintenance of the apartment building by failing to install a functioning smoke detector in apartment J as required by Administrative Code of the City of New York § 27-2045.

Administrative Code § 27-2045, in pertinent part, provides:

> "§ 27-2045. Duties of owner and occupant with respect to installation and maintenance of smoke detecting devices in class A multiple dwellings.
> a. It shall be the duty of the owner of a class A multiple dwelling which is required to be equipped with smoke detecting devices pursuant to article six of subchapter seventeen of chapter one of this title to:
> (1) provide and install one or more approved and operational devices in each dwelling unit. Such devices shall be installed in accordance with the requirements of reference standard 17-12."

In support of its motion for summary judgment, defendant relies upon the deposition testimony of Chief Heal, who specifically testified that he had an independent recollection of his personal observation of the smoke detector on the floor of apartment J just after the fire had been extinguished (Chief Heal's Dep. Transcript at 58-59, 63, 149, 159-160, 175). Defendant also relies upon the BF-24 report which documented the presence of an operational battery-operated smoke detector inside apartment J at the time of the fire.

Defendant also points out that Chief Heal testified, at his deposition, that if it were determined that a particular apartment failed to have the required smoke detector, it would be deemed an offense for which a violation would be issued by him to the building owner (*Id.* at 59-62, 71). It is undisputed that Chief Heal did not issue a violation to defendant. A Report and Record Request from the New York City Fire Department (which would include violations for missing smoke detectors) further indicates that no violations had been issued to the subject building as of July 15, 2003. In addition, Peter Ruggiero (Ruggiero), the agent/supervisor of the subject building, testified, at his deposition, that the building never received any safety violations from the Department of Buildings (Ruggiero's Dep. Transcript at 53).

Defendant additionally relies upon Ruggiero's deposition testimony, wherein Ruggiero attested to the fact that he performed an annual inspection once a year, pursuant to law, in which he inspected the apartments in the building and prepared Annual Inspection Reports (*Id.* at 12-13). Ruggiero testified that if during an inspection, he observed that a smoke detector was not operable, he would replace the batteries and, if necessary, the entire detector (*Id.* at 46, 48-49). Ruggiero testified, at his deposition, that he, accompanied by the building superintendent, performed an annual inspection in apartment J on February 25, 2002, approximately four months prior to the fire, and prepared an Annual Inspection Report (*Id.* at 24-25, 36). The Annual Inspection Report, dated February 25, 2002 and signed by Ruggiero, checked off that there was a working smoke detector in apartment J. Ruggiero

also specifically recalled that the smoke detector was operable at the time of his inspection (*Id.* at 81-82).

Ruggiero additionally testified, at his deposition, that on the morning of the fire, at approximately 7:00 A.M., he went to the apartment to close the windows and observed the smoke detector on the floor near the living room and pointed it out to the firefighters who were still in the apartment (*Id.* at 14, 54-55). Ruggiero, at his deposition, recognized the smoke detector that he saw the morning after the fire as being the one depicted in the photograph taken by Rincones (*Id.* at 74-75).

Defendant has also submitted the sworn affidavit as well as the deposition testimony of Rincones. Rincones, in his affidavit, attests that on June 28, 2002, he observed a smoke detector and a wall bracket, which are depicted in two photographs (which have been submitted to the court).

Defendant, by the submission of the foregoing, has established a *prima facie* showing of its compliance with Administrative Code § 27-2045 (*see Delgado v New York City Hous. Auth.*, 51 AD3d 570, 571 [2008]; *Acevedo v Audubon Mgt.*, 280 AD2d 91, 94 [2001]; *Amble v City of New York*, 157 AD2d 688, 689 [1990]). It was, therefore, incumbent upon plaintiffs to submit evidentiary proof, in admissible form, sufficient to raise a genuine material triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]; *Fields v S & W Realty Assoc.*, 301 AD2d 625, 625 [2003]).

Plaintiffs attempt to raise an issue of fact by relying upon the deposition testimony of Suhina and Khanis (who, as noted above, was Suhina's friend). Suhina testified, at her deposition, that there were no smoke detectors in the apartment when she moved in or at any time during the four years that she and her son lived in the apartment (Suhina's Dep. Transcript at 38). She also claimed to have complained to defendant's superintendent about the lack of a smoke detector prior to the fire (*Id.* at 44). Khanis similarly testified, at her deposition, that there was never a smoke detector in the apartment during the six months that she lived there (Khanis' Dep. Transcript at 45, 68, 70, 71). Khanis testified that while she did not check the walls specifically for the presence of a smoke detector, she looked at every single wall for repair purposes, and did not see any smoke detectors (*Id.* at 70-71). Khanis also claimed to have complained to the superintendent about the lack of a smoke detector (*Id.* at 76).

These unsubstantiated, conclusory, and self-serving assertions by Suhina and Khanis, undocumented by any written complaints by them to defendant's building staff, are refuted by the BF-24 report; the deposition testimony of Chief Heal as to his personal observation of the physical existence of the smoke detector in apartment J at the time of the fire; Ruggiero's detailed description, in his deposition testimony, of his annual inspection for the smoke detector, and his Annual Inspection Report dated February 25, 2002, indicating the presence of a working smoke detector in apartment J at that time; and the photographs of the smoke detector and bracket taken by Rincones, and Rincones' deposition testimony and

sworn affidavit. Thus, Suhina and Khanis' mere bare unsubstantiated assertions, alone, in the face of the evidentiary proof, are insufficient to raise a genuine triable issue of fact as to the presence of a smoke detector in apartment J (*see Zuckerman,* 49 NY2d at 562-563; *Delgado*, 51 AD3d at 571; *Fairclough v 679 Magenta*, 309 AD2d 619, 620 [2003]).

Plaintiffs further argue that defendant cannot show its entitlement to summary judgment because Suhina never signed acknowledgments that defendant installed a smoke detector in the subject apartment. This argument must be rejected. While it has been held that a signed lease indicating the presence of a smoke detector establishes a *prima facie* defense for a defendant (*see Peyton v State of Newburgh, Inc.,* 14 AD3d 51, 53 [2004]; *Fields*, 301 AD2d at 625; *Acevedo*, 280 AD2d at 94), this is not a mandatory requisite for a defendant to establish a *prima facie* defense (*see Downey v Beatrice Epstein Family Partnership, L.P.*, 48 AD3d 616, 618-619 [2008]; *Fairclough*, 309 AD2d at 620; *Amble*, 157 AD2d at 689).

Here, Suhina was not the tenant of record, and Ruggiero's deposition testimony and his February 25, 2002 Annual Inspection Report signed by him, substantiates the installation by defendant of the requisite smoke detector (*see Fairclough*, 309 AD2d at 620; *Amble*, 157 AD2d at 689). Although Ruggiero ordinarily had the tenant sign the Annual Inspection Report, the tenant listed on the February 25, 2002 Annual Inspection Report was still Ms. Yakobishvili, and Ruggiero testified, at his deposition, that he ordinarily only asked the person who was the tenant to sign the report (Ruggiero's Dep. Transcript at 24). In addition,

Ruggiero testified that there was a young man (presumably Aulovs) present in apartment J at the time he performed the inspection, but he did not make him sign the Annual Inspection Report because he appeared to be "half drunk" (*Id.* at 25).

Plaintiffs, in an attempt to raise a triable issue of fact with respect to the absence of a smoke detector, also point to the fact that Marshal Cusumano, in his 10-45 Report which accompanied his FAI Sheet, checked "No" next to the question "Smoke Detector Present?" However, Marshal Cusumano, when questioned at his deposition about this entry on his 10-45 Report, testified that he checked off the box "No" where it asked if a smoke detector was present because he "didn't encounter one during [his] investigation or [he] did not see it" (Marshal Cusumano's Dep. Transcript at 73-74). Marshal Cusumano explained that his job is to determine the cause of the fire, and that he does not specifically remove debris and search for a smoke detector (*Id.* at 74-75). He testified that the entry simply meant that he did not see the smoke detector during his evaluation (*Id.* at 74).

As observed in *Downey* (48 AD3d at 618, *affg* 12 Misc 3d 1193 [A], 2006 NY Slip Op 51560 [U] [2006]), "oftentimes, the fire detector is knocked down during the course of firefighting efforts at a location and therefore, when an individual creating an incident report views the scene after the incident, they [sic] have no way of knowing that there was, in fact, a working smoke detector." In fact, at the time Marshal Cusumano had made his report, Chief Heal had already observed the smoke detector on the floor (Chief Heal's Dep. Transcript at 64, 160), and (as noted above) Chief Heal concluded that "the water under high

pressure [used by the firefighters must have] hit the ceiling [and] knocked it off the ceiling" and that he had seen this happen first-hand "many times" (*Id.* at 63). Thus, Marshal Cusumano's 10-45 Report is insufficient to create a triable issue of fact as to the presence of the smoke detector (*see Downey*, 48 AD3d at 619).

Plaintiffs assert that much of the information contained in Chief Heal's BF-24 report was given to him by other people. A report by a firefighter made in the ordinary course of his or her duties, however, has been held to be admissible and reliable (*see Scully v Brooklyn Union Gas*, 35 AD3d 435, 436 [2006]; *Peyton*, 14 AD3d at 52; *Marsden v EMLT Realty Corp.*, 304 AD2d 417, 418 [2003]). In any event, Chief Heal personally observed the smoke detector first-hand and corroborated his BF-24 report with his testimony at his deposition (Chief Heal's Dep. Transcript at 63, 149, 159-160, 175).

Plaintiffs further argue that Chief Heal's recollection of the presence of a smoke detector in apartment J should be subjected to scrutiny by the trier of fact because he spent only 10 minutes inside the apartment (Chief Heal's Dep. Transcript at 121), and his deposition was not taken by them until almost four years after the fire. Such argument is unavailing. Chief Heal testified that he was able to independently recollect the specific presence of the smoke detector (*Id.* at 58, 149, 175), and the mere passage of time from the date of the fire does not create a triable issue of fact as to his unequivocal testimony or his credibility. Plaintiffs fail to cite any evidentiary support for their speculation that Chief Heal's

observations were suspect (*see Butler-Francis v New York City Hous. Auth.*, 38 AD3d 433, 434 [2007]).

Plaintiffs attempt to attack Chief Heal's deposition testimony by noting that Chief Heal had responded no when asked if he had heard a smoke detector at the time he first went to the foyer and that he stated that he did not remember if anyone told him that they heard a smoke detector going off (Chief Heal's Dep. Transcript at 138-139). Chief Heal, however, clarified his answers by stating that he thought he was being asked if a smoke detector was going off in another apartment (*Id.* at 140). He specifically testified that the firefighters who responded to the scene heard the smoke detector in the subject apartment (*Id.* at 141-142).

Plaintiffs point to the fact that none of the photographs taken by the Fire Department show the smoke detector. However, the absence of a photograph of the smoke detector (which was not a potential ignition source) does not indicate that no smoke detector was present, particularly since its presence was already observed and indicated in the BF-24 report. Moreover, (as noted above), three and a half days after the fire, Rincones photographed a smoke detector, which, he testified at his deposition, he found between the bedroom and the bathroom on the floor of the subject apartment (Rincones' Dep. Transcript at 76). Rincones also photographed the mounting for a smoke detector which, he testified at his deposition, was either on the wall or on the ceiling, and was in the hallway just outside the bedroom of the subject apartment (*Id.* at 79). Rincones further testified that he found the smoke detector which he photographed on the floor below the bracket (*Id.* at 80).

Plaintiffs contend that there is no testimony offered by defendant to connect the photographs taken by Rincones with the conditions at the apartment as it existed at the time of the fire. This contention is without merit. Chief Heal testified, at his deposition, that following a fire, there is continuity of evidence and the Fire Department does not leave the fire apartment unoccupied and did not allow non-Fire Department personnel inside the apartment prior to Rincones' entry (Chief Heal's Dep. Transcript at 170, 172). These photographs were taken by Rincones only three and a half days after the fire, long before this litigation was commenced, and there is no evidence that the conditions in the apartment had changed in this short amount of time. Rincones was also deposed in this matter with respect to his photographs and observations at the fire scene. Rincones' testimony, at his deposition, specifically describes the circumstances under which the photographs were taken, connecting them to the fire at issue (Rincones' Dep. Transcript at 79-80). Furthermore, Rincones' deposition testimony and affidavit are consistent with Chief Heal's deposition testimony and the BF-24 report regarding the presence of the smoke detector. Thus, plaintiffs' rank speculation questioning the authenticity of the photographing of the smoke detector are insufficient to create a question of fact.

Plaintiffs argue that a triable issue of fact is raised because Chief Heal testified, at his deposition, that he saw a smoke detector on the floor of the living room, while Rincones testified that he found it on the floor outside the bathroom (Chief Heal's Dep. Transcript at 159-160; Rincones' Dep. Transcript at 79-80). Such argument is unavailing since the exact

location of the smoke detector could have been moved due to the activities of the firefighters. The fact remains that the deposition testimony of both Chief Heal and Rincones establishes the presence of the smoke detector in the subject apartment.

Plaintiffs have submitted the expert affidavit of Robert Malanga (Malanga), a fire protection engineer, who asserts that the smoke detector depicted in Rincones' photograph is remarkably clean and undamaged, and shows no heat or smoke damage, whereas the smoke detector bracket shows clear evidence of heavy smoke. Malanga concludes that this shows that no smoke detector was installed on this bracket at the time of the fire. This speculative conclusion, however, is not supported by the evidentiary proof (*see Fields*, 302 AD2d at 625). Moreover, contrary to this conclusion, a review of the photograph reveals that the smoke detector actually appears darkened and charred.

Plaintiffs contend that since the smoke detector found by Rincones was lying face up, there is no way to tell whether the smoke detector had a battery inserted. However, it is "not the landlord's duty to maintain or replace the smoke detector subsequent to the commencement of the apartment's occupancy" (*Fairclough*, 309 AD2d at 619-620; *see also* Administrative Code §27-2045 [b]). Once a smoke detector is provided by the owner, the occupant of the apartment is solely responsible for its maintenance, such as the replacement of batteries (*see* Administrative Code § 27-2045 [b]; *Peyton*, 14 AD3d at 53; *Tucker v 64 W. 108th St. Corp.*, 2 AD3d 193, 194 [2003]; *Acevedo*, 280 AD2d at 94).

Malanga also criticizes Rincones' failure to remove and preserve the smoke detector. However, the smoke detector's presence was adequately documented by Rincones' photograph and the BF-24 report. In any event, since the occupant of the apartment was responsible for the smoke detector's subsequent maintenance, plaintiffs have not raised any viable claim of spoliation (*see Peyton,* 14 AD3d at 54).

Plaintiffs rely upon Malanga's expert opinion that if operable smoke detectors had been installed in apartment J, and, thus, early warning provided, the occupants would have been able to escape the apartment prior to the development of the untenable conditions that caused Suhina's injuries and Aulovs' death. Malanga concludes that the absence of the smoke detector was a proximate cause of Suhina's injuries and Aulovs' death.

Malanga's conclusion, however, lacks any evidentiary support and assumes the absence of the smoke detector, a fact refuted by the evidence (*see Fields*, 301 AD2d at 625). In any event, even if it could be established that defendant failed to install a smoke detector in apartment J, plaintiffs' claim would still fail because they cannot show through admissible evidence that the failure to install it was a proximate cause of Suhina's injuries and Aulovs' death.

Plaintiffs rely upon *Lein v Czaplinski* (106 AD2d 723, 725 [1984]), in which the Appellate Division, Third Department, found that the plaintiff therein had "adduced sufficient evidence of proximate cause" that the landlord's failure to install a smoke detector caused the alleged injuries. Such reliance is misplaced. This matter is distinguishable from

Lein since, in *Lein* (106 AD2d at 724), the Fire Chief who investigated the fire specifically testified that the uninstalled smoke detector, which had been left in its box on the foot of the stairs, was not placed in the correct location and thus failed to give adequate warning to the decedent. Among the evidence recounted by the Appellate Division, Third Department, in *Lein* (106 AD2d at 724), was the testimony of the coroner that the decedent had apparently awakened and tried to escape but was by then too overcome by smoke to do so. Here, there is no such evidence, and plaintiffs have not presented adequate proof on the issue of proximate cause (*compare Salmon v Wendell Terrace Owners Corp.,* 5 AD3d 372, 374 [2004]; *Binh Nguyen v Prime Residential Bronx R&R v LLC,* 307 AD2d 201, 202 [2003]).

Malanga simply speculates that Suhina and Aulovs would have been alerted to the existence of the fire earlier and been able to escape if a smoke detector had been installed. However, there is no evidence to substantiate Malanga's speculation that Suhina and Aulovs did not hear a smoke alarm. Malanga's expert affidavit contains only bare conclusory allegations and assumes facts not supported by the evidence (*see Fields*, 301 AD2d at 625).

Malanga has failed to demonstrate with any evidence where Suhina and Aulovs were when the fire started or whether or not they were alerted to the existence of the fire before they sustained their injuries (*see Acevedo*, 280 AD2d at 96; *Amble*, 157 AD2d at 689). Noticeably absent from plaintiffs' expert's affidavit is any indication of an opinion as to the rate at which the fire spread, or the point in time at which an operating smoke detector would

have alerted Suhina and Aulovs to the fire (*see State Farm Ins. Co. v Nichols,* 34 AD3d 994, 997 [2006]; *Alloway* v *715 Riverside Dr.*, 298 AD2d 148, 149 [2002]).

Malanga simply relies on the speculative assumption that a smoke detector possibly could have prevented Suhina's injuries and Aulovs' death (*see Downey,* 48 AD3d at 619; *State Farm Ins. Co.*, 34 AD3d at 997; *Alloway*, 298 AD2d at 149; *Acevedo,* 280 AD2d at 96; *Jamison v 157-61 W. 105th St. Hous. Dev. Fund Corp.*, 15 Misc 3d 1106 [A], 2007 NY Slip Op 50519 [U], *4-5 [2007]). Malanga's expert affidavit is devoid of any evidentiary facts, and is not based upon facts in the record or personally known to him, but largely consists of mere unsupported allegations and conclusory speculations, which are insufficient to raise a triable issue of fact to defeat summary judgment (*see Delgado,* 51 AD3d at 571; *Butler-Francis*, 38 AD3d at 434; *Alloway*, 298 AD2d at 149).

Suhina testified, at her deposition, that she cannot recall the incident because her memory was "erased" by the fire (Suhina's Dep. Transcript at 28, 51-54, 57). Thus, there is no testimony that Suhina and Aulovs were not timely alerted to the existence of the fire before sustaining their injuries (*see Acevedo*, 280 AD2d at 96).

Malanga speculates that the positions of Suhina and Aulovs lying by the door show that they failed to hear a smoke alarm. However, Malanga fails to proffer any scientific data or evidentiary support to demonstrate that the mere positions of Suhina and Aulovs by the door show that they failed to hear a smoke alarm so as to connect the absence of a smoke detector as a proximate cause of Suhina's injuries and Aulovs' death. In this regard, it is

noted that the hospital records indicate that Suhina had an excessive blood alcohol level of 153 mg/dL and Aulovs had an excess blood alcohol level of 116.9 mg/dL on the night of the fire. Elizabeth Spratt (Spratt), defendant's expert toxicologist, who reviewed Suhina and Aulovs' hospital records, concluded, to a reasonable degree of scientific certainty, that Suhina and Aulovs' physical senses and their ability to react to the fire were impaired by the amount of alcohol that they had both consumed that evening. Thus, Suhina and Aulovs' positions at the door to the apartment could have been equally due to their state of intoxication which (according to Spratt's expert report) diminished their capacity to appreciate the danger that they were in and to timely respond to the fire. Consequently, Malanga's speculative and conclusory expert affidavit is insufficient to rebut defendant's *prima facie* entitlement to summary judgment or to raise an issue of fact (*see Butler-Francis*, 38 AD3d at 434).

Plaintiffs have also submitted the expert affidavit of Dr. Eugene Khotimsky (Dr. Khotimsky), a psychiatrist, to show that Suhina has no memory of the day of the fire. Dr. Khotimsky concludes that Suhina does not recall the events of the day of the fire due to traumatic amnesia caused by the event of the fire and her resulting injuries. Plaintiffs argue that since this is a wrongful death case and Suhina has lost her memory of the fire, they should be held to a lesser standard of proof of proximate cause pursuant to the holding in *Noseworthy v City of New York* (298 NY 76, 80 [1948]).

Plaintiffs' reliance on the doctrine set forth in *Noseworthy* (298 NY at 80) is unavailing. While the burden of proof may be lessened, Suhina's amnesia and Aulovs' death do not relieve plaintiffs of their obligation to provide some proof from which defendant's negligence can reasonably be inferred (*see Taino v City of Yonkers,* 43 AD3d 401, 402 [2007]). Here, no reasonable inference can be drawn to support a claim that the absence of a smoke detector proximately caused Suhina's injuries and Aulovs' death even under the reduced standard applicable to plaintiffs in wrongful death cases (*see Noseworthy*, 298 NY at 80; *Peyton*, 14 AD3d at 54; *Acevedo*, 280 AD2d at 98). Thus, since plaintiffs have failed to establish any proof from which negligence can be inferred, the *Noseworthy* doctrine (298 NY at 80) does not benefit plaintiffs.

Plaintiffs also argue that questions of fact exist as to the cause of the fire, which preclude a granting of summary judgment to defendant. Malanga contends that due to Marshal Cusumano and Rincones' failure to identify any other potential causes of the fire, they were "backed into" a conclusion that the fire was most probably caused by the careless use of smoking material. Malanga claims that the record contains no physical, documentary, or testimonial evidence to support defendant's theory that the fire started on the couch.

Malanga's contention is without merit. The evidence discloses that Marshal Cusumano examined the classic V-pattern emanating from the area of most damage towards the area of least damage, and he determined that the cause and origin of the fire was the

couch in the living room (Marshal Cusumano's Dep. Transcript at 86-89, 95). Marshal Cusumano's conclusion was corroborated by Chief Heal, who had observed that the couch had burned to its springs (Chief Heal's Dep. Transcript at 58, 123, 136). While Malanga calls into question the investigative efforts of all of the Fire Department officials and Rincones, he fails to elaborate upon how they made mistakes in determining the cause of the fire.

Plaintiffs claim that the physical evidence in this case was manipulated to bolster defendant's defense. Specifically, plaintiffs assert that the smoking materials which were photographed appear to have been undamaged by the fire, and collected and photographed together. However, Suhina admitted that she and Aulovs were smokers and that they smoked in the apartment (Suhina's Dep. Transcript at 49-50), and plaintiffs do not deny that smoking materials were present in the apartment at the time of the fire.

Malanga asserts that defendant failed to properly exclude all potential alternative sources for the fire, including electrical sources. Malanga, however, never demonstrated any alternative ignition source (*see Butler-Francis*, 38 AD3d at 434). Malanga never examined the scene of the fire, and his expert affidavit is "devoid of evidentiary facts and consist[s] of mere conclusions, speculation and unsupported allegations" (*Castro v New York Univ.*, 5 AD3d 135, 136 [2004]; *see also Butler-Francis*, 38 AD3d at 434). While Suhina claimed, at her deposition, that there were ongoing electrical problems in the apartment, such as sparking from electrical wires and appliances (Suhina's Dep. Transcript at 46-48), Chief Heal determined that the fire was not electrical (Chief Heal's Dep. Transcript at 145, 153)

and Marshal Cusumano likewise concluded that electrical outlets were not the cause of the fire (Marshal Cusumano's Dep. Transcript at 115-116). Rincones, in his expert affidavit, also concluded that neither the outlet located behind the couch nor faulty wiring were sources of ignition for the fire.

The investigating fire marshal's deposition testimony, along with the other evidence submitted by defendant, is sufficient to establish the cause of the fire (*see Delgado*, 51 AD3d at 571; *Colon v H & B Plumbing & Heating*, 305 AD2d 235, 236 [2003]). Thus, plaintiffs' opposition papers fail to raise a triable issue of fact that the fire had been caused by some reason other than careless smoking (*see Delgado*, 51 AD3d at 571).

Consequently, defendant has sufficiently established its defense so as to warrant the entry of summary judgment dismissing plaintiffs' complaint as against it as a matter of law (*see* CPLR 3212 [b]; *Downey*, 48 AD3d at 618; *Amble*, 157 AD2d at 689). Defendant's motion must, therefore, be granted (*see* CPLR 3212 [b]).

Accordingly, defendant's motion for summary judgment dismissing plaintiffs' complaint as against it, is granted.

This constitutes the decision and order of the court.

ENTER,

J. S. C.