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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Index Number : 111967/2007

CHANG, JULIA

VS.

BOARD OF MANAGERS

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

this motion to/for _____

	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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

MAY 13 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: MAY 10 2010

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Julia Chang,

Plaintiff (s),

-against-

The Board of Managers of 325 Fifth Avenue Condominium, Cooper Square Realty, Inc., and Young Taik Oh,

Defendant (s).

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DECISION/ ORDER
Index No.: 111967-2007
Seq. No.: 004

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs' n/m (3212) w/LCS affirm, exhs	1
Pltf opp w/JAP affid, TEC affirm	2,3
Defs' reply w/ LCS affirm	4
Steno Minutes (3/18/10)	5

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff alleging damages as a result of lax security. The Board of Mangers of 325 Fifth Avenue Condominium ("board") and Cooper Square Realty, Inc. ("management company") seek summary judgment dismissing the claims against them. The moving defendants have answered the complaint and this action was discontinued with prejudice as to defendant Young Taik Oh on December 17, 2008). The plaintiff filed her note of issue on October 9, 2009. Since his motion was timely filed thereafter, it is ripe for consideration and decision on the merits (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004)]. There have been prior motions in this case seeking preanswer dismissal of the action, to compel discovery and for

sanctions. Those matters, arguments, etc. will not be repeated, in this decision (see Orders, Gische J., 6/25/08 and 6/19/09).

Arguments

Plaintiff alleges that the defendants were negligent because her condominium unit was burglarized. She contends that the board is responsible for ensuring the proper maintenance of the building located at 325 Fifth Avenue, New York, York ("the building") wherein she has her residence (Unit 26B) ("apartment") and that the board breached that duty to her by not improving its security following a rash of burglaries at the building. The measures she contends should have been undertaken include installation of security cameras, security personnel to monitor those cameras and a lock on the door leading from the garage to the interior stairwell.

The board and management company (hereinafter "defendants", unless otherwise specified) argue they are entitled to summary judgment as a matter of law on the basis that it did not owe plaintiff a duty to keep her safe from unforeseeable criminal acts. Defendants maintain that plaintiff does not know, and cannot prove, how the alleged burglar got into her apartment. Although plaintiff contends the burglar was an intruder, defendants allege he or she could have been let into the building by another tenant.

Defendants question whether plaintiff's apartment was really burglarized because there was no forced entry and the bottom lock (according to plaintiff) was locked, but not the top. Defendants contend that not only should she have locked both locks, she should have put her valuables ($500,000 worth of jewelry) in the apartment's wall safe when she left the apartment. Defendants contend that the bottom lock might have been

working fine, but someone had a key. Thus, defendants contend plaintiff was the sole proximate cause of the events that resulted in her damages.

Plaintiff has hired a private investigator ("Pepe") who investigated the burglary by, among other things, visiting the building, interviewing persons on staff and construction workers who were completing work at the building. Pepe states that the building's manager ("Ferrer") demonstrated how easy it is to open the apartment door with a credit card or wire. Pepe opines this is why there were no signs of forced entry, though plaintiff locked the bottom lock on the door. Pepe also states the video storage system had malfunctioned and Ferrer discovered there was no recorded footage of the day of the burglary. Pepe observed that construction workers regularly disarmed the alarm system in the building to avoid false alarms.

Defendants contend that the memo they sent to all residents on April 7, 2007 notifying residents to lock their doors and take extra precautions to keep themselves safe, should have prompted plaintiff to be more careful of her personal belongings.

Discussion

A movant seeking summary judgment in its favor must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Furthermore, all the evidence must be viewed in the light most favorable to the party opposing the motion and all reasonable inference must be resolved in that party's favor (Udoh v. Inwood Gardens, Inc., 70 A.D.3d 563 [1st Dept 2010]).

Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

Landlords have common-law duty to take minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by third persons (Mason v. U.E.S.S. Leasing Corp., 96 N.Y.2d 875 [2001]). Therefore any argument that the landlord is not the guarantor of the safety of plaintiff or her property is only a partial recitation of the law. Furthermore, liability is governed by the standard of reasonable care under the circumstances (Mason v. U.E.S.S. Leasing Corp., supra). Thus, where there have been prior incidents of criminal conduct of the same type or the same location this may establish plaintiff's claim that the danger was forseeable.

According to plaintiff, there were a total of 8 reported burglaries in this building in a very short period time before her apartment was burglarized. She claims that she heeded management's warning (the memo) to take precautions with locking her apartment door. Plaintiff contends that despite those precautions, her apartment was burglarized and that this was because the locks were flimsy and there was inadequate security.

Though defendants disbelieve plaintiff's account of what happened and they claim it was plaintiff's "fault" her jewelry was stolen, there are disputed and unresolved issues of fact that must be decided by the trier of fact. Among the disputed issues are whether plaintiff's apartment was burglarized and if so, whether defendant took reasonable steps to kept the building safe in light of these prior incidents (Udoh v. Inwood, 70 AD3d 563 [1st Dept 2010]; Wayburn v. Madison Land Limited Partnership,

282 AD2d 301 [1st Dept 2001]). Plaintiff has come forward with evidence that the video security system in the building was not properly set up and that the construction workers working at the building had a habit of deactivating alarmed doors while they were working. These claims raise triable issues of fact whether the building was secure and whether defendants took reasonable steps to keep the premises safe. Although defendants disbelieve plaintiff's claim, that her apartment was burglarized. The issue of what security measures defendants should have undertaken is question of fact for the trier of fact to decide as well (Allan v. Helmsey-Spear, Inc., 50 NY2d 507 [1980]).

Having failed to prove that they are entitled to summary judgment as a matter of law, defendants' motion is denied. Since the note of issue was filed, this case is ready to be tried. Therefore, plaintiff shall serve a copy of this decision on the office of Trial Support so that the case can be scheduled for trial.

Any relief that has not been expressly addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
May 10, 2010

So Ordered:

Hon. Judith J. Gische, JSC