

Kellman v Poonam Apts. LLC
2020 NY Slip Op 32083(U)
February 26, 2020
Supreme Court, Kings County
Docket Number: 507286/2017
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Index Number 507286/2017

Seq#002

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

TERRY KELLMAN,

Plaintiff,

against

POONAM APARTMENTS LLC AND JELENE GREENFIELD
AS MANAGING AGENT,

Defendants.

Papers

Numbered

Notice of Motion and Affidavits Annexed.....	_____
Order to Show Cause and Affidavits Annexed...	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	_____
Other	_____

Upon the forgoing papers, defendants’ motion for summary judgment is decided as follows:

Factual Background

Plaintiff commenced this action for injuries he sustained when, on January 29, 2017, he was shot by non-parties on premises owned and/or controlled by defendants. Plaintiff asserts two causes of action for negligence against plaintiff. In his second negligence claim, plaintiff asserts that defendants were negligent in “[f]ailing to take proper precautions for the safety and wellbeing of the plaintiff; (b) . . . the hiring, screening, training, and supervising of its employees; (c) [f]ailing to adopt appropriate procedures for the protection of visitors including the plaintiff; [and] (d) Negligence [sic] at law.”

Plaintiff testified at his deposition that he was staying in an apartment of a friend named Jessica Jones in the building (the “subject building”) located at 180 Park Hill Avenue in Staten Island (the “subject premises”). Plaintiff testified that Ms. Jones’s lease provided that he was permitted to stay in the apartment. He testified that the main entrance to the subject building was

never locked because the locks were broken.

Plaintiff testified that, on the day of the accident, at approximately 3:30 in the morning, he left the apartment, went down the elevator and intended to leave the subject building to walk his sister home. He testified that, when he exited the elevator, he began to walk down a hallway toward the lobby of the subject building. He testified that he heard Orlando Martinez, who he knew from the neighborhood, call his name from the other end of the hallway. He testified that Mr. Martinez did not live in the subject building and he had not seen Mr. Martinez in the subject building before. He testified that Mr. Martinez was with another person, Angelo Nesemi¹, who plaintiff did not know. He testified that, when he approached the two men, he did not say a word to them and they said nothing to him, but that the two men seemed angry. Plaintiff testified that, when he was approximately 15 to 20 feet from the two men, he saw that Mr. Nesemi had a gun and plaintiff turned around to run. Plaintiff testified that Mr. Nesemi then shot plaintiff in the left buttock. He testified that he did not know why the two men were in the building or why Mr. Nesemi shot him.

Plaintiff testified that he was not aware of anyone being shot or fighting in the subject building prior to the accident. Plaintiff also testified that Mr. Martinez and Mr. Nesemi were involved in another shooting at a nearby building, 280 Park Hill Avenue, that same day, occurring just before his incident.

Keith Haymes testified at his deposition that defendant Poonam Apartments hired him as a security consultant. He testified that his responsibilities included making security recommendations for the property, monitoring and saving any video of incidents at the property

¹ Mr. Nesemi's name is spelled differently in different papers. For the purposes of this decision, the court adopts the spelling used in plaintiff's deposition transcript.

and serving as a liaison with the police about those incidents. He also testified that he visited the property several days each week and met with the manager, Daniel Bagliore, to discuss any issues. He testified that he made his security recommendations by email, but he does not know if the email account he used still exists.

Mr. Haymes testified that there are six ways to enter the subject building. One such way is the doors to the main entrance that leads into the lobby. He testified that the main entrance consists of a door to the building that leads into a vestibule and then another door from the vestibule to the main lobby. He testified that the building had a security camera in the vestibule of the main entrance but no intercom. He testified that, the locks to the main building door were broken and repaired a number of times, but then never repaired after being broken at some point. He testified that he had discussions with Mr. Bagliore about the broken locks to the doors during the period 2011 to 2014 or 2015. He also testified that he could not recall any time when the vestibule door was ever locked. Mr. Haymes testified that a second entrance from the parking lot was also never locked, and that the four entrances in the back of the subject building were never locked.

With regard to criminal activity, Mr. Haymes testified that defendants kept records of criminal activity perpetrated by residents, and that Mr. Bagliore may have kept records of other criminal activity that occurred on the subject premises. He further testified that he was not aware of any violent crimes that occurred on the subject premises in 2016, and that there were no shootings on the subject premises at any time prior to this incident. He also testified that he was aware of complaints of drug sales on the subject premises or nearby. Mr. Haymes testified that locking the doors to the subject building would have provided greater security to the building's

residents.

Daniel Bagliore submits an affidavit in support of defendants' motion. He states that he is the director of compliance for defendant Poonam Apartments, who owns the subject premises. Mr. Bagliore states that the units in the subject building are covered by Section 8 of the Housing Act of 1937. He further states that tenants are required by their leases and Section 8 to obtain management's written consent before anyone else may move in to an apartment in the building. However, Mr. Bagliore does not reference any specific portion of Section 8, codified at 42 USC § 1437f, nor does he provide a copy of plaintiff's lease. Nevertheless, he states that Ms. Jones did not obtain such consent. He states that there were no prior shootings at the subject premises, but that there was a shooting nearby on the same day as plaintiff's incident involving the same alleged assailants.

Donald Greene also submits an affidavit in support of defendants' motion. He states that he has been the president of a security management consulting firm for 23 years, and his experience also includes service as a special agent with the FBI. Mr. Greene opines that the shooting was a premeditated crime, based in part on the fact that plaintiff knew Mr. Martinez, that the alleged assailants did not speak with plaintiff before the shooting, that the alleged assailants took nothing of value, and that the alleged assailants were not in disguise. Mr. Green acknowledges that a locked door may deter reasonable incidents, but would not deter a highly motivated person with a specific target.

Dr. Robert McCrie submits an affidavit in opposition to defendants' motion. He states that he is a professor of security management and deputy chair of the Department of Security, Fire, and Emergency Management of John Jay College of Criminal Justice. He states he is also a

certified protection professional, and that he has worked in the security field for over 40 years.

Dr. McCrie references several laws that he opines may apply to this action, but he does not apply them to the facts of this case. He opines that the lack of functioning locks is a departure from acceptable security standards and procedures, and that this departure was the proximate cause of plaintiff's incident.

Dr. McCrie also states that he collected and evaluated data from the 120th Precinct of the NYPD² and NYC Department of Correction. He states that, according to NYPD CompStat data for the "three years prior to the incident [there were] an average of eight murders/non-negligent manslaughter were recorded, 23 rapes, 208 robberies, and 276 felonious assaults".

Analysis

Defendants seek summary judgment to dismiss plaintiff's claims for negligence. On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

A property owner has common law a duty to maintain minimal security measures to protect tenants and their guests from foreseeable criminal acts by others in the property owner's building (*Perez v Real Tuff Piping and Heating, Inc.*, 73 AD3d 882, 883 [2d Dept 2010]; *Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 151 [2d Dept 1999]). The foreseeability of a criminal act that allegedly caused an injury "depends upon the location, nature, and extent of

² Mr. Haymes testified that the subject premises was located within the 120th Precinct of the NYPD.

those previous criminal activities and their similarity, proximity, or other relationship to the crime in question” (*Perez*, 73 AD3d at 883, citing *Jacqueline S. v City of New York*, 81 NY2d 288, 295 [1993]).

Defendants provide no evidence of crimes in the area, other than the testimony of Mr. Haymes and Mr. Bagliore, who state that they are not aware of any shootings at the subject premises prior to plaintiff’s incident. Conversely, plaintiff submits crime statistics of the three years preceding the incident for the police precinct that includes the location of the incident. Defendants do not object to or otherwise contest these statistics. The volume of these crimes, all of which involve an assault component like the incident at issue, raise a question of fact as to whether defendants should have foreseen the type of incident at issue because of the crimes in the area (*Novikova*, 258 AD2d at 152-53). Additionally, as the movants, defendants have the burden to show that these crimes are unlike the incident at issue, or so far removed geographically that they could not have informed defendants of the likelihood of similar crime in their building (*Vanderhurst v Nobile*, 130 AD3d 716, 717 [2d Dept 2015]). Defendants make no such showing.

Defendants also argue that the intentional and premeditated actions of the alleged assailants break any causal connection between defendants’ duty to provide security and the shooting. As the Court of Appeals explained in *Maheshwari v City of New York* (2 NY3d 288 [2004]), the actions of third parties only break the causal connection between defendants’ action and the incident at issue if the third parties’ actions are not foreseeable (*Maheshwari*, 2 NY3d at 295). However, criminal actions of third parties are foreseeable if there have been sufficiently similar prior criminal acts in the vicinity (*Novikova*, 258 AD2d at 152-53). Thus, the intention of the alleged assailants, their alleged criminal acts and their means of entry into the building

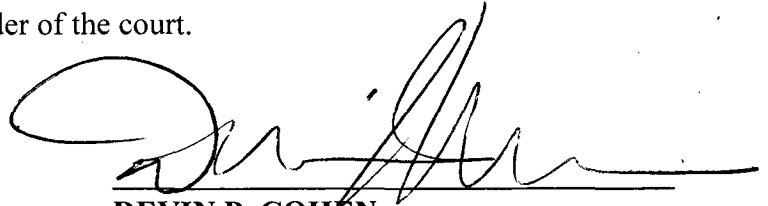
would be foreseeable if there has been a history of similar crimes at the subject building or in the surrounding area. Accordingly, there are genuine triable issues of fact.

For the foregoing reasons, defendants' motion is denied.

This constitutes the decision and order of the court.

February 26, 2020

DATE



DEVIN P. COHEN

Justice of the Supreme Court

KINGS COUNTY CLERK
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