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

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EVAN PRIZER and HEATHER BRODIN-PRIZER,

Index No. 152834/2012

Plaintiffs,

-against-

DECISION/ORDER

81st WEST RIVER COMPANY, LLC, MANHATTAN SKYLINE MANAGEMENT CORP. and "JOHN DOE," first and last names being fictitious as unknown to plaintiffs but being the burglar identified in the attached complaint,

Defendants.

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HON. CYNTHIA 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.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs commenced the instant action to recover damages resulting from a burglary at their apartment. The named defendants 81st West River Company, LLC ("West River") and Manhattan Skyline Management Corp. ("Skyline") (collectively referred to herein as "defendants") now move for an order pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiffs' complaint. For the reasons set forth below, defendants' motion is granted only in part.

The relevant facts are as follows. Plaintiffs are tenants in a residential building located at 424 West End Ave., New York, New York (the "building"), which is owned by defendant West River and managed by defendant Skyline. A doorman is present at the main entrance of the building 24 hours a day. On May 23, 2009, while plaintiffs were away for the weekend, their apartment was

burglarized. Specifically, plaintiffs allege that jewelry worth over $100,000 was taken from plaintiff Heather Bordin-Prizer's underwear drawer. Plaintiffs' apartment contained a nanny cam and captured the incident. After comparing the nanny camera footage with surveillance footage from the building, it was discovered that the burglar had entered the building through the building's main entrance. Specifically, the building's surveillance footage shows that the burglar entered the building at approximately 12:15 pm alongside a tenant of the building. According to the deposition testimony of Mr. Antonio Salamone ("Mr. Salamone"), who was the doorman on duty at that time, he believed the burglar to be the known tenant's guest and so did not stop him.

Plaintiffs have now commenced the instant action seeking damages from defendants on the theory that building security was inadequate as a result of defendants' negligence. Specifically, plaintiffs alleges that the doorman on duty, Mr. Salamone, was negligent in unwittingly and unintentionally allowing an unknown individual to walk past him and enter an elevator of the building and then burglarize the plaintiffs' apartment. Additionally, plaintiffs allege that Mr. Salamone was negligent in failing to stop the individual and ask him where he was going in order to announce him which was what he was supposed to do. Plaintiffs further allege that defendants were negligent in impeding with the investigation of the burglary and, as such, seek punitive damages. Furthermore, plaintiffs allege in their bill of particulars that defendants were "negligent in the hiring [and] employing" of security personnel at 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). 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." *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

In the present case, as an initial matter, defendants' motion for summary judgment dismissing plaintiffs' negligent security claim is denied as issues of fact remain as to whether defendants' act of allowing the burglar into the building constituted a negligent failure to provide adequate security. It is well settled that "[l]andlords have a duty to take minimal precautions against foreseeable criminal activity by third parties." *Carmen P. Maria P. v. PS & S Realty Corp.*, 259 A.D.2d 386, 387 (1st Dept 1999) (citing *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 293-94 (1993)). "Where this duty is breached, a tenant who is victimized by a criminal in the building may recover damages from the landlord, if the failure to provide adequate security was a proximate cause of the [crime]." *Id.* Here, Defendants contend that they are entitled to summary judgment as the building's entrance was fully secured and the fact that the doorman permitted an individual to enter the building because he believed this person to have been the guest of a tenant is not negligence. However, such contention is without merit as "[t]he question of whether defendants's conduct amounts to negligence is inherently one for the trier of fact." *Corbally v. Sikras Ralty Co.*, 161 A.D.2d 107 (1st Dept 1990). Thus, contrary to defendants' contention, it is up to the jury to determine whether allowing the burglar into the building on the belief that he was a guest of a tenant constitutes negligence. In other words, this court cannot conclude that as a matter of law it was reasonable for the doorman to believe the burglar was the known tenant's guest and not stop him on his way into the building. Rather, such determination must be left to the jury.

Further, to the extent defendants rely on the First Department's holding in *Sakhai v. 411 E*

57th St. Corp., 272 A.D.2d 231 (1st Dept 2000), to support a finding to the contrary, such reliance is misplaced as *Sakhai* is factually distinguishable from the present case. In *Sakhai*, unlike here, there was no proof whatsoever as to the manner in which the alleged burglar gained access to the building, nor was the burglar ever identified. Thus, the court granted the landlord defendants summary judgment dismissing plaintiff's claims on the ground that "[i]t is mere speculation that defendant's employees were negligent." *Sakhai*, 272 A.D.2d at 233. Here, on the other hand, the burglar has been specifically identified in security footage and it is undisputed that he entered the building through the front entrance and walked right past the doorman. Thus, *Sakhai* is inapposite and its holding does not warrant a finding of summary judgment in favor of defendants in this action dismissing plaintiffs' negligent security claim.

However, to the extent plaintiffs claim that defendants are liable based on the theories of negligent hiring, negligent retention and negligent supervision, defendants are entitled to summary judgment dismissing said claims. A necessary element for such claims "is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury." *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 161 (2nd Dept 1997). Here, defendants have made a prima facie showing establishing their right to summary judgment dismissing plaintiffs' claims for negligent hiring, retention or supervision by demonstrating that the record is devoid of any evidence that Mr. Salamone had a propensity for letting unknown individuals into the building and plaintiffs have provided no opposition thereto. Thus, defendants are entitled to summary judgment dismissing these claims.

Based on the foregoing, defendants' motion is granted only to the extent that plaintiffs' claims for negligent hiring, retention and supervision are hereby dismissed but the motion is

otherwise denied. This constitutes the decision and order of the court.

Dated: 4/27/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.