

Gjonbalaj v West 89th St. Condominium
2012 NY Slip Op 31920(U)
July 16, 2012
Supreme Court, New York County
Docket Number: 109920/2008
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 109920/2008
GJONBALAJ, ALI
vs
317 WEST 89TH STREET
Sequence Number : 007
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

decided per the memorandum decision dated _____
which disposes of motion sequence(s) no. 007 and 008.

FILED

SEP 12 2012

Dated: 7/16/12

Saliann Scarpulla
SALIANN SCARPULLA *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: PART 19

-----X
ALI GJONBALAJ, as Administrator of
the Estate of ALLEN GJONBALAJ,

Plaintiff,

Index No. 109920/2008
Submission Date: 4/4/12

-against-

THE WEST 89TH STREET CONDOMINIUM
and 317 WEST 89TH STREET LLC C/O
SAMSON MANAGEMENT and FOUR STAR
GENERAL CLEANING CORP.,

DECISION AND ORDER

Defendants.

-----X
THE WEST 89TH STREET CONDOMINIUM
and 317 WEST 89TH STREET LLC,

Third-Party Plaintiffs,

-against-

FOUR STAR GENERAL CLEANING CORP.,

Third-Party Defendant

-----X
For Plaintiff:
Baron Associates, P.C.
2509 Avenue U
Brooklyn, NY 11229

For Defendants/Third Party Plaintiffs
The 317 West 89th Street Condominium and 317 West 89th Street LLC:
Malapero & Prisco LLP
295 Madison Avenue
New York, NY 10017

For Defendant/Third Party Defendant
Four Star General Cleaning Corp.:
Furman Kornfeld & Brennan, LLP
61 Broadway, 26th Floor
New York, NY 10006

HON. SALIANN SCARPULLA, J.:

This is an action for conscious pain and suffering and the wrongful death of Alen Gjonbalaj (“Gjonbalaj”). Defendant/third-party defendant, Four Star General Cleaning Corp. (“Four Star”), moves for an order granting it partial summary judgment dismissing the complaint of Gjonbalaj’s father, plaintiff Ali Gjonbalaj (“Mr. Gjonbalaj” or “plaintiff”), the administrator of Gjonbalaj’s estate. (Motion seq. no. 007). Defendants/third-party plaintiffs The West 89th Street Condominium (the “Condominium”) and 317 West 89th Street LLC (“317 West”) also move for an order granting them partial summary judgment dismissing Mr. Gjonbalaj’s complaint. (Motion seq. no. 008). Motion sequence numbers 007 and 008 are consolidated for disposition.

Background

The Condominium is a building located at 317 West 89th Street, New York, NY and 317 West is its managing agent. In July 2007, Gjonbalaj had been the building’s superintendent for approximately three years. On the morning of Saturday, July 28, 2007, Gjonbalaj who was 26 years old, was found murdered in his first floor apartment, having been shot by an unidentified assailant. Gjonbalaj lived alone, and, as far as his father knew, no one else had keys to his apartment. According to Mr. Gjonbalaj, at the time of his son’s death, the building had not yet converted to a condominium, but there were plans for it to become one. Defendant 317 West was the building’s management company, and was sued “C/O Samson Management” (“Samson”).¹

¹Counsel for 317 West and the Condominium stated that 317 West had been incorrectly sued as “C/O of Samson.”

317 West retained Samson to provide property management services for the Condominium. Samson had employed Gjonbalaj. Samson also employed Gregory Haye ("Haye") as a property manager for the Condominium. Haye testified at his deposition that he began working for Samson before the murder, although he could not recall the date when his employment started.² Haye testified that he was not present at the building on the day of the murder. Although he testified that he would visit the premises periodically, he did not say when or if he had visited, inspected, or conducted any investigation of the building or Gjonbalaj's apartment after the murder.

Gjonbalaj was Samson's sole employee at the building. Haye testified that Gjonbalaj's duties included overseeing the on-site operation of the building, which encompassed overseeing the porters/doormen. In February 2004, Samson as agent for 317 West, entered into a "Cleaning Contract" with defendant Four Star, which remained in effect at the time of Gjonbalaj's death. Pursuant to the Cleaning Contract, Four Star provided porters and doormen at the condominium, and pursuant to later negotiations, the porters and doormen provided "around the clock" service. According to Four Star general manager, Christina Hoffman ("Hoffman"), three porters/doormen worked at the

²There appears to be a question as to whether Haye worked for Samson when Gjonbalaj was murdered. Haye testified at his deposition that he began working for Samson three and one-half years earlier, which would have been approximately three months after the murder. Yet Haye also testified that he worked at the building at the time of the murder. Additionally, Mr. Gjonbalaj testified that his son's supervisor changed once while he worked as the superintendent.

premises daily, each putting in an eight-hour shift.³ The cleaning contract indicated that the people staffing the building's front door were required, during specified hours, to perform cleaning services to the lobby, front hallway, and elevator, and to attend to garbage collection from the floors where the tenants resided. The porters/doormen would also keep the basement and front sidewalk clean, and. The contract provided that the porters/doormen would perform other cleaning services on request for additional fees.

The building's front entrance had a vestibule and a locked door, leading to the lobby. The Four Star employees, while serving in the doormen capacity, worked in the vestibule. The building also had a buzzer/intercom system. Beside the front entryway, there was another locked doorway, which led to the basement. According to Mr. Gjonbalaj, there was another entry into the basement, which was within the building, a few steps down from the lobby level near the rear door of the building.

The building also had a backdoor, which was located near the service elevator. The backdoor was used by the porters/doormen to take out the garbage. The porters would pick up garbage from the tenants' apartments, haul the garbage through the back courtyard, around a side alley, and to the front of the building. While the back of the building was fenced in, no one who testified could say whether there was any door or opening in that fence, or whether there were doors between the courtyard and the alley and between the alley and the front of the building. Hoffman did not know whether the

³Hoffman testified that she had only been on the premises once, when she first started the account.

backdoor locked. Mr. Gjonbalaj testified that he visited his son at the building about five times during the three years that his son was the superintendent, and on some of those occasions the backdoor was locked.

According to Mr. Gjonbalaj, at the time of the murder, his son had been on vacation for at least three days. Gjonbalaj had allegedly told his father that a superintendent from a building across the street would fill in for him while he was on vacation, and vice versa. Mr. Gjonbalaj believed that this was arranged among the two of them and the "supervisors." Mr. Gjonbalaj did not know whether this individual would be paid for his services, or whether the building in which he worked had the same owner. Mr. Gjonbalaj was also unaware of whether this person had filled in for his son during the several days leading up to his death. Mr. Gjonbalaj also testified that about a year after the murder, this individual allegedly told him that the lock on the building's front door had not been working.

Mr. Gjonbalaj testified that, among his son's duties, was fixing broken locks if he could, and that on one occasion, about three to four months prior to the murder, his son told him that the lock on the front door was not locking, that he constantly had problems with it, that he was fixing it almost daily, that he did not know what to do with it, and that "thank God they're replacing the door because the apartment building is going co-op [sic]," so that he would not "have to go crazy." The door was not replaced before Gjonbalaj's death.

Mr. Gjonbalaj was informed of his son's death on the day it occurred and immediately went to the building. The police were at the front door, would not let him in that door, and took him directly to the police station for questioning. The police issued a report which indicated that Marcellus Lemmens ("Lemmens"), a friend of Gjonbalaj's, had informed them that on the morning of the murder he had gone to visit Gjonbalaj. When he arrived the apartment door was "opened," and he found Gjonbalaj severely injured and bleeding on his bedroom floor. Lemmens called the police, who declared Gjonbalaj dead at 11:40 A.M., and canvassed the building with negative results.

A "Supplemental Case Information" report from the City's Chief Medical Examiner's office indicates Gjonbalaj was last seen alive by a "friend," and that same friend found his body, and that the police had not reported the case "until CSV was almost at the scene." The Chief Medical Examiner's office's initial scene investigation report of July 28, 2007, reveals that the investigator first arrived at the scene at 4:17 p.m.; the apartment looked orderly; the apartment door was closed and unlocked; the windows were closed; there was no jewelry on the deceased; and beer and marijuana were found on the living room table. The Medical Examiner's photo of the alleged marijuana on that table had a question mark after the word "marijuana." The Medical Examiner's toxicology report found no drugs or alcohol in the decedent's blood or urine.

Soon after the murder, Mr. Gjonbalaj commenced this action against only 317 West and the Condominium. These defendants then commenced a third-party action

against Four Star, and Mr. Gjonbalaj then added Four Star as a defendant also. Mr. Gjonbalaj's amended complaint alleges that the defendants negligently operated, maintained, repaired, managed, controlled, and supervised the premises, and violated statutes and regulations, including Real Property Law § 231 (2).⁴ Plaintiff's bills and supplemental bills of particulars are devoid of any claim regarding that statute, but add that the defendants failed to have properly operating locks in the lobby; failed to maintain and repair the lobby's locks, or did so negligently; failed to keep the front door closed; permitted the building's other doors to remain unlocked; and failed to properly maintain the buzzer/intercom system, provide adequate and appropriately trained security staff, and take appropriate security measures in a crime-ridden area and for a building that had been subjected to multiple criminal incidents. Plaintiff's pleadings also allege that the doorman was not at the front door when the intruder entered the building.

As to Four Star, plaintiff's pleadings also allege that it violated Multiple Dwelling Law § 50-a, which imposes, in connection with certain class A multiple dwellings, liability on anyone "who shall willfully destroy, damage, or jam or otherwise interfere with the proper operation of, or remove, without justification" the self-closing and self-locking doors and the building's intercommunication system, or parts thereof.

⁴ Real Property Law § 231(2) deals with the liability imposed on owners of real property who knowingly lease or give possession of their property for unlawful businesses, trades, or manufacturing, or permit their property to be used for such unlawful purposes where, as a result, damages ensue from that unlawful use.

Four Star served an answer asserting cross claims against the Condominium and 317 West sounding in common-law indemnification and contribution. The Condominium and 317 West answered, asserting cross claims against Four Star sounding in common-law and contractual indemnification, contribution, and breach of an alleged contract to procure insurance for the protection of the Condominium and 317 West.

At his deposition, Mr. Gjonbalaj testified that he did not know whether, on the day his son was killed, the locks on the building's front and back doors, and his son's apartment door were working, or whether his son was murdered by a building resident, guest, or by an intruder. He also did not know if the intercom/buzzer system was operative when his son was murdered, and whether the front door and the apartment door had been forced open. Further, Mr. Gjonbalaj indicated that he lacked knowledge of any prior criminal activity in the building. Additionally, he testified that he did not know Lemmens. Mr. Gjonbalaj testified that he was unaware of anyone who had threatened his son or with whom he had any fights, and that was told by the police that they had found a gun under his son's mattress and a few empty bags of marijuana on a table in his apartment. However, the police report made no mention of that gun.

Hoffman testified that on a given day, in a 24-hour period, there would have been three doormen on duty. Hoffman identified the three doormen who worked at the building during the time of Gjonbalaj's murder, but could not specify who worked which shift the day of the murder. She spoke to several of them that day as to whether they had

seen anything, but could not remember their responses. Hoffman, thereafter, testified that another individual had been assigned to work at the building at that time, and that it took more than three people to staff the premises. Hoffman also testified that Four Star never missed a shift at the premises.

Hoffman also testified that she had no contact person at the premises and that all her dealings were with Samson, particularly an employee named "Gregory," presumably meaning Haye. She could not remember having a conversation with Gjonbalaj, but believed she might have met him the one time she visited the premises. She did not recall any prior incident at the premises, nor had she received, before the murder, any complaints about Four Star's porters/doormen. Prior to Gjonbalaj's murder, Hoffman was not told that the building's locks were inoperable. She did not know if the rear door lock was working at the time of the murder.

Haye testified that he had contact with Gjonbalaj "[p]erhaps once a week." Haye did not recall whether he had received any complaints about the doormen and did not recall this particular building with respect to the doormen. He could not recall whether he had received, prior to the murder, any complaints from tenants, and had no recollection as to whether Gjonbalaj told him that a doorman had been away from his post for a long time, or that front or back doors had broken locks. Haye also testified that if there was a complaint about a doorman it would go to the superintendent and then, if needed, to him.

The Condominium and 317 West now seek an order granting them summary judgment dismissing the complaint. These defendants argue that because Mr. Gjonbalaj did not know how the assailant entered the building, he cannot demonstrate that defendants' alleged negligence was a cause of his son's death. The Condominium and 317 West also assert that plaintiff cannot show whether the assailant was an intruder, rather than a tenant or a tenant's guest, and therefore cannot demonstrate that any negligence with respect to safeguarding the building's entryways was a cause of his son's death. Further, in light of the police's alleged discovery of marijuana and a gun, these movants suggest that the murderer may well have been someone who was visiting Gjonbalaj for drug related activities involving his own criminal conduct.

The Condominium and 317 West also assert that plaintiff has adduced no evidence that they violated Real Property Law § 231 (2), and maintain that the record is devoid of any prior criminal activity in the building, which would give rise to a duty to adopt additional security measures. They further note that Mr. Gjonbalaj was unaware of any such criminal activity. The Condominium and 317 West also argue that they had no notice of any prior criminal activity on the premises or in the immediate area, and had received no complaints of such activity. Absent any evidence of criminal activity, they argue that they were not required to provide any enhanced security, and accordingly discharged their duty by allegedly providing the requisite security, namely, locking doors, an intercom system, and 24-hour security.

Four Star also moves for an order granting it summary judgment dismissing Mr. Gjonbalaj's complaint. Four Star argues that because Gjonbalaj was not an intended beneficiary of its contract with Samson, and because Four Star did not owe any duty to the Gjonbalaj, independent of its contractual duties to Samson, the complaint must be dismissed. In particular, Four Star asserts that it did not entirely displace codefendants' duties to secure the premises, that Gjonbalaj did not detrimentally rely on the terms of the contract, and that there is no evidence demonstrating that it launched a force or instrument of harm which resulted in Gjonbalaj's death. Additionally, Four Star maintains that the complaint must be dismissed because Mr. Gjonbalaj cannot establish that any negligence on its part was a proximate cause of his son's death, as he cannot show that the murderer was an intruder, or that there were signs of forced entry into the building or Gjonbalaj's apartment.

None of the moving defendants seek summary judgment on their cross claims.

In opposition, Mr. Gjonbalaj maintains that Four Star's contract was clearly for the tenants' benefit, and that accordingly, Four Star owed his son a duty to properly perform the contract, which it has failed to do. Mr. Gjonbalaj does not dispute that there is a lack of evidence that his son detrimentally relied on the contract's provision, or that Four Star's duties with respect to building security entirely displaced the codefendants' obligations in that regard. He claims, however, that Four Star has failed to demonstrate that it did not launch a force or instrument of harm. Mr. Gjonbalaj asserts that Hoffman

has no personal knowledge on this issue, because she was not at the building, and because Four Star has not provided any sworn testimony from any one of its employees who were at the building around the time in issue.

As to causation, plaintiff asserts that his testimony regarding his son having told him about the longstanding problem with the front door lock, which was to be remedied once the apartment became a co-op, his testimony about the superintendent across the street having told him about the broken front door lock, the newspaper article reporting that tenants had indicated that the front door lock had been inoperable for a week, and the fact that Gjonbalaj had been found in his bedroom, shot in the back, and wearing no shoes, socks, or shirt, is sufficient to raise an issue as to whether the front lock was defective, the defendants had notice of it, and whether such defect was a proximate cause of Gjonbalaj's death.

In opposition to the Condominium's and 317 West's claim that plaintiff has failed to demonstrate that there had been prior criminal activity of a similar type or nature on the premises, plaintiff maintains that this argument is without merit, and that these defendants had actual and constructive notice of the front door lock's defect, and that an intruder could enter, and commit a crime. Plaintiff also observes that, simply because the police and Medical Examiner's office's documents failed to indicate that there was a forced entry, does not exclude the possibility that there had been a forced entry.

In reply, Four Star claims that, irrespective of whether there was evidence that the front door lock was broken, Mr. Gjonbalaj failed to demonstrate that it is more likely than not that the murderer had been an intruder, and, thus, has failed to show that any allegedly broken lock was a proximate cause of his son's death. Four Star also notes that the Medical Examiner's documents indicate that the apartment door was unlocked. The Condominium and 317 West add that plaintiff, in his opposing papers, has failed to show that they had notice of any prior criminal activity in the building or its vicinity, or that the front door lock was broken. The Condominium and 317 West maintain that the contents of a newspaper article and what Mr. Gjonbalaj's son and the superintendent from across the street allegedly told him about the lock are hearsay.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the 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). Where the proponent fails to meet this burden, the motion should be denied even if the papers in opposition are inadequate. *Pastoriza v. State of New York*, 108 A.D.2d 605 (1st Dept. 1985). On a motion for summary judgment the testimony of the nonmoving party is

accepted as true. *O'Sullivan v. Presbyterian Hosp. in City of New York at Columbia Presbyterian Medical Center*, 217 A.D.2d 98, 101 (1st Dep't 1995).

Turning first to the Condominium's and 317 West's motion, it should be noted that 317 West does not seek to distinguish itself from the Condominium or urge that it did not entirely displace the Condominium in providing security for the building. *See Hagen v. Gilman Mgt. Corp.*, 4 A.D.3d 330 (2d Dept 2004). Accordingly, these two defendants shall be treated together for purposes of this motion.

"Building owners and managing agents have a common-law duty to take minimal security precautions to protect tenants from the foreseeable criminal acts of third parties." *Maria T. v. New York Holding Co. Assoc.*, 52 A.D.3d 356, 357 (1st Dept 2008). Where a party fails in its obligations to provide the requisite security measures, the tenant can only recover where it shows that the negligence was a proximate cause of his injuries. *Muong v. 550 Ocean Ave., LLC.*, 78 A.D.3d 797, 798 (2d Dept 2010). The "plaintiff is not required to exclude every other possible cause, but need only offer evidence from which proximate cause may be reasonably inferred." *Id.* (internal quotation marks and citation omitted); *see also Venetal v. City of New York*, 21 A.D.3d 1087, 1090 (2d Dept 2005) (to establish liability, tenant not required to "conclusively demonstrate" that perpetrator was an intruder or entered building via improperly maintained door); *see e.g. Carmen P. v. PS&S Realty Corp.*, 259 A.D.2d 386 (1st Dept 1999) (infant plaintiff raised issue of fact warranting the denial of summary judgment on issue of causation where it was shown that

unidentified assailant attacked her in a building with a history of crime and inoperable locks). “[T]o withstand a motion for summary judgment, the plaintiff need not prove proximate cause by a preponderance of the evidence but, assuming that the defendant has met its prima facie burden, need only raise a triable issue of fact as to proximate cause.” *Muong, LLC*, 78 A.D.3d at 798.

To meet its prima facie burden in such a case, the defendants are required to establish that the tenant’s injuries were not proximately caused by their negligence, and, if they fail to meet this burden, their motion must be denied without regard to the adequacy of the plaintiff’s opposing papers. *Muong*, at 798-799; *Schuster v. Five G. Assoc., LLC*, 56 A.D.3d 260 (1st Dept 2008) (defendants met their prima facie burden by showing that door locks were working, that there were no earlier criminal acts, and that there was a lack of evidence that person who assaulted plaintiff was an intruder); *Alvarez v. Masaryk v Towers Corp.*, 15 A.D.3d 428, 429 (2d Dept 2005).

Initially, it should be noted that plaintiff has failed to mention Real Property Law § 231 (2) in his bill of particulars, did not set forth any facts in his bills of particulars which would come within that statute, and did not address or dispute the Condominium and 317 West’s assertion that there is no evidence that defendants, under that statute, knowingly leased or gave possession of any part of the building “for any unlawful trade, manufacture, or business or knowingly permitt[ed] the same to be so used.” It, thus, appears that plaintiff has abandoned any such claim.

To the extent that the Condominium and 317 West argue that they were not required to provide any enhanced security measures because there was no evidence of criminal activity on the premises or in the immediate vicinity, such assertion is without merit, because these movants have failed to refute the pleadings' allegations of such criminal activity, and, as previously noted, it is their burden, in the first instance, to demonstrate the lack of prior acts of criminality.⁵ *Schuster*, 56 AD3d at 260.

Haye failed to refute such allegation, and, because it is unclear when he started working for Samson, and his deposition testimony suggests that at best that he started such employment immediately before the murder occurred, it cannot be said that he has any knowledge of the building's prior criminal activity, nor did he testify on this particular issue. That Hoffman testified that she did not "recall" any prior incidents does not constitute an unequivocal denial of there having been any incidents, and, if such incident did not involve Four Star's employees' duties, it is unclear whether she would have learned of any prior criminal activity at the building. Further, no evidence has been provided from any Four Star porter/doorman on this issue.

⁵ Defendants argue that they are entitled to summary judgment because plaintiff has failed to establish his prima facie showing that there are no material questions of fact. However, it is well established that on a motion for summary judgment it is the movants' burden – here, the defendants – to first make such a showing. Failure to do so requires denial of a motion for summary judgment, regardless of the adequacy of plaintiff's proof. *AFA Protective Sys., Inc. v. Kaufman Eighth Ave. Assocs.*, 251 A.D.2d 127 (1st Dep't 1998); *Pastoriza v. State of New York*, 108 A.D.2d 605 (1st Dept. 1985).

In addition, the Condominium and 317 West have provided no evidence demonstrating that the building's intercom/buzzer system and all of its exterior door locks were operational and had been properly maintained at the time of Gjonbalaj's murder. This issue was raised in plaintiff's pleadings, both Haye and Hoffman were silent on these issues. Further, as previously noted, the record is unclear as to when Haye commenced his employments with Samson, and no affidavit has been presented from him or his predecessor on any of the foregoing issues.

The Condominium and 317 West claim that there is no evidence of any forced entry, because the police and Medical Examiner's documents did not mention a forced entry. However, in order to establish a prima facie showing, it is their burden to establish that there is no evidence of a forced entry by admissible evidence. That the police and Medical Examiner's office's records indicated that the apartment door was allegedly opened by Lemmens and was unlocked is unavailing, because no affidavit has been provided by Lemmens on the condition of the door, and because it is unclear what an assailant may have done to the door lock after entering and before leaving the apartment. Moreover, the contents of the police and Medical Examiner's records are hearsay to the extent that they are based on what Lemmens might have directly or indirectly told them. *See State Farm Mutual Auto. Ins. Co. v. Langan*, 18 A.D.3d 860, 862 (2d Dep't 2005); *Sansevere v. United Parcel Serv.*, 181 A.D.2d 521, 524 (1st Dept 1992).

As the landlord and managing agent, the Condominium and 317 West should have been able to ascertain and put into the record whether the locks and intercom system were working on the day of Gjonbalaj's murder, and whether there was any sign of a forced entry. They fail, for example, to present any evidence or testimony that their security measures were in working order that day. They similarly fail to present any evidence that they did not have to replace or repair the apartment door or its lock, because there was a lack of a forced entry. *See e.g. Pagan v. Hampton Houses*, 187 A.D.2d 325 (1st Dept 1992) (where apartment showed no signs of forced entry, plaintiff could not demonstrate that decedent's death was more likely caused by intruder). If there had been a forced entry, a jury could conclude that the murder was carried out by someone other than a tenant, because as the superintendent, Gjonbalaj presumably would have recognized a tenant and opened his apartment door for that tenant.

The burden is on defendants to establish that there is no evidence that the assailant was an intruder. *Schuster*, 56 A.D.3d at 260; *see also Muong*, 78 A.D.3d at 798. Because defendants have failed to demonstrate the lack of a forced entry, they have not met their burden in this respect.

Defendants' suggestion, that Gjonbalaj death was the result of illegal drug dealing, has not been substantiated, and has no support in the record. In particular, the police report did not mention a gun possessed by Gjonbalaj, and no affidavits have been provided from anyone indicating that Gjonbalaj was ever suspected of drug activity based

upon the nature and number of his visitors. Further, having a small quantity of marijuana does not signify that one was a dealer. Also, defendants have submitted no record of any scientific analysis of the substance, which even the Medical Examiner's office was unsure was marijuana.

In light of the foregoing, and the fact that the Condominium and 317 West's motion is largely based at their pointing at gaps in the plaintiff's proof, these defendants have failed to meet their prima facie burden on this motion. Because the Condominium and 317 West have failed to make a prima facie showing that there were no prior criminal acts in the building, that the security measures were operational, and that there was no evidence that the assailant was an intruder, these defendants' motion for partial summary judgment must be, and hereby is, denied, irrespective of the adequacy of Mr. Gjonbalaj's papers.

Four Star has also failed to prima facie establish its right to summary judgment. First, it has wholly failed to address the issue of its alleged violation of Multiple Dwelling Law § 50-a. In particular, it does not claim that the statute is inapplicable to the building. Further, Four Star has not provided any affidavits from any of its employees or former employees, who worked at the building, indicating, with respect to any of the building's three doors and intercom system, that its employees did not "willfully destroy, damage, or jam or otherwise interfere with the proper operation of, or remove" any of the locks or intercom system, or any of their parts, Multiple Dwelling Law § 50-a [5]; *cf. Ragona v.*

Hamilton Hall Realty, 251 A.D.2d 391, 392 (2d Dept 1998), here where the doormen/porters, among other things, used the back entryway to remove the residents' garbage, and manned the front doorway, and where the evidence does not establish that intruders were unable to access the rear of the building through the side alleyway or through any opening or gate there may have been in the rear fencing.

Second, Four Star has failed to prima facie demonstrate that, as a contractor, it owed Gjonbalaj no duty. In general, a contractual duty alone to maintain premises will "not give rise to tort liability in favor of a third party." *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138 (2002). Nonetheless, a duty of care to a third party will arise where 1) the contracting party has entirely displaced another's duty to safely maintain premises, 2) the plaintiff has relied to his/her detriment on the contracting party's continued performance of its duties, or 3) where the contracting party has negligently "launche[d] a force or instrument of harm." *Id.* at 141 (internal citation and quotation marks omitted).

Mr. Gjonbalaj's claim that his son was a third-party beneficiary under Four Star's contract with Samson, and was therefore, owed a duty by it, is without merit, because Four Star did not "expressly assume any protective duty enforceable by the tenants." *Anokye v. 240 E. 175th St. Hous. Dev. Fund Corp.*, 16 A.D.3d 287, 288 (1st Dept 2005). Additionally, Mr. Gjonbalaj fails to dispute Four Star's assertion that Gjonbalaj did not rely on that contract to his detriment, here where the doormen were not always at their posts, because they also functioned as porters. Nor does plaintiff dispute Four Star's

position that it did not entirely displace another's duties to safely maintain the premises, here where Samson's employee, Gjonbalaj, to some extent maintained the locks and also oversaw the porters/doormen. *See generally Hagen v. Gilman Mgt. Corp.*, 4 A.D.3d at 330.

However, the pleadings allege that Four Star permitted the building's doors to remain unlocked and that Four Star violated the Multiple Dwelling Law § 50-a. Any failures on the porters/doormen's part to be present at their post, lock a door left open by others, or to report a broken lock would not constitute the launching of a force or instrument of harm, because the necessary affirmative act would be missing. *See Church v. Callanan Indus.*, 99 N.Y.2d 104, 111-112 (2002); *Mesler v. PODD LLC*, 89 A.D.3d 1533, 1535 (4th Dept 2011) (failure to salt sidewalk insufficient to impose duty to third party, because it merely constituted the failure to do good); *Bauerlein v. Salvation Army*, 74 A.D.3d 851, 856 (2d Dept 2010). Nonetheless, if a Four Star employee, for example, disabled a lock to perform chores such as garbage removal, and failed to relock an exterior door, that would not only constitute a violation of Multiple Dwelling Law § 50-a (5), if applicable, but could constitute the launching of a force or instrument of harm.

The pleadings, when broadly read, can be construed as Four Star having launched an instrument of harm. Because Four Star has not prima facie eliminated the claims that its employees violated the Multiple Dwelling Law and permitted the building's doors to remain unlocked, it has failed to demonstrate that it did not owe Gjonbalaj a duty. *See*

Prenderville v. International Serv. Sys., Inc., 10 A.D.3d 334, 337-338 (1st Dept 2004) (contractor required to prima facie show that it did not create or worsen a dangerous condition, and that burden was not met where its employees lacked any recollection as to their activities on the relevant days). Four Star has also failed to present admissible evidence affirmatively demonstrating that there was no forced entry into Gjonbalaj's apartment. Four Star has, under the circumstances presented, failed to show that there is lack of evidence that the assailant was an intruder. Accordingly, Four Star's motion is denied.

In accordance with the forgoing, it is

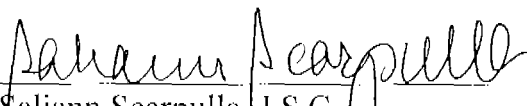
ORDERED that Four Star General Cleaning Corp.'s motion (seq. no. 007) for an order granting it partial summary judgment dismissing Ali Gjonbalaj's complaint is denied; and it is further

ORDERED that The West 89th Street Condominium and 317 West 89th Street LLC C/O Samson Management's motion (seq. no. 008) for an order granting them partial summary judgment dismissing Ali Gjonbalaj's complaint is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
July 16, 2010

ENTER:


Saliann Scarpulla, J.S.C.