

Urich v 765 Riverside LLC

2014 NY Slip Op 31621(U)

June 23, 2014

Supreme Court, New York County

Docket Number: 155157/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
CLAIRE URICH,

Plaintiff,

Index No. 155157/12

-against-

DECISION/ORDER

765 RIVERSIDE LLC and J.K. MANAGEMENT CORP.,

Defendants.

-----X
765 RIVERSIDE LLC and J.K. MANAGEMENT CORP.,

Third-Party Plaintiffs,

-against-

VINCENT HEYWARD,

Third-Party Defendant.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmations in Opposition to the Motion	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff Claire Urich commenced the instant action against defendants 765 Riverside LLC ("765") and J.K. Management Corp. ("JK") (hereinafter collectively referred to as "defendants") to recover for injuries she allegedly sustained as a result of an assault that occurred on defendants' premises. Defendants now move for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint. For the reasons set forth below, defendants'

motion is denied.

The relevant facts are as follows. Plaintiff is a tenant in apartment 6B in the apartment building located at 765 Riverside Drive, New York, New York (the "building") and has been living there for over twenty years pursuant to a written lease agreement (the "Lease"). The building was owned by defendant 765 and managed by defendant JK. The building has two entrances, a main entrance and a side entrance. The main entrance has two sets of doors; the outer doors are unlocked and lead to a vestibule which leads to a set of inner doors which are locked and can only be opened with a key that is provided to the tenants of the building by the landlord. There is an intercom system located in the vestibule of the main entrance. The side entrance to the building also has two sets of doors; the outer set of doors are unlocked and lead to a vestibule which leads to a set of inner doors which are locked and can only be opened with the same key that opens the inner doors of the main entrance. The mailboxes for the building are located directly past the inner set of doors of the side entrance.

Plaintiff alleges that she and other tenants had complained about the condition of the side entrance door prior to the date of the assault. Specifically, plaintiff alleges that in 2006, she complained that the door would not fully close. Plaintiff further alleges that the problem with the side entrance door occurred many times but that eventually, after each complaint, the door was fixed and was able to fully close and lock. Plaintiff testified that she did not recall any issues with either the main entrance door or the side entrance door during the two week period prior to the assault. Further, she testified that she had heard of three prior incidents in the building but that they all involved attempts to enter the building via the sixth floor fire escape and not via the side door entrance. Plaintiff testified that as a result of these attempts, tenants in the building

installed “better gates” on their respective fire escape windows.

Plaintiff testified that on August 18, 2009, plaintiff left work at around 1:00 a.m. but because of subway trouble, did not arrive at the building until approximately 4:00 a.m. She alleges that when she arrived at the building, she noticed third-party defendant Vincent Heyward (“Heyward”) loitering inside the side door vestibule and that she waited until Heyward left the building at which point she entered the building through the main entrance and waited for the elevator. She alleges that it was at that point that she saw Heyward outside the building walking past the main entrance and enter the building through the side door “instantly” and that he could not have been buzzed in by another tenant because there is no intercom inside the side door vestibule. Heyward and plaintiff then entered one of the building’s two elevators together at which point Heyward proceeded to assault and rape plaintiff, robbing her of all the cash she had on her person and fleeing with her keys (hereinafter referred to as the “assault.”) After the assault, Heyward was apprehended and ultimately convicted and sentenced for the assault and rape of plaintiff. Plaintiff commenced the instant action against defendants alleging causes of action for, *inter alia*, negligence and breach of contract based on defendants’ failure to provide adequate security in the building as required by the Lease and failing to provide the necessary and required services including but not limited to repairs of the locks on the entrance doors and general maintenance of the building.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49

N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.* “Landlords have a ‘common-law duty to take minimal precautions to protect tenants from foreseeable harm,’ including a third party’s foreseeable criminal conduct.” *Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 547 (1998), citing *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 293-94 (1993). “A tenant may recover damages, however, only on a showing that the landlord’s negligent conduct was a proximate cause of the injury.” *Id.* “A plaintiff is not required to exclude every other possible cause, but need only offer evidence from which proximate cause may be reasonably inferred.” *Id.* at 550. “Plaintiff’s burden of proof on this issue is satisfied if the possibility of another explanation for the event is sufficiently remote or technical ‘to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence.’” *Id.*, citing *Schneider v. Kings Highway Hosp. Ctr.*, 67 N.Y.2d 743 (1986). “Thus, a plaintiff who sues a landlord for negligent failure to take minimal precautions to protect tenants from harm can satisfy the proximate cause burden at trial...if the evidence renders it more likely or more reasonable than not that the assailant was an intruder who gained access to the premises through a negligently maintained entrance.” *Id.* at 551.

In the instant case, defendants have established their prima facie right to summary judgment as they have shown that they did not negligently fail to maintain the building or fail to provide adequate security in the building and that they did not have any notice of a malfunctioning lock in the building’s side door. Defendants have provided the testimony of

Robert Byrd, the superintendent of the building, who testified that on the date of the assault, the side entrance door functioned and locked properly and was not broken. Specifically, Mr. Byrd testified that after the assault, he opened the inner door of the side entrance and allowed it to close by itself and that after doing so, the door closed and locked by itself and the door required no adjustments. Further, Mr. Byrd testified that he was unaware of any prior instances of intruders breaking into the building and that he did not know how Heyward gained access to the building. At his deposition, Mr. Byrd recalled past instances of tenants making complaints that the side door did not close properly and that there were issues with the side door lock but that when he received such complaints, he would check the door and adjust it to make sure that it closed and locked properly. Specifically, he testified that to fix the problem, he would adjust a screw on the door check located at the top of the door. Mr. Byrd further testified that he received no complaints about the side door being broken in the days prior to the assault. Additionally, defendants have provided the testimony of Joseph Kastner, a licensed locksmith and the President of Protector Security Associates, which is in the business of providing security services, locksmith services, intercoms and security cameras. Mr. Kastner testified that on August 19, 2009, he received an "emergency telephone call" from defendant JK to provide approximately 200 new keys for the tenants in the building and to replace the key cylinders in the entrance doors because Heyward had taken plaintiff's keys and fled with them after the assault. Mr. Kastner testified that on that date, he visited the building himself to change the key cylinders and found that the lock on both the main entrance door and the side entrance door operated properly and did not require replacement. Specifically, when asked about the result of his inspections of the side door entrance, Mr. Kastner testified that "[t]hey were good. Everything

was appropriate, good shape.” Mr. Kastner also testified that a key was necessary to open the side door and that when he let the door close by itself, it locked and did not open without a key. Mr. Kastner also found that the door closer, which automatically closes the door, operated properly and that it did not require any adjustment when he inspected it.

However, in response, plaintiff has raised issues of fact sufficient to defeat defendants’ motion for summary judgment. Plaintiff has provided a letter, dated February 24, 2008, written to defendants by four tenants in the building notifying them of the following: incidents of intruders in the building coming in from the sixth floor fire escapes; the breaking into- and damaging of the building’s mailboxes located inside the building’s side door entrance; defects in both the inner front and side door entrances, specifically that “[b]oth the inner front and side doors operate defectively. The pneumatic closers frequently don’t work resulting in the doors remaining ajar after a tenant enters or leaves the building. Anyone can access the building”; and that the building has become the site of “drug drops” and general criminal activity such as the scribbling of graffiti. The tenants’ letter requests better security such as the fixing of both entrance doors, and the addition of sensor lights, “No Loitering” signs and security cameras “to ward off intruders.” Additionally, plaintiff has provided affidavits from other tenants in the building affirming that both the front and side entrance doors did not function properly and that the building is a site for criminal activity. Specifically, plaintiff has provided the affidavit of Colette Hawkins-Whitlock, a tenant in apartment 4F in the building, who has affirmed that “[f]or some time prior to the incident involving [plaintiff], there were problems with the doors at both the front and side entrances. Cylinders were consistently loose and difficult to operate. The doors were either slow to close or did not fully close shut. There were occasions when the side


door was either left open or there would be signs posted instructing tenants to use the front entrance.” Further, Ms. Hawkins-Whitlock affirmed that she complained about the locking mechanisms to the building staff and Mr. Byrd and that while Mr. Byrd attempted to fix the problem, “the repairs didn’t last.” Ms. Hawkins-Whitlock also affirmed that the building “experienced other security issues that included mailboxes broken into, people using drugs on the roof, two apartments burglarized and individuals loitering in both foyers, particularly in the side door foyer that has no tenants’ intercom system. Additionally, plaintiff has provided the affidavit of Michael Berkowitz, a tenant in apartment 2F in the building, who has affirmed that the inner side door was “not properly maintained, the lock [was] not properly aligned or broken, the door [was] difficult to open.” Further, Mr. Berkowitz affirmed that “[a]t the time of [plaintiff’s] incident, the lock would spin so that any key could open the lock.” Mr. Berkowitz also affirmed that “[t]he foyer was used as a drug den and that he saw “a lot of marijuana ‘blunts’ in the foyer” and he complained about these problems to Mr. Byrd but that “[t]he door is constantly in disrepair.” Finally, plaintiff has provided the affidavit of Wanda Corsino, a tenant in apartment 5E in the building, who has affirmed that “[f]or some time prior to and at the time of the incident involving [plaintiff], there were problems with the side (both) entrance doors. Cylinders were consistently loose and the door could easily be opened. There were times prior to and at the time of [plaintiff’s] incident when any key used in the lock of the side (Both) entrance door could easily open the door.” Ms. Corsino also affirmed that there were other security issues including “robberies...and individuals loitering in the hallway foyers, particularly in the side door foyer that has no tenants’ intercom system” and that she complained to the building’s staff about these issues. This evidence is sufficient to raise a triable issue of fact as to whether defendants were

negligent in failing to properly maintain the entrance doors of the building or provide minimal security precautions. *See Burgos*, 92 N.Y.2d at 552 (“Plaintiff also averred that none of the building’s entrances had functioning locks. These statements are sufficient to raise a triable issue of fact as to whether the assailants...entered the building through a negligently maintained door”); *see also Carasquilo v. Macombs Vil. Assoc.*, 99 A.D.3d 455, 456 (1st Dept 2012) (“The evidence presents triable issues of fact as to whether defendants breached their duty to take minimal security precautions to protect plaintiff from the criminal acts of third-party intruders” which “included that the magnetic lock to the lobby door was not working...and that the building complex had been the scene of drug and other criminal activities, including a mugging and a robbery.”) As plaintiff has provided evidence that it is more likely than not that Heyward, an intruder, gained access to the building through the side door, which had consistent issues with its lock and which plaintiff has alleged any key could open, summary judgment is inappropriate. *See Burgos*, 92 N.Y.2d at 551.

Accordingly, defendants’ motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint is denied. This constitutes the decision and order of the court.

Dated: 6/23/14

Enter: _____


J.S.C.

CYNTHIA S. KERN
J.S.C.