At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1ST day of SEPTEMBER 2020.

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

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HECTOR SOSA as PROPOSED ADMINISTRATOR Of the ESTATE OF ANA DEL VALLE, deceased, and HECTOR SOSA, individually,

Plaintiff,

Index No.: 515043/2018

-against-

Decision and Order

STV INCORPORATED, NEW YORK CITY HOUSING AUTHORITY and JOHN DOES 1-10

Defendants.

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After oral argument on JULY 1, 2020 and a review of the submissions herein, the Court finds as follows:

Defendants, NEW YORK CITY HOUSING AUTHORITY (hereinafter NYCHA), move pursuant to CPLR §3212, for an Order granting summary judgment and dismissing the Complaint of the Plaintiff. (MS#2). Defendants, STV INCORPORATED (hereinafter STV) , cross-move pursuant to CPLR §3212, for an Order granting summary judgment and dismissing the Complaint of the Plaintiff. (MS#3).

FACTS

The instant action for personal injury arises out of an incident involving the decedent Ana Del Valle in connection with Ms. Del Valle's assault and murder on May,

11, 2018, inside her apartment located at 140 Moore Street in Brooklyn, New York, at a NYCHA-owned building known as Building 7 at Bushwick Houses.

Plaintiff alleges in their Complaint, on May 11, 2018, Ms. Del Valle was assaulted and killed by assailants John Does 1-10. It is further alleged in the Complaint, Ms. Del Valle's injuries and death were proximately caused by STV's and NYCHA's purported negligence in failing to repair or properly repair the surveillance cameras and front door locks where Ms. Del Valle lived.

ARGUMENTS

Defendant contends the plaintiff cannot establish that the person who killed Ms. Valle were intruders because they are unidentified. Additionally, defendants contend there is evidence in the record that establishes all the locks on the doors were in working condition on the date of the incident and therefore, they cannot prove the locks on the doors were negligently maintained.

Plaintiff in opposition contends the only evidence establishes that whomever was in the building murdering people that day were intruders. There is likewise no evidence establishing they were tenants and not intruders, and as such there are issues of fact. Additionally, plaintiff contends there is ample testimony that doors at said premises were always being propped open when they were not supposed to be and the defendants offer nothing to establish that the doors were not propped open at the time of the incident, which would establish they are negligently maintained.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64

N.Y.2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trail of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers.

A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR §3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.*

Under New York law, a landlord has a duty to protect its tenant against criminal conduct by taking minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct. In applying this standard, the Court of Appeals has defined criteria by which a landlord can he held liable for a criminal attack in its building i.e. the assailant must be an intruder who gained access to the building via a negligently maintained entrance. "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 NY2d 544, 548 [1998], *quoting Jacqueline S. v City of New York*, 81 NY2d 288, 293-294 [1993]; *see Martinez v City of New York*, 153 AD3d 803, 805 [2017]; *Alvarez v Masaryk Towers Corp.*, 15 AD3d 428, 428 [2005]). This duty extends to the guests of a tenant (see id.). A tenant or guest may recover damages, however, only on a showing that the landlord's negligent

conduct was a proximate cause of the injury (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d at 548; *Miller v State of New York*, 62 NY2d 506, 509 [1984]; *Martinez v City of New York*, 153 AD3d at 805). "In premises security cases particularly, the necessary causal link between a landlord's culpable failure to provide adequate security and a tenant's injuries resulting from a criminal attack in the building can be established only if the assailant gained access to the premises through a negligently maintained entrance. Since even a fully secured entrance would not keep out another tenant, or someone allowed into the building by another tenant, plaintiff can recover only if the assailant was an intruder" (*Burgos v Aqueduct Realty Corp.*, 92 NY2d at 550-551; *see Martinez v City of New York*, 153 AD3d at 805-806).

Here, the defendant established its prima facie entitlement to judgment of a matter of law by presenting evidence that the front and back locks into Building 7 were operable on the day of the incident (*see Martinez v City of New York*, 153 AD3d at 806; *Schuster v Five G. Assoc., LLC*, 56 AD3d 260 [2008]; *Alvarez v Masaryk Towers Corp.*, 15 AD3d at 429; *Lester v New York City Hous. Auth.*, 292 AD2d 510, 511 [2002]). In opposition, however, the plaintiff raises triable issues of fact as to whether the decedent's assailant was an intruder who entered the building through a negligently maintained entrance (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d at 552; *Jacqueline S. v City of New York*, 81 NY2d at 295; *Venetal v City of New York*, 21 AD3d 1087, 1091 [2005]; *Carmen P. v PS&S Realty Corp.*, 259 AD2d 386, 388 [1999]); *quoting Aminova v. New York City Hous. Auth.*, 168 AD3d 651, 652–53, 91 NYS3d 264 (2019).

In the present case, numerous issues of fact exist. There exists a question of fact as to whether the alleged assailant was an intruder. Here, while the assailant(s) is/are

unidentified the evidence establishes it is more likely than not that the assailant(s) was/were intruders given the fact that the plaintiff's unrelated next door neighbor was also murdered that morning, and the police have determined that the murders were perpetrated by the same assailants with the same weapon on the same day. There is testimony regarding the video from a neighbor of the alleged perpetrator(s) and the neighbor stating those people did not live in the building and were intruders. There exists a question of fact as to whether the entrances were negligently maintained. There is conflicting testimony regarding the door being habitually propped open and being open on the date in question, and that NYCHA was aware of this issue. There is conflicting testimony regarding the security cameras video. All of which are questions of fact and credibility, which are best left for the jury to decide.

As to defendant STV's motion for summary judgment. A showing of good cause requires "a satisfactory explanation for the untimeliness . . . rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]; *see also Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726 [2004]). Thus, a party's "contentions that no prejudice resulted from its delay and that its motion was meritorious [are] insufficient justifications to permit late filing" (*Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986, 988 [2d Dept 2005]). "'In the absence of a showing of good cause for the delay in filing a motion for summary judgment, the court has no discretion to entertain even a meritorious, non-prejudicial motion for summary judgment'" (*Bargil Assoc., LLC v Crites*, 173 AD3d 958, 958 [2d Dept 2019], quoting *Bivona v Bob's Discount Furniture of NY, LLC*, 90 AD3d 796, 796 [2d Dept 2011]; *see also Brill*, 2 NY3d at 652; *see also Greenpoint Props., Inc. v Carter*, 82 AD3d 1157, 1158 [2d Dept 2011]).

Defendant STV, contends, however, that his cross motion, insofar as it seeks summary judgment, can nevertheless be considered on the basis that NYCHA's motion was timely filed. It is true that a cross motion for summary judgment made after the expiration of the requisite time period "may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross motion" (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *appeal dismissed* 9 NY3d 862 [2007]; *see also Munoz v Salcedo*, 170 AD3d 735, 736 [2d Dept 2019]; *Sheng Hai Tong v K & K 7619, Inc.*, 144 AD3d 887, 890 [2d Dept 2016]; *Derrick v North Star Orthopedics, PLLC*, 121 AD3d 741, 743 [2d Dept 2014]; *Wernicki v Knipper*, 119 AD3d 775, 776 [2d Dept 2014]; *He Ping Shao v Cao Zhao Wei*, 118 AD3d 943, 944 [2d Dept 2014]). Here, the relief sought by defendant STV against plaintiff is not nearly identical to the relief sought by NYCHA. Moreover, this exception only applies to true cross motions as defined in CPLR 2215, which must be brought against a "moving party," and not to purported "cross motions" against a nonmoving party (*see also Rubino v 330 Madison Co., LLC*, 150 AD3d 603, 604 [1st Dept 2017]; *Sanchez v Metro Bldrs. Corp.*, 136 AD3d 783, 785 [2d Dept 2016]; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 87 [1st Dept 2013]; *Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986, 988 [2d Dept 2005]). Here, defendant STV is moving for summary judgment in his favor as against plaintiff, who is a nonmoving party. Thus, defendant STV's cross motion is not a true cross motion for summary judgment, and the court is without discretion to decide the merits of its untimely motion insofar as it seeks summary judgment as against plaintiff. As such, defendant STV's motion for summary judgment is hereby denied as untimely.

Accordingly, defendant's NYCHA's Motion for Summary Judgment is hereby denied in its entirety, for the reasons stated above. (MS#2) Defendant STV's motion for summary judgment is also denied as untimely, for the reasons stated above. (MS#3)

This constitutes the Decision/Order of the Court.

Date: SEPTEMBER 1, 2020

RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

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