| **Brice v 275 W. 150th St. Assoc. Ltd. Partnership** |
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| 2016 NY Slip Op 30982(U) |
| May 26, 2016 |
| Supreme Court, New York County |
| Docket Number: 150615/11 |
| Judge: Sherry Klein Heitler |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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RENITA BRICE, Individually and as m/n/g of ANFERNEE BRICE, an infant over the age of 14,

Plaintiffs,

-against-

275 WEST 150TH STREET ASSOCIATES LIMITED PARTNERSHIP and PROPERTY MANAGEMENT GROUP, INC.,

Defendants.

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Index No. 150615/11
Motion Sequence 001

**DECISION & ORDER**

**HON. SHERRY KLEIN HEITLER**

In this personal injury action, defendants 275 West 150th Street Associates Limited Partnership and Property Management Group, Inc. (collectively, "Defendants") move pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' complaint in its entirety on the ground, among others, that plaintiffs' injuries are the result of targeted, premeditated criminal acts committed upon her by two non-parties. As more fully set forth below, Defendants' motion is granted.

Plaintiff Renita Brice ("Plaintiff") alleges that on June 22, 2011 she was assaulted by two men within her apartment located at 279 West 150th Street, a five-story residential walk-up building in Manhattan ("Building"). As the result of a police investigation, Plaintiff's two assailants, Jacob Lawton ("Lawton") and Russell Partin ("Partin"), were arrested. Partin pled guilty to Burglary in the First Degree and, among other things, was sentenced to six years in prison. Lawton also pled guilty to Burglary in the First Degree and was sentenced to, among other things, seven years in prison.[1] During their plea allocution, Partin and Lawton stated that their assault upon the Plaintiff was not a random act, and that they had specifically targeted her.

[1] See Defendants' exhibits D-G.

The Plaintiff was deposed on March 19, 2014.[2] She testified that she had a sexual relationship with Lawton which ended approximately six months prior to the incident. When their relationship ended Lawton became very upset with Plaintiff and threatened her several times over the phone, telling her he was outside of her house. The Plaintiff testified that the Building had an outdoor intercom system which allows guests to identify themselves to tenants before they are granted access (Brice Deposition p. 81). She never called the police or notified the Defendants about the threats she received from Lawton (*id.* pp. 48, 52-53, 55-56).

On June 21, 2011, the night before the incident, the Plaintiff and her son came home around 9:00 pm and locked their apartment door using two locks and a chain (*id.* at 65-68). At the time the intercom system was working (*id.* at 82). At approximately 5:55 am the next morning the Plaintiff heard knocking at her door. She got out of her bed, looked through the peephole, and saw a man who was eventually identified as Partin who was holding a police badge. Partin called out the Plaintiff's first and last name but she did not recognize his voice. Believing that Partin was a police officer, the Plaintiff unlocked the door and removed the chain, at which point Partin and Lawton forced their way into the apartment and physically assaulted the Plaintiff with a baseball bat and a gun. They told Plaintiff to keep quiet while they stole her jewelry and her son's cell phone (*id.* at 68-73, 87). The Plaintiff's son, who was asleep during the incident, was not harmed.

Defendants' property manager, Mr. Bruce Walker, was deposed on behalf of the Defendants.[3] He testified that the Building's front entrance consists of two self-locking doors composed of aluminum and glass. There is also a basement entrance which is equipped with a lock and is not used for tenant access (Walker Deposition pp. 12, 18-19, 27). Mr. Walker testified that he was not aware of any issues with the Building's front entrance in the two years preceding the

[2] A copy of Plaintiff's deposition transcript is submitted as Defendants' exhibit H ("Brice Deposition").
[3] A copy of Mr. Walker's deposition transcript is submitted as Defendants' exhibit J ("Walker Deposition")

incident and was not aware of any prior incidents at the Building which required a police response (Walker Deposition pp. 31-32, 38).

Plaintiffs nevertheless allege that Defendants negligently failed to maintain the Building's front entrance locks. In this regard, Plaintiff testified as follows (Brice Deposition, pp. 83-84):

Q You said there are two doors that lead into your building from the outside. You needed a key to access both, correct?

A That's correct. . . .

Q The locks on the doors to your building from the outside, were they working on the date of your incident? . . .

A No.

Q Can you explain to me how they were not working, the locks?

A They were broken.

Q Do you know for how long they were broken?

A About two weeks.

Q Did you ever make a complaint about the locks being broken?

A Yes, I did.

Q Who did you make a complaint to?

A The office and Norman, the super.

Q Did you make a written complaint or did you call or did you tell them in person?

A The night before the incident, I told Norman in person and days prior, I called the office.

The Plaintiff's son, who was a minor at the time of the incident, testified that the front entrance locks were in working order the night before the incident, but that they regularly malfunctioned (Defendants' exhibit I, pp. 27-29):

Q Do you know whether the locks on these doors were operating on June 22, 2011?

A To be honest with you, I don't think so.

Q You don't think so? Why don't you think so?

A Usually those locks are really messed up. You would push the door and the door would just open.

Q You said you and your mother went out the night before?

A Yes.

Q Did you need to use the key to access the front doors when you got back in?

A Yes, but prior to that they had tape on the door. You know how there's the door and the thing? Like, they had tape on it, so you could just push it and come right in. We were complaining about that before. We were saying, "Oh, somebody is going to come in here and try to hurt somebody." We were making fun of that and lo and behold it happened to us.

Q Is this on both doors?

A Yes.

Q But when you came back in, did you use a key?

A When we came back, it was gone. It was like locked but somewhat unlocked but we still used our key.

Q Was the tape back on?

A No.

Q Prior to coming back the night before, there was tape on the door?

A. Yes.

Q But that was gone when you got back in?

A Yeah.

Plaintiff claims that Defendants' failure to properly secure the premises and their testimony that the front door locks regularly malfunctioned, allowing her assailants to enter the Building without a key, raises a triable issue of fact. Defendants claim that summary judgment is warranted because their alleged failure to maintain the Building's front door locks did not proximately cause Plaintiff's injuries because she was the target of an intentional crime

**DISCUSSION**

"A landowner and its managing agent have a duty to take minimal precautions to protect their tenants from foreseeable harm, including the harm caused by a third party's foreseeable criminal conduct on the premises." *Ishmail v ATM Three, LLC*, 77 AD3d 790, 791 (2d Dept 2010). "In order to establish foreseeability, plaintiffs are required to present proof that the criminal conduct at issue was 'reasonably predictable based on the prior occurrence of the same or similar criminal activity at a location sufficiently proximate to the subject location.'" *Id.* (quoting *Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 153 [1999]). "[A]n owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such conduct, and is

reasonably aware of the need for such control." *Kranenberg v TKRS Pub, Inc.*, 99 AD3d 767, 768 (2d Dept 2012). "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.'" *Beato v Cosmopolitan Assoc., LLC*, 69 AD3d 774, 776 (2d Dept 2010) (quoting *Williams v Citibank*, 247 AD2d 49, 51 [2d Dept 1998]).

While the testimony by the Plaintiff and her son clearly raise an issue of fact whether the Building's front door locks malfunctioned on a regular basis and whether Defendants negligently failed to repair such locks, the real issue in this case is whether such alleged defects were causally related to Plaintiff's injuries such that liability can be imposed on the Defendants. The law dictates that they do not.

"Evidence of negligence is not enough by itself to establish liability." *Sheehan v New York*, 40 NY2d 496, 501 (1976). Plaintiffs must also prove that their negligence "was the cause of the event which produced the harm." *Id.; see also Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 387 (1st Dept 2006). Here, plaintiffs have presented no evidence to show that the Building was prone to criminal activity or that Plaintiff notified the Defendants or the police of Lawton's threats. *See Ishmail*, 77 AD3d at 791; *Williams v Citibank, N.A.*, 247 AD2d 49, 52 (1st Dept 1998); *Urena v Hudson Guild*, 213 AD2d 312, 312 (1st Dept 1995). Moreover, apart from speculation, plaintiffs have not shown that the assailants actually entered the Building through the front doors. No testimony was adduced from Mr. Walker or anyone else with respect to whether there was any evidence of a forced entry either through the basement or front doors.

In *Buckeridge v Broadie*, 5 AD3d 298 (1st Dept 2004), the plaintiff was hired by the defendant to perform various jobs at the defendant's house. While painting the interior of the home, an unknown man and woman posing as environmental protection workers gained entry to the house under false pretenses by claiming to be investigating a water main break in the area. There was no

criminal activity at the defendant's residence or at other neighborhood residences that would have placed the defendant on notice for liability purposes. The two intruders robbed the house and physically assaulted both the plaintiff and the defendant. The plaintiff sued the defendant for personal injuries sustained at the hands of the intruders. In awarding the defendant summary judgment, the First Department explained that "an owner of property may be liable for the injuries inflicted by a trespasser, who, while on the owner's property, commits a violent crime against a third person. Such liability can arise only where the owner knew or should have known of the probability of conduct on the part of the trespasser which was likely to endanger the safety of those lawfully on the premises." *Id.* at 299. In rejecting the plaintiff's contention that the defendant's failure to ascertain the true identity of the intruders raised an issue of fact as to defendant's negligence, the court held that "[p]laintiff's injury was the result of an intervening, intentional criminal act of sophisticated armed robbers disguised as agency workers, who targeted defendant and his home in advance" and that "[t]he intentional criminal act at issue 'was an unforeseeable, intervening force which severed the causal nexus between the alleged negligence of [defendant] and the complained-of injury.'" *Buckeridge*, 5 AD3d at 300 (quoting *Harris v New York City Hous. Auth.*, 211 AD2d 616, 617 [2nd Dept 1995]).

This case and *Buckeridge* are extraordinarily similar. Here too, assailants entered Plaintiff's residence under false pretenses using false identities in order to commit a premeditated criminal act. Plaintiffs' contention that *Buckeridge* is distinguishable because those assailants were "sophisticated" is without merit. The First Department's decision was not based on the assailants' intelligence level, but rather on the fact that their criminal acts were intentional and pre-planned. In any event, plaintiffs cannot support their claim that Lawton and Partin "cannot possibly"[4] be considered sophisticated. As set forth in the minutes from Lawton and Partin's plea and sentencing

[4] Affirmation of Neil Flynn, Esq., dated March 7, 2016, ¶ 18.

proceedings, both assailants disguised themselves as police officers, demonstrating that their actions were the product of considerable thought and planning. Lawton already had a criminal record of impersonating a police officer. In fact, they admitted that they went to the Plaintiff's apartment with the specific intention to intimidate her (Defendants' Exhibit D, pp. 3, 6-7; Defendants' Exhibit F, pp. 58-59):

> THE COURT: Now, it's charged that on June 22, 2011, inside of 279 West 150th Street, apartment 3A, that you, along with your co-defendant Mr. Lawton, that you and Mr. Lawton gained entry into that apartment by stating that you were police officers in order to have the victim open up the door and, in fact, when she did, you both entered unlawfully into that apartment for the purpose of stealing, committing larceny, is that true?
>
> THE DEFENDANT: Not exactly.
>
> THE COURT: Why did you go into the apartment?
>
> THE DEFENDANT: It was an intimidation tactic actually, it wasn't to steal. It was pretty much to confront her about something he thought was a paternity situation and then she became loud and I freaked out.
>
> THE COURT: So you went in there to intimidate her?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And, in fact, during the course of that you concede she suffered physical injury as defined under the Penal Law; is that right?
>
> THE DEFENDANT: Yes.
>
> * * * *
>
> THE COURT: Okay. So today you are pleading guilty to the third count of the Indictment, Burglary in the First Degree, in violation of Penal Law Section 140.30, Subsection 2, and it's alleged that on or about June 22nd of last year, you knowingly entered and remained unlawfully in a dwelling of a person known to the Grand Jury, with the intent to commit a crime therein, and effectuating entry and while in the dwelling and immediate flight therefrom, a participant in the crime caused physical injury to such person was not a participant in the crime. Is that true?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Where did this incident take place? . . . Was it in an apartment?
>
> THE DEFENDANT: Apartment. . . .
>
> THE COURT: And it is my understanding that you entered that apartment with another individual; is that correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Who was that individual?
>
> THE DEFENDANT: Russel Parton.

THE COURT: And it is my understanding that in the course of the entry into that apartment, somebody was physically hurt; is that true?

THE DEFENDANT: Yes.

THE COURT: Who was physically hurt?

THE DEFENDANT: Renita Brice.

THE COURT: And how was she hurt?

THE DEFENDANT: She was struck with a, um, a bat.

THE COURT: Okay. Also, it is my understanding that items were taken from the apartment. Did you take any items from the apartment? . . .

THE DEFENDANT: Um, yes.

THE COURT: What did you take?

THE DEFENDANT: Cellphone.

In addition to *Buckeridge*, a number of other cases support Defendants' position. *Flynn v Esplanade Gardens, Inc.*, 76 AD3d 490 (1st Dept 2010) and *Rivera v New York City Hous. Auth.*, 239 AD2d 114 (1st Dept 1997) are especially on point.[5] In *Flynn*, the plaintiff heard a knock at the door, looked through his peephole, and saw his former girlfriend. When plaintiff opened the door she was followed into the apartment by another man with whom the former girlfriend was involved. After a verbal altercation the other man attacked the plaintiff and seriously injured him. Plaintiff sued the building, alleging that a security guard stationed in the lobby permitted the assailants to enter the building without announcing them over the intercom. However, "[b]ecause the specifically targeted attack on plaintiff was in no way a predictable result of allowing [the assailants] into the building, the harm to plaintiff was not proximately caused by [the defendant's] negligence, if any . . . ." *Id.* at 492. The court concluded, "under the precedents of this Court, it is well settled that a targeted attack on a resident of an apartment building does not give rise to liability on the part of the landlord for a failure to provide security. Plainly, the targeted attack in

[5] *See also Santiago v New York City Housing Auth.*, 63 NY2d 761 (1984); *Frederick v 550 Realty Hgts., LLC*, 101 AD3d 462 (1st Dept 2012); *Cynthia B. v 3156 Hull Ave. Equities, Inc.*, 38 AD3d 360 (1st Dept 2007); *Flores v Dearborne Mgt., Inc.*, 24 AD3d 101 (1st Dept 2005); *Cerda v 2962 Decatur Ave. Owners Corp.*, 306 AD2d 169 (1st Dept 2003); *Travelers Indem. Co. of Am. v More Buying Power, Inc.*, 67 AD3d 1000 (2d Dept 2009).

this case – evidently involving the settling of a score over an abortive romance – calls for the application of this rule." *Id.* at 494.

In *Rivera*, the plaintiff was stabbed by assailants in a conspiracy to murder the plaintiff's relative. It was unclear how the perpetrators gained access to their apartment, but the plaintiff testified that the defendant New York City Housing Authority ("NYCHA") failed to repair the building's door locks. The First Department determined that NYCHA could not be liable for plaintiff's injuries, despite NYCHA's alleged negligence, because there was no proof as to the manner in which the assailants gained access to the premises. Plaintiff also could not prove that NYCHA's alleged negligence was the proximate cause of his injuries. The assailants' criminal design rendered it "most unlikely that any reasonable security measures would have deterred" them, and "given the paucity of evidence of prior criminal activity on the premises . . . the criminal acts giving rise to plaintiff's injuries were unforeseeable as a matter of law." *Id.* at 115. The "causal connection" between NYCHA's alleged negligence and the plaintiff's injuries was "undermined by the clear evidence that this attack was motivated by a preconceived criminal conspiracy." *Id.*

Not all such cases result in dismissal. Courts have consistently denied summary judgment in cases where the injury occurred in a location which had a history of violent crime of which the defendant had notice. In *Newman v McDonald's Rests. of N.Y., Inc.*, 48 AD3d 1152 (4th Dept 2008), for example, the plaintiff was shot during a robbery while eating at the defendant's restaurant. Prior to the shooting, a restaurant employee had asked her supervisor for a security guard because the restaurant had been the scene of threats to another employee, disorderly conduct, fights, larcenies, robberies, burglaries, and a stabbing. In light of those prior incidents, the court concluded that there was an issue of fact whether the restaurant owner should have done more to protect its customers. In *Venetal v City of New York*, 21 AD3d 1087 (2d Dept 2005), a woman who had been raped on the roof of her NYCHA apartment building sued NYCHA for negligent security.

In denying NYCHA's summary judgment motion, the court noted that over 70 crimes had been committed in the plaintiff's building in the two years prior to the accident, including murder, rape, arson, and assault. The court also relied on testimony by the plaintiff and the building superintendent that the keys from one apartment building opened the doors to other buildings in the housing complex.

This case is more like *Buckeridge*, *Flynn*, and *Rivera* than *Venetal* and *Newman*. It is most unfortunate that the Plaintiff was the victim of a targeted criminal attack. But there is nothing in the record to show that the Building had previously been the setting for a similar crime or that Plaintiff notified Defendants or the police that she was being threatened. Whether or not Defendants negligently failed to maintain the Building's front entrance locks, the unrefuted evidence is that the assault committed upon Plaintiff was not a random act, but the intentional, targeted, and premeditated criminal act of her assailants which serves to supersede Defendants' alleged negligence as the proximate cause of Plaintiff's injuries.

Accordingly, it is hereby

ORDERED that the motion by defendants 75 West 150th Street Associates Limited Partnership and Property Management Group, Inc. for summary judgment is granted; and it is further

ORDERED that plaintiffs' complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

**ENTER:**

**DATE:** 5.26.16

**SHERRY KLEIN HEITLER, J.S.C.**

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