[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Duplicate Original

Ostroy, et ano.,

- v -

Sir Speedy, Inc., et al.

Third Party Action

INDEX NO. 114674-2008

MOTION DATE

MOTION SEQ. NO. #1

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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 is decided in accordance with the accompanying decision

FILED

JUL 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/17/11

7/1/11 Louis B. York J.S.C.

LOUIS B. YORK J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 2

----------X

ANDREW B. OSTROY, Individually and as Executor of the Estate of ADRIENNE LEVINE, Deceased, and as Parent and Natural Guardian of SOPHIE OSTROY, an infant daughter of ADRIENNE LEVINE, Deceased,

Plaintiff,

-against-

SIX SQUARE LLC, EDWARD STEINMAN, JOSEPH ALPERT, CHARLES ALPERT, BRADFORD GENERAL CONTRACTORS CO., INC., BGC CONSTRUCTION CORP., and JUS HERNANDEZ a/k/a LUIS HERNANDEZ,

Defendants.

----------X

BRADFORD GENERAL CONTRACTORS CO.,INC., and JUS HERNANDEZ, a/k/a LUIS HERNANDEZ,

Third-Party Plaintiffs,

-against-

DIEGO PILLCO,

Third-Party Defendant.

----------X

Index No. 114674/08

DECISION AND ORDER

LOUIS B. YORK, J.:

Motion sequence numbers 007 and 008 in the above captioned action are consolidated for disposition.

In motion sequence number 007, defendants Bradford General Contractors Co., Inc. (Bradford) and Jus Hernandez, a/k/a Luis Hernandez (Hernandez) move, pursuant to CPLR 3211 and 3212, for summary judgment dismissing the complaint, and all cross claims asserted against

Hernandez. In motion sequence number 008, defendants Six Square LLC (Six Square), Edward Steinman, Joseph Alpert and Charles Alpert (collectively, the Six Square defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

The within action is brought to recover damages for the wrongful death of Adrienne Levine, an actress, writer and director who wrote and/or performed in a number of films, including the independent film "Waitress." Levine, who performed under the name Adrienne Shelly, was assaulted and killed on November 1, 2006 in her Greenwich Village apartment by Diego Pillco (Pillco), an undocumented immigrant worker, who was performing renovation work in the building.

In addition to having a successful career, Levine was the mother of a two-year old daughter, plaintiff Sophie Ostroy, and the wife of plaintiff Andrew Ostroy. Although the family lived elsewhere, Levine rented an apartment at 15 Abingdon Square, New York, New York (the Premises), as a quiet place to do her writing and conduct her business.

At the time of the murder, Pillco was employed by defendant Bradford. Bradford, a small general contracting and repair company, was owned and operated by defendant Hernandez and his brothers. Bradford had been hired to perform renovations on apartment 37, one floor below Levine's apartment. The Premises was owned, operated and managed by Six Square, a limited liability company, which, in turn, was owned by Joseph and Charles Alpert, and managed by defendants Joseph Alpert and Edward Steinman.

Pillco confessed and pled guilty to killing Levine. However, his account of the circumstances leading up the crime changed. Initially, in a videotaped confession, given on November 6, 2006, Pillco stated that, while he was performing demolition work in the bathroom

of apartment 37, Levine came downstairs from her apartment, and asked Pillco not to make so much noise. Pillco stated that he was not in a good mood on that day, and reacted by throwing the hammer on the floor. He stated that Levine yelled at him and he hit her with the door as she was leaving. Levine then said she was going to call the police. Pillco stated that he then followed her up the stairs to her apartment, pushed her and punched her. Levine fought back but Pillco pushed her again, and according to him, she fell backwards against a computer table in the apartment and died. Pillco then decided to make her death appear as if it had been a suicide by tying one end of a sheet around her neck and the other end over the shower rod so that it would appear as if she had hanged herself (Herbst Aff., Ex. 1).

However, on February 14, 2008, when he pleaded guilty to first degree manslaughter, Pillco gave a different account of his actions. In his allocution, Pillco stated that when he was coming upstairs from the basement he saw Levine in the elevator and decided to rob her. Levine got off at the fourth floor and Pillco went up to the fifth floor. He then went down the stairs and saw Levine's purse next to the open door of her apartment. He grabbed the purse and took the money, but when he went to put the purse back Levine came out and saw him. Levine stated she was going to call the police and Pillco tried to grab the phone from her. Pillco stated he got scared and covered her mouth. When Levine fell to the floor he saw a sheet and decided to choke her. Pillco admitted that he tied the sheet around her neck and strung Levine up so that she choked to death (Comer Aff., Ex. N).

Plaintiffs commenced the within action in October 2008, alleging causes of action for personal injuries to Levine (first cause of action), wrongful death (second cause of action), loss of services and estate accumulation (third cause of action), and loss of parental guidance (fourth

cause of action). The Six Square defendants interposed an answer November 25, 2008, and defendants Bradford and Hernandez served their answer on December 2, 2008. On December 23, 2008 Bradford and Hernandez commenced a third-party action against Pillco. Pillco is currently incarcerated and has defaulted in answering the third-party complaint.

Plaintiffs contend that defendants are liable for damages resulting from Pillco's crime, on the three basic theories: First, plaintiffs contend that defendants Bradford and Hernandez violated the Immigration Reform and Control Act of 1986 (IRCA) by hiring an undocumented immigrant to perform work and that the Six Square defendants knew of the undocumented worker and were complicit in this violation. Plaintiffs contend that the violation of this federal statute constitutes negligence per se and further contend that, by hiring an undocumented worker who would be fearful of the authorities, the defendants exposed tenants, like Levine, to the danger of physical assault if she threatened to call the authorities, and defendants are, therefore, absolutely liable to the plaintiffs.

Second, plaintiffs allege that defendants are liable under the theory of respondeat superior, because Pillco was acting within the scope of his employment. Plaintiffs allege that although Pillco's assault involved a lack of judgment, his actions were directed at preventing Levine from calling the authorities which, because of Bradford's knowing and unlawful use of undocumented workers, presented a threat to Bradford's interests. According to plaintiffs, Pillco's assault was, therefore, committed while acting in the scope of his employment and in furtherance of his master's interests.

Third, plaintiffs allege that the defendants were negligent. Plaintiffs claim that Bradford and Hernandez are liable for illegal and negligent hiring, training, retention and supervision.

Plaintiffs contend that, because Pillco was hired illegally and placed in a building alone and unsupervised, it was foreseeable that he would interact with a tenant, knowing that Pillco would be fearful of the authorities and that his illegal status and fear might provoke him to assault the tenant.

Plaintiffs further argue that Six Square failed to exercise reasonable care to employ a competent and careful contractor, and that Pillco and Bradford were not qualified to do the work. Plaintiffs argue that Six Square had a nondelegable duty to repair and render habitable the apartments in the building and that it is, therefore, liable for the tortious acts of an independent contractor.

Finally, plaintiffs allege that the Six Square defendants were negligent in failing to provide proper security in the building, such as cameras, which might have deterred Pillco from committing this crime. Plaintiffs expert opines that, if one were going to hire an undocumented worker like Pillco, the tenants in the building should have been warned of his illegal status so that they could have avoided provoking him by threatening to call the authorities (Greene Aff., ¶ 8).

Motion Sequence Number 007

Bradford and Hernandez seek to dismiss the action and all cross claims against Hernandez.

Violation of IRCA

As noted, plaintiffs argue that, since Bradford violated federal law and regulation by failing to conduct eligibility checks of their workers, this defendant, along with Hernandez, exposed tenants and authorized visitors in the building to undocumented workers who were

fearful of the police and immigration authorities, and might, therefore, present a danger if an altercation escalated, and a threat was made to call the authorities. Plaintiffs argue that these actions constitute both negligence per se and negligence.

"[U]nder New York Law, a defendant is liable for negligence per se if the plaintiff establishes (1) that he or she is among the class of people for whose particular benefit a statute has been enacted; (2) that a private right of action would promote the legislative purpose behind the statute; and (3) that creation of the right would be consistent with the overall legislative scheme" (*Fagan v AmerisourceBergen Corp.*, 356 F Supp 2d 198, 214 [ED NY 2004]).

With respect to the Immigration Reform and Control Act of 1986, the House Report stated that the purpose of the legislation was:

> to close the back door on illegal immigration so that the front door on legal immigration may remain open. The principal means of closing the back door, or curtailing future illegal immigration, is through employer sanctions.
>
> . . . Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in such of employment

(*United States v Kim*, 193 F 3d 567, 573 [2d Cir. 1999], quoting, H.R.Rep. No. 99-682 [I], at 46 [1986]).

According to the stated legislative purpose, the IRCA was not created to protect individuals from illegal aliens. Rather, it was to encourage legal immigration through employer sanctions. Therefore, since Levine was not within a class of persons intended to be protected by the statute, Bradford's violation of it is an insufficient basis upon which to place liability for Pillco's crime.

Nor was it foreseeable that Bradford and Hernandez's failure to document Pillco's eligibility to work in this country would lead to Levine's murder. "Even where a statutory command is not obeyed, there is no breach of duty towards those who do not come within the zone of apprehended danger, and no liability where the injury is not the result of disobedience of the statute" (*Boronkay v Robinson & Carpenter*, 247 NY 365, 368 [1928], citing *Di Caprio v New York Cent. R.R. Co.*, 231 NY 94 [1921]). Thus, the First Department has held that an owners' violation of a statute is insufficient to defeat a motion for summary judgment where there is no evidence that the violation of the statute was a proximate cause of the crime (*Coronel v Chase Manhattan Bank*, 19 AD3d 310 [1st Dept 2005], *lv to app dismissed* 7 NY3d 836 [2006]).

Here, there was no proximate cause between Pillco's undocumented status and the crime he committed. Plaintiffs' argument, that Pillco's undocumented status made him fearful of the authorities, and, therefore, more likely to commit a violent crime, as opposed to fleeing the scene, is simply not logical. Bradford and Hernandez are, therefore, not liable for Pillco's crime on this basis as well.

The Doctrine of Respondeat Superior

Under the doctrine of respondeat superior, a master may be held vicariously liable for a tort committed by an employee in the course of the performance of his or her duties, "even if such duties are carried out in an irregular fashion or with disregard of instructions" (*Adams v New York City Tr. Auth.*, 211 AD2d 285, 294 [1st Dept 1995], *affd* 88 NY2d 116 [1996] citing *Riviello v Waldron*, 47 NY2d 297, 302 [1979]; *Heindel v Bowery Sav. Bank*, 138 AD2d 787, 788 [3d Dept 1988]; *Murray v Watervliet City School Dist.*, 130 AD2d 830, 831 [3d Dept 1987];

Jones v Weigand, 134 App Div 644, 645 [2d Dept 1909]). However, in order to hold an employer liable for an employee's actions, the employee's "tortious act must have in some way been effectuated to advance the employer's interest" (*Adams v New York City Tr. Auth.*, 211 AD2d 285 at 294). "[T]he employer bears no vicarious liability where the employee committed the tort for personal motives unrelated to the furtherance of the employer's business (*see Carnegie v J.P. Phillips, Inc.*, 28 AD3d 599, 600 [2d Dept 2006]).

"To act within the scope of employment, 'the servant's conduct must be the kind which he is authorized to perform' . . . and 'actuated at least in part, by a desire to serve the master.'" (*Massey v Starbucks Corp.*, 2004 WL 1562737, 2004 US Dist Lexis 12993 [SD NY 2004), quoting *United States v Demauro*, 581 F 2d 50, 54 [2d Cir 1978]).

Here, Pillco's crime was unrelated to his job of renovation work and cannot be said to have been for the benefit of his employer. His crime was clearly outside the scope of his employment. Neither Bradford nor Hernandez are liable for Pillco's conduct on the basis of respondeat superior.

Negligent Hiring

In order to establish a claim for negligent hiring, a plaintiff is required to present evidence that "the employer knew or should have known of the employee's propensity for the conduct resulting in the injury" (*Jackson v New York Univ. Downtown Hosp.*, 69 AD3d 801, 801 [2d Dept 2010][internal quotation marks and citations omitted]; *Carnegie v J.P. Phillips, Inc.*, 28 AD3d 599, 600 [2d Dept 2006]; Oliva v City of New York, 297 AD2d 789, 791 [2d Dept 2002]; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161 [2d Dept], *app dismissed*, 91 NY2d 848, *cert denied* 522 US 967 [1997]. "There is no common-law duty to

institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee" *(Kenneth R. v Roman Catholic Diocese of Brooklyn,* 229 AD2d at 163). Here, there has been no evidence presented that either Bradford or Six Square had reason to believe that Pillco was a dangerous person who should not have been allowed to work at the Premises. Pillco's status as an undocumented alien is insufficient grounds, standing alone, to suggest otherwise.

While this Court sympathizes with plaintiffs' loss, nonetheless, based upon the foregoing, plaintiffs have not presented sufficient legal grounds upon which to hold Bradford or Hernandez liable for Pillco's vicious crime.

Motion Sequence Number 008

Having determined that Bradford and Hernandez may not be held liable for Levine's death under theories of violation of IRCA, respondeat superior and negligent hiring of Pillco, the Six Square defendants may not be held liable under those theories either. As to these defendants, plaintiffs' also assert negligence with respect to the security in the building, and with respect to their obligation to employ a careful and competent contractor. These issues are considered herein.

Security Measures

"A possessor of real property is under a duty to maintain reasonable security measures to protect those lawfully on the premises from reasonably foreseeable criminal acts of third parties" (*Bryan v Crobar*, 65 AD3d 997, 999 [2d Dept 2009], citing *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 518-519 [1980]; *Dillman v Bohemian Citizens Benevolent Socy. of Astoria*, 227 AD2d 434, 435 [2d Dept 1996]). "Foreseeable" means that "in terms of past experience 'that

there is a likelihood of conduct on the part of third persons . . . which is likely to endanger the safety of the visitor'" (*Jacqueline S. v City of New York*, 81 NY2d 288, 294 [1993], quoting *Nallan v Helmsley-Spear, Inc.*, 50 NY2d at 519). However, a party cannot be held liable for the extraordinary and unforeseeable acts of a third party (*Dillman v Bohemian Citizens Benevolent Socy. of Astoria*, 227 AD2d at 435). "[T]he criminal conduct at issue must be shown to be reasonably predictable based on prior occurrences of the same or similar criminal activity at a location sufficiently proximate to the subject location" (*Bryan v Crobar*, 65 AD3d at 999). "Without evidentiary proof of notice of prior criminal activity, the owner's duty reasonably to protect those using the premises from such activity never arises" (*Coronel v Chase Manhattan Bank*, 19 AD3d at 311, quoting *Williams v Citibank*, 247 AD2d 49, 51 [1st Dept] *lv. denied* 92 NY2d 815 [1998]).

The Premises is a six-story residential building with a doorman. An interior door, which separates the lobby from the vestibule, locks automatically when closed. The basement contains the boiler and the superintendent's office area and apartment.

Plaintiffs assert that the Six Square defendants were negligent with respect to security in that there is an unlocked elevator that had no camera at the time of the murder, and an open staircase between floors that has no doors. In addition, plaintiffs present evidence that the superintendent was frequently unavailable and/or unresponsive to the tenants' needs. Plaintiffs contend that the basement areas were supposed to be locked and off-limits to workers, but at the time of the murder these areas were not locked.

Plaintiffs contend that, had there been a security camera in the elevator, it would have deterred Pillco from attempting to rob Levine. Plaintiffs further contend that Six Square had no

procedures in place to govern, supervise or control the workers while they were on the Premise. No sign-in, check-in or other procedure for contractors and their employees was established, nor was there any means of limiting their access to other apartments. According to the plaintiffs, it is well-known that undocumented workers are generally fearful of the authorities, and, therefore, hiring illegal laborers and bringing them into a residential apartment building, where they might have direct unsupervised exposure to tenants unaware of their illegal status, was a gross failure to exercise reasonable care. Plaintiffs contend that the tenants in the building should have been warned of these workers' illegal status and the defendants' failure to do so was a failure to exercise reasonable care for the safety of their tenants.

Plaintiffs have introduced evidence indicating that, ten years prior to Ms. Levine's murder, there was one robbery in the building. In that incident, a man knocked on the door of Apartment 5, which is on the first floor, and said he was a plumber. The woman who lived there let him in and he robbed her (Ramirez, Dep. at 91). Also more than ten years prior to Ms. Levine's murder, there was another incident in which someone broke into an apartment from the fire escape and stole a laptop *(id.*, at 93).

Contrary to plaintiffs' attorney's assertion that Six Square's managing agent (Steinman) believed the building was located in a dangerous place, and was concerned about the possibility of crime in the building, Steinman's deposition testimony was that he believed that the West Village and anywhere in New York City was dangerous (Comer Aff., Ex. L at 110). Plaintiff's attorney's statement that "[n]umerous security-related complaints were received (and ignored) by the Six Square defendants from tenants in the years prior to the incident" (Herbst Aff., ¶ 11) is unsubstantiated by deposition testimony. Moreover, Levine's murder did not occur because an

intruder was able to enter the Premises as a result of inadequate security. Pillco was a worker who was on the Premises to perform renovation work.

Plaintiffs have presented no evidence that there has ever been any criminal activity perpetrated by a worker in the building. Thus, their contention that the Six Square defendants were required to have taken precautions regarding these workers is unfounded (see *Coronel v Chase Manhattan Bank*, 19 AD3d 310, *supra*.).

The Six Square Defendant's Non-Delegable Duty

Plaintiffs argue that the Six Square defendants had a nondelegable duty to render the Premises safe and habitable, and, therefore, even though an employer who hires a general contractor is not liable for the contractor's negligent acts, this case falls under a well-established exception to that rule.

As a rule, "an employer who hires an independent contractor is not liable for the independent contractor's negligent acts" *American Guar. & Liab. Ins. Co. v Federico's Salon*, Inc., 66 AD3d 521, 522 [1st Dept 2009], quoting *Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 [1992]). The exceptions to this rule are: (1) where the employer is under a statutory duty to perform or control work; (2) the employer has assumed a specific duty by contract; (3) is under a duty to keep the premises safe; or (4) has assigned work to an independent contractor which the employer knows or has reason to know involves special dangers inherent in the work, or dangers which should have been anticipated by the employer *(Rosenberg, supra.* at 668).

Plaintiffs argue that, since the Six Square defendants were under a nondelegable duty to keep the premises safe, they are liable for Pillco's crime against Levine.

Were this a case of an injury due to negligent performance of repairs, plaintiffs might be able to charge the Six Square defendants with the exception to the rule. Here, however, the employee of an independent contractor committed an unforeseen criminal act, and the above rule, which applies to a contractor's negligence, is inapplicable.

Kleeman v Rheingold (81 NY2d 270 [1993]) cited by the plaintiffs, is not on point, since it involved the negligent acts of a process server and an attorney-client relationship. The Court stated that: "[a]s plaintiff's attorneys, defendants had a nondelegable duty to her and, accordingly, they cannot evade legal responsibility for the negligent performance of that duty by assigning the task of serving process to an 'independent contractor'" (81 NY2d at 273).

Accordingly, based upon the foregoing, it is

ORDERED that as to motion sequence number 007, the motion by defendants/third party plaintiffs Bradford General Contractors Co., Inc., and Jus Hernandez a/k/a Luis Hernandez to dismiss the complaint is granted and the complaint is dismissed in its entirety as against those defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the third-party complaint, which is based solely upon indemnification is rendered moot and, therefore, dismissed without costs and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that as to motion sequence number 008, the motion by defendants Six Square, LLC, Edward Steinman, Joseph Alpert and Charles Alpert to dismiss the complaint is granted and the complaint is dismissed in its entirety as against said defendants, with costs and

[* 15]

disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the cross claims asserted by defendants Six Square, LLC, Edward Steinman, Joseph Alpert and Charles Alpert against defendants Bradford General Contractors Co., Inc., and Jus Hernandez a/k/a Luis Hernandez are dismissed as moot.

June 17

Dated: A[redacted], 2011

ENTER:

FILED

JUL 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

7/1/11

J.S.C.

LOUIS B. YORK
J.S.C.