EA
12/15/15
E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____

Justice

Index Number : 101854/2010
FAUGHEY KATHRYN P.ESTATE OF
vs
NEW 56-79 ASSOCIATES, L.P.
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | **No(s).** _____

Answering Affidavits — Exhibits _____ | **No(s).** _____

Replying Affidavits _____ | **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

FILED
DEC 16 2015
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
DEC 11 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/9/15

_____ **J.S.C.**

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

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

----------x

ESTATE OF KATHRYN FAUGHEY, by her Executor, WALTER B. ADAM and WALTER B. ADAM,

Plaintiffs,

Index No. 101854/10

-against-

DECISION/ORDER

NEW 56-79 IG ASSOCIATES, L.P., NEW 57-79 IE ASSOCIATES, L.P., BLDG MANAGEMENT CO., INC., BUILDING MANAGEMENT CO., INC., 435 EAST 79TH STREET ASSOCIATES LLC, CHARLES MURKOFSKY and LLOYD GOLDMAN,

Defendants.

----------x

HON. CYNTHIA S. 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.....	1,2
Affirmation in Opposition	3
Replying Affidavits.....	4,5
Exhibits.....	6

Plaintiffs Estate of Kathryn Faughey by her Executor Walter B. Adam (the "Estate") and Walter B. Adam ("Adam") (hereinafter referred to as "plaintiffs") commenced the instant action against defendants alleging that defendants were negligent in failing to provide adequate security and seeking damages stemming from the murder of Dr. Kathryn Faughey ("the Decedent"). Defendants 435 East 79th Street Associates, LLC ("435") and Charles A. Murkofsky ("Murkofsky") (hereinafter referred to as "435") now move for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint and any and all cross-claims asserted against them. Defendants New 56-79 IG Associates, L.P. ("New 56-79"), New 57-79 IE

Associates, L.P. ("New 57-79"), BLDG Management Co., Inc. ("Bldg"), Building Management Co., Inc. ("Management") and Lloyd Goldman ("Goldman") (hereinafter collectively referred to as the "Owners") separately move for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint and any and all cross-claims asserted against them. The motions are consolidated for disposition and are resolved as set forth below.

The relevant facts are as follows. On or about February 12, 2008, the Decedent was a psychologist working at her office located at 435 East 79th Street, New York, New York, Suite 1B (the "building" or the "Suite") when she was murdered by non-party David Tarloff ("Tarloff") (the "incident"). Dr. Kent Shinbach ("Dr. Shinbach"), a psychiatrist, was working in the same office at the time. Dr. Shinbach, who was with a patient at the time of the incident, suddenly heard noises coming from the Decedent's office and went to investigate. When Dr. Shinbach asked the Decedent if everything was okay and received no response, he opened the door to her office, found the Decedent on the floor and was thereafter attacked by a man with a knife who was later identified as Tarloff. Tarloff told Dr. Shinbach that the Decedent was dead and asked for his ATM card so that he could get money from him. Tarloff then attacked Dr. Shinbach several times with a knife or a cleaver until Tarloff escaped.

Tarloff first entered the building's front door lobby at around 6:29 p.m. on the date of the incident. He told Francisco Batista ("Batista"), the doorman of the building who was stationed in the lobby area, that he was there to see Dr. Shinbach and the doorman directed him to the Suite. It is undisputed that the Owners installed security cameras around the building and that a monitor displaying footage from said cameras was located at the desk in the lobby where the doorman was stationed. Additionally, it is undisputed that the video footage collected after the incident showed that Tarloff went to the basement of the building after being allowed to enter the

building by Batista and that he remained in the basement for almost an hour before reappearing in the lobby and being directed to the Suite for a second time by Batista after which he committed the above atrocities.

During the prosecution of Tarloff for the incident, it became apparent that Dr. Shinbach had had contact with Tarloff when he was an attending psychiatrist at Gracie Square Hospital in the late 1990s. Specifically, when Tarloff wanted to sign out of the hospital prematurely, Dr. Shinbach testified that he should be retained in the hospital for further treatment, over Tarloff's objection. The Decedent had no past relationship with Tarloff.

The building is a 14-floor residential and commercial rental property. There were 240 rental apartments that were accessed from the inside of the building while the commercial businesses were accessed from the outside of the building. The psychiatric and psychological professional offices were located in the Suite, where the incident occurred, and were accessed directly from the hallway connected to the lobby on the first floor of the building. There is only one entrance to the Suite and upon entering the Suite, there is a waiting area that contains seating. Additionally, there was a single entrance into each of the doctor's offices and each office had a lock on the door. 435 leased the Suite from the Owners and consisted of four members: the Decedent, defendant Murkofsky, who was a managing member of 435, Dr. Stanley Portnow and Dorothy Topper. Dr. Shinbach subleased office space from 435.

The Owners provided security for 435 and the residential tenants, which included a twenty-four-hour doorman who was stationed in the lobby by the main entrance of the building. The doorman directed patients to the professional offices in the Suite but did not ask them to identify themselves due to privacy concerns. Additionally, Owners had installed security cameras which were monitored by the doorman. After the incident, plaintiff Adam, the

decedent's husband, commenced the instant action on behalf of the Decedent's Estate and on behalf of himself alleging that defendants were negligent in failing to provide adequate security for the building. 435 and the Owners now move for summary judgment.

The court will address both motions together. 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). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980). 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." *Id.*

"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, 547 (1998)(citing *Jacqueline S. v. City of New York*, 81 N.Y.2d 288, 293-94 (1993)). "Landlords have a 'common-law duty to take minimal precautions to protect tenants [only] from foreseeable harm,' including a third party's foreseeable criminal conduct." *Id.* at 550. Indeed, a landlord will not be required to take protective measures "unless it is shown that he knows or, from past experience, has reason to know that there is a likelihood of third-party conduct likely to endanger the safety of those lawfully using the premises." *Williams v. Citibank*, 247 A.D.2d 49, 51 (1st Dept 1998). "It is that knowledge, actual or constructive, that creates the duty to take reasonable precautions for the safety of those lawfully using the premises." *Id.* However, courts have found

that a premeditated intentional attack is not a foreseeable result of any security breach if reasonable security measures are in place. *See Maheshwari v. City of New York*, 2 N.Y.3d 288, 294 (2004)(holding that "the brutal attack was not a foreseeable result of any security breach" based on the fact that reasonable security measures were in place and that the incident was "[a] random criminal attack" which was unlike any other criminal act which had occurred in the past.) *See also Harris v. New York City Hous. Authority*, 211 A.D.2d 612, 616 (2d Dept)(holding that an intentional criminal act against a targeted victim "sever[s][] the causal nexus between the alleged negligence of [defendant] and the complained-of injury.").

In the instant action, this court finds that defendants have established their *prima facie* right to summary judgment dismissing the complaint and any and all cross-claims asserted against them as they have shown that the security measures that were in place in the building were reasonable based on the fact that the incident was not foreseeable and that Tarloff's actions constituted an intentional criminal act against the decedent, a targeted victim, which severs the causal nexus between defendants' alleged inadequate security measures and the incident. Initially, this court finds that defendants have demonstrated that the incident was not foreseeable on the ground that they had no notice of prior criminal activity in the building. Specifically, Mickey Napolitano, an employee of Bldg., testified that she was unaware of any crimes, assaults or conduct similar in nature to the incident. Indeed, she testified that the only prior criminal incident she was aware of was a burglary by a staff member/handyman of the building. However, an isolated incident, committed by an employee of the building and not an intruder, is insufficient to establish notice of prior criminal activity so as to trigger a duty owed to the decedent. *See Rodriguez v. Camaway Realty, Inc.*, 96 A.D.3d 479 (1st Dept 2012). Additionally, Ms. Napolitano testified that she was unaware of any prior incidents of disruptive

behavior by visitors to the Suite. Further, Batista, the doorman, testified that he was unaware of any criminal conduct in the building and never had any occasions to call the police to the building prior to the incident. Hans Wepner, another doorman for the building, testified that in his forty years as a doorman for the building, he was unaware of any criminal activity, robbery, burglary or anything of that nature. Moreover, Dr. Shinbach testified that he never made any complaints about any security concerns to the building or 435 and that he was unaware of any criminal activity taking place in the building prior to the incident. Finally, Murkofsky testified that he did not receive any complaints from any of the doctors in the Suite that there were any security concerns.

Further, this court finds that the security measures in place were reasonable in order to protect the tenants in the building based on the fact that the incident was not foreseeable. It is undisputed that defendants provided the building with a twenty-four-hour doorman, who was stationed at the lobby entrance; there was only one means of ingress and egress to the building aside from the service area entrance which was locked and could only be accessed via a buzz-in through the doorman; the doormen were instructed to call the police if any person seeking to gain access to the building was acting strangely, unusually or erratically; and each doctor and clinician working in the Suite had a lock on his or her individual office doors. Additionally, pursuant to the affidavit provided by Karim Vellani, defendants' security expert, such security measures were sufficiently reasonable based on the circumstances and the layout of the building. Further, Batista testified that he worked as a doorman for the building since 1989, was the doorman on duty at the time of the incident and that he let Tarloff into the building based on his request to see Dr. Shinbach. Batista further testified that although he had not seen Tarloff before the day of the incident, Tarloff was not acting strangely, unusually or erratically and thus, he did

not believe that Tarloff's behavior warranted calling the police. He further testified that he did not notice Tarloff wandering around the basement of the building prior to the incident and that he did not recognize Tarloff when he entered the lobby of the building for a second time.

Moreover, the court finds that Batista's failure to recognize Tarloff when he entered the building a second time and his failure to notice Tarloff in the basement did not constitute a failure to provide adequate security. The Owners had the proper security measures in place and any failure by Batista to recognize Tarloff or notice him in the basement of the building was not evidence of inadequate building security. Indeed, Tarloff entered the building for a second time almost an hour after he first entered the building and Batista testified that he did not find Tarloff's behavior to be strange or unusual and thus, he did not remember seeing him an hour earlier. Further, the building has over 240 apartments and many people were constantly going in and out. Additionally, Batista testified that he could not watch the monitor if he had to open the door for someone and that he only "watch[ed] the monitor when there's nothing to do, if [he was] not busy. If somebody calls for help or need[s] a taxi or needs this, there's no one there to watch the monitor because it's only one person on duty." Further, even if Batista had been looking at the monitor, there is no evidence that footage from the basement cameras was actually displayed on the monitor on Batista's desk on the date of the incident. Indeed, when asked who determined which camera the doorman looks at at any given time, Batista testified that "[t]he super is the one who has control of that" and he could not recall what footage was displayed on the date of the incident or whether he could see what was going on in the basement at all. However, even if the court found that Batista's failure to notice Tarloff in the basement did constitute inadequate security measures, which it does not, such inadequate security measures was not the proximate cause of the incident as Tarloff only attacked the decedent and Dr.

Shinbach after being let in through the front entrance of the building for a second time and not via the basement of the building. Moreover, Tarloff's actions constituted an intentional criminal act against the decedent, a targeted victim, which severs the causal nexus between the alleged inadequate security measures and the incident.

In response, plaintiffs have failed to raise an issue of fact sufficient to defeat defendants' motions for summary judgment. Plaintiffs' assertion that there exists an issue of fact as to whether defendants took the requisite minimal security precautions based on their failure to require Tarloff to identify himself prior to being allowed in the Suite is without merit. As an initial matter, this court finds that such precaution was not required to be taken by defendants as it was sufficient, based on the lack of foreseeability of the incident, that Tarloff identified himself as someone there to see Dr. Shinbach. Further, even if this court were to find that such precaution should have been taken by defendants, the failure to do so was not the proximate cause of the incident. Indeed, although Tarloff did not have an appointment with Dr. Shinbach, even if Tarloff had been identified and announced, Dr. Shinbach testified that he would have allowed Tarloff to enter the office to make an appointment. Specifically, Dr. Shinbach testified that a patient or a visitor seeking to become a patient would be allowed into the Suite. Thus, the failure of defendants to require that Tarloff identify himself was not the proximate cause of the incident and thus does not raise an issue of fact as to whether the requisite minimal security precautions were taken.

Additionally, plaintiffs' assertion that there exists an issue of fact as to whether defendants should have implemented additional security measures based on the nature of the practice of the doctors in the Suite, namely, that it was a psychiatric practice is without merit. As an initial matter, it is undisputed that some of the doctors in the Suite, namely Decedent, mainly

saw patients dealing with infertility issues and not patients who had illnesses with violent tendencies. Moreover, Dr. Shinbach testified that he was "a general adult psychiatrist" but he never testified that any of his patients had illnesses that were violent in nature. In fact, Dr. Shinbach, along with the other doctors in the practice, testified that they had not experienced violent or disruptive patients while working in the Suite. Thus, merely operating a psychiatric practice, without more, is insufficient to establish that an incident such as the one that occurred was foreseeable.

Accordingly, both motions for summary judgment are granted and the action is thus dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 12/9/15

Enter: _____
J.S.C.