NEW YORK SUPREME COURT – COUNTY OF BRONX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

----------X

BARRY MORALES,

Index №. 22057/2020E

Plaintiff,

Hon. **Elizabeth A. Taylor**,
Justice Supreme Court

-against-

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

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The following papers numbered ____ to ___were read on this motion **(NYSCEF Seq. No. 2)** for noticed on _____and duly submitted as **Nos.** __ on the Motion Calendar of _____

Sequence No. 2	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	33-50
Cross-motion, Answering Affidavit and Exhibits, Memorandum of Law	51-63
Reply Affidavit	81-85, 86

Upon the foregoing papers, the above motion and cross-motion are decided in accordance with the annexed decision and order.

Dated: OCT 18 2024

Hon. _____
Elizabeth A. Taylor, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY X CASE STILL ACTIVE
2. MOTION IS.....
3. CHECK IF APPROPRIATE..... ☐ GRANTED ☐ DENIED X GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART IA2

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BARRY MORALES,

Plaintiff,

DECISION and ORDER
Index No. 22057/2020E

-against-

THE NEW YORK CITY HOUSING AUTHORITY,

Defendant.

----------X

Elizabeth A. Taylor, J.

In Motion Sequence No. 2, defendant moves for summary judgment pursuant to CPLR 3212 dismissing the complaint, and plaintiff cross-moves for summary judgment pursuant to CPLR 3212 granting him summary judgment as to liability.

FACTS

Plaintiff alleges that on May 28, 2019, he was entering the NYCHA building in which his mother resided at approximately 3:00 a.m. At that time, Acosta, whom plaintiff had known since childhood, approached him and asked to speak with him privately. The two men walked to plaintiff's residence, located a short distance away at 165 St. Anne's Avenue. They spoke for about a minute about a $3,100.00 debt plaintiff believed; purportedly, Acosta had stolen certain items of furniture, the expense of which was charged to plaintiff's girlfriend. Acosta admitted that he had stolen the property which was charged to plaintiff's girlfriend but expressed no intent or perceived obligation to repay the plaintiff for his defalcations. Neither man threatened the other with physical harm.

Plaintiff then returned to his mother's building. He entered the lobby through the main lobby entrance door, which was "always unlocked." No one was in the lobby at the time, although a guard was supposed to be on duty. He pressed the button for the elevator so he could proceed to

his mother's apartment on the seventh floor, and during the next thirty seconds, was looking at his cell phone while standing to the left of the elevator doors. He suddenly saw Acosta entering the lobby through the unlocked door. Plaintiff said nothing. Acosta said, "I'm not gonna pay," pulled out an automatic handgun, shot plaintiff in both legs. Acosta was apprehended, and criminally charged and convicted for the assault.[1]

Although plaintiff never personally made any prior complaints about the condition of the front lobby door, he was present in his mother's apartment when she made numerous telephonic complaints about the condition to the NYCHA rent and housing offices. Plaintiff testified that NYCHA took no action in response to these numerous complaints, as a result of which the front lobby door of the Building was "always unlocked."

Frasier, who was the Assistant Superintendent at the Mill Brook Houses when the shooting occurred, admitted that crime was an ongoing issue within the Mill Brook Houses. There were frequent issues relating to shootings, assaults, stabbings, fights, and general crime. Frasier admitted that during his tenure (from 2018 through February 11, 2020, thus encompassing the day of this incident, May 28, 2019), there were problems with door locks. Sometimes they weren't locking, sometimes the magnet wasn't working, or the door was off the hinge or off-balance, and sometimes there would be a problem with the key or with the cylinder. Frasier admitted that problems with front lobby entrance door locks was a recurring problem, since the doors were frequently tampered with. Frasier testified that NYCHA's Office of Safety and Security was obligated to provide a guard to watch the lobby of each building within the Mill Brook complex 24 hours per day. Nonetheless, at the time of this incident, no such guard was present in the lobby of the building.

Frasier testified that he personally kept a log of the building's inspections in his office,

[1] As a result of the shooting, Acosta was arrested and convicted of Attempted Assault with Intent to Cause Serious Physical Injury with a Weapon. He was sentenced to seven years incarceration.

right behind his desk in a file cabinet. These inspection reports contained a general breakdown of the conditions in each building as well as an update on some of the things that were "negatively reported" and that "needed some attention." Additionally, the NYCHA-created daily caretaker checklists contained a rundown of daily inspections of each building, including each floor, the basement, the compactor room, and lobby doors.

During discovery, NYCHA stated that none of these records could be located. Plaintiff did not object to the sufficiency of the search, or otherwise move for an discovery sanctions.

ARGUMENT

Defendant argues that the admissible and uncontroverted evidence before this Court establishes that plaintiff's injuries were caused solely by the intentional shooting committed by Jose Acosta, and that his brazen, intentional criminal conduct was an intervening superseding cause that severed any causal connection between any alleged negligence by NYCHA and plaintiff's injuries. Defendant maintains that Jose Acosta's violent criminal act was unforeseeable and could not have been anticipated by NYCHA.

On the cross-motion, and in opposition to the defendant's motion, plaintiff maintains that as a matter of law NYCHA is liable because the record evidence indisputably establishes that NYCHA had knowledge of significant criminal activity occurring within the very housing complex where the incident occurred, that such criminal activity included shootings of the very same nature as the incident in question, that prior similar ambient crime had seriously infiltrated the premises, and that NYCHA was on notice of a risk of such infiltration. Armed with that knowledge, NYCHA is liable as a proximate result of having failed to provide functional door locks for the lobby entrance, and to otherwise maintain the building in a reasonably safe manner.

In addition, plaintiff contends, summary judgment should be granted in plaintiff's favor as

a sanction for NYCHA's admitted, willful spoliation of critical evidence.

DISCUSSION

Summary judgment is appropriate where there are no material issues of fact. (Sillman v. Twentieth Century-Fox Film Corporation, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498 [1957].). Ultimately, summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. "An unfounded reluctance to employ this remedy will only serve to swell the trial calendar and thus deny to other litigants the right to have their claims properly adjudicated." (Andre v. Pomeroy, 35 N.Y.2d 361, 362 N.Y.S.2d 131 [1974]).

Where the moving party has established entitlement to summary judgment, the opposing parties must either demonstrate the existence of an existing material issue of fact requiring a trial or tender an acceptable excuse for failing to do so. (Zuckerman v. New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 [1980]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 [1985].) Moreover, the adversaries' evidence must be submitted in evidentiary form. (Id. See also Rubinfield v. City of New York, 263 A.D.2d 448, 692 N.Y.S.2d 706 [2d Dep't 1999] [holding that it is a function of the court and not the jury to determine whether a prima facie case of causation has been established]).

A landowner has a duty to maintain its premises in a reasonably safe condition "in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." (Peralta v. Henriquez, 100 N.Y.2d 139, 144 [2003], quoting Basso v. Miller, 40 N.Y.2d 233, 241 [1976].) In this regard, a possessor of real property is under a duty to maintain reasonable security measures to protect those lawfully on the premises from reasonably foreseeable criminal acts of third parties. (Nallan v Helmsley-Spear, Inc., 50 N.Y.2d 507, 518-519

[1980].) The landowner's duty extends to criminal assaults that are foreseeable. (Walfall v. Bartini's Pierre, Inc., 128 A.D.3d 685 [2d Dept. 2015] [defendants failed to demonstrate that the attack upon the decedent was not foreseeable]; Vetrone v. Ha Di Corp., 22 A.D.3d 835 [2d Dept. 2005] [injury to security guard was foreseeable where defendant oversold tickets to New Year's Eve party, resulting in unruly crowd unable to gain admission to restaurant]; Mays v. City of Middletown, 70 A.D.3d 900 [2d Dept. 2010] [assault on plaintiff already in custody by members of crowd was foreseeable].)

"Landlords have a common-law duty to take minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person." (Mason v U.E.S.S. Leasing Corp., 96 N.Y.2d 875, 878, 756 N.E.2d 58, 730 N.Y.S.2d 770 [2001].) "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." (Burgos v Aqueduct Realty Corp., 92 N.Y.2d 544, 706 N.E.2d 1163, 684 N.Y.S.2d 139 [1998]). 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" (Novikova v Greenbriar Owners Corp., 258 A.D.2d 149, 153, 694 N.Y.S.2d 445 [2d Dept. 1999]).

Defendant contends that the uncontroverted and uncontradicted evidence demonstrates that the intentional and unforeseeable criminal actions of the third-party defendant which resulted in the shooting of plaintiff was an intervening superseding proximate cause which severed the causal nexus between NYCHA's alleged negligence and the plaintiff's injuries. However, in *Scurry v. New York City Hous. Auth.* (39 N.Y.3d 443, 211 N.E.3d 1130, 190 N.Y.S.3d 677 [2023]), the

Court of Appeals considered two separate incidents which occurred in two different public housing complexes owned and operated by the New York City Housing Authority (NYCHA). In both cases, intruders entered their buildings through exterior doors that did not have functioning locks. In addition, in both cases, the attack was "targeted" – in one case, by a former intimate partner, in the other, by rival gangs of youths.

The Court held that summary judgment should not issue dismissing the complaint in either case. Instead, "though the sophisticated nature of an attack may in some cases be relevant to the proximate cause analysis, the fact that an attack was 'targeted' does not sever the causal chain between a landlord's negligence and a plaintiff's injuries as a matter of law." (Id at 450.) The Court further explained that the issue of proximate cause is for the jury to determine, stating:

> "It is well settled that '[g]iven the unique nature of the inquiry in each case, proximate cause is generally an issue for the trier of fact, so long as the court has been satisfied that a prima facie case has been established and the evidence could support various reasonable inferences' (*Turturro*, 28 NY3d at 483 [internal quotation marks omitted]; *see e.g., Hain*, 28 NY3d 524; *Derdiarian*. 51 NY2d at 315). '[I]n order to withstand summary judgment, a plaintiff need only raise a triable issue of fact regarding whether defendant's conduct proximately caused plaintiff's injuries' (*Burgos*, 92 NY2d at 550). Plaintiffs in both *Scurry* and *Murphy* raised triable issues of fact regarding proximate cause; in both cases, proximate cause should be assessed by the finder of fact." (Scurry v. New York City Hous. Auth., 39 N.Y.3d 443, 454.)

Scurry refutes and forecloses defendant's argument that the "targeted" nature of the assault constitutes a supervening cause.

The plaintiff has clearly established a prima facie case that the lobby doors were frequently not working, of which defendant had notice, and that the area was a high crime area. documentary evidence confirms problems with both building entrance doors in the weeks before the attack (*see Jacqueline S. v City of New York*, 81 NY2d 288, 295, 614 N.E.2d 723, 598 N.Y.S.2d 160 [1993]). Furthermore, there is cogent evidence that the building and the neighborhood surrounding

it were high-crime areas with a history of similar violent occurrences. (Cabrera-Perez v. Promesa Hous. Dev. Fund Corp., 225 A.D.3d 464, 465, 2024 N.Y. App. Div. LEXIS 1337, *3 [1st Dept. 2024].)

However, on the facts presented, the issue of proximate cause remains an issue for the jury to determine. "Given the unique nature of the inquiry in each case, proximate cause is generally an issue for the trier of fact, so long as the court has been satisfied that a prima facie case has been established and the evidence could support various reasonable inferences" (Turturro v City of New York, 28 NY3d 469, 483-484, 45 N.Y.S.3d 874, 68 N.E.3d 693 [2016] [internal quotation marks and citations omitted].) *Scurry* held that the plaintiffs in the cases before the Court of Appeals had raised issues of fact as to proximate cause, but nowhere did the Court of Appeals hold that the ultimate trier of fact could not find the absence of proximate cause in a targeted assault case. Whether the absence of minimal security measures was a proximate cause of injury remains a jury question.

Plaintiff is not entitled to summary judgment based on spoliation. First, the plaintiff's cross-motion for summary judgment is untimely. "An untimely motion or cross motion for summary judgment may be considered by the court where . . . a timely motion for summary judgment was made on nearly identical grounds" (Munoz v Salcedo, 170 AD3d 735, 736, 95 N.Y.S.3d 358 [2019] [alterations and internal quotation marks omitted]). "In such circumstances, the issues raised by the untimely cross motion are already properly before the motion court and, thus, the nearly identical nature of the grounds may provide the requisite good cause to review the merits of the untimely cross motion" (Homeland Ins. Co. of N.Y. v National Grange Mut. Ins. Co., 84 AD3d 737, 738-739, 922 N.Y.S.2d 522 [2011] [citation omitted]). Here, however, the defendant on the main motion did not raise any issue regarding discovery or spoliation. (Jarama v 902 Liberty

Ave. Hous. Dev. Fund Corp., 161 A.D.3d 691, 78 N.Y.S.3d 73 [1st Dept. 2018] [court could consider the merits of defendants' untimely cross motion based on the same issues raised in plaintiff's motion, but not as to the remainder of the motion, because it did not address issues nearly identical to those raised in the timely motion and defendants did not demonstrate good cause for the delay]).

In addition, the plaintiff failed to challenge the sufficiency of the defendant's discovery responses before filing a note of issue. Lastly, the facts presented did not support the extreme sanction of spoliation. In similar cases lesser sanctions such as a negative inference have been imposed for spoliation. (Cabrera-Perez v. Promesa Hous. Dev. Fund Corp., supra.)

Based upon the foregoing, it is hereby

ORDERED that the respective motions for summary judgment are denied.

Dated: OCT 18 2024

ENTER:

Hon. Elizabeth A. Taylor, J.S.C.