To be Argued by:
JOHN F. WATKINS
(Time Requested: 30 Minutes)

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Court of Appeals

of the

State of New York

BRYAN SCURRY and BRANDON CRUSHSHON, as Proposed Administrator of the Estate of BRIDGET CRUSHSHON (Deceased),

Plaintiffs-Respondents,

– against –

NEW YORK CITY HOUSING AUTHORITY,

Defendant-Appellant.

(For Continuation of Caption See Inside Cover)

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Date Completed: August 5, 2022

NEW YORK CITY HOUSING AUTHORITY,

Third-Party Plaintiff,

– against –

"JOHN DOE" and/or "JANE DOE" as fictitious Names of the Executor, Executrix or Administrator of the Estate of WALTER D. BONEY (Deceased),

Third-Party Defendant.

NEW YORK CITY HOUSING AUTHORITY,

Second Third-Party Plaintiff,

– against –

MERCEDES BONEY, as Administratrix of the Estate of WALTER D. BONEY (Deceased),

Second Third-Party Defendant.

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PRELIMINARY STATEMENT

Defendant-Appellant/Third-Party Plaintiff/Second Third-Party Plaintiff New York City Housing Authority ("defendant" or "NYCHA") submits this brief in further support of its appeal from the Decision and Order of the Appellate Division, Second Department, dated January 27, 2021 (the "January Decision"), which affirmed the prior Order of the Supreme Court, King's County, dated February 23, 2018 (the "Supreme Court Order"), that denied NYCHA's motion for summary judgment dismissing plaintiffs' complaint.

Plaintiffs' opposition suffers from a fatal flaw: it ignores the undeniable fact that Boney was *the most, not one of the most,* motivated attackers imaginable – an assassin so hellbent on killing his target that he was willing to engulf himself in flames and die an excruciatingly painful death while potentially immolating anyone else within reach to achieve his evil objective. Indeed, this is an extraordinary case, even for a "targeted attack", and no amount of posturing by plaintiffs' counsel can obscure its sheer brutality. To suggest, as plaintiffs do, that a locked entrance door would have caused Boney to abandon his evil plot, pack up his gasoline can and matches and disappear quietly into the night, simply defies logic and commonsense and ignores Boney's pattern of maniacal behavior and relentless stalking of his ex-fiancé prior to the attack. Moreover, such a finding would represent a significant departure from prior statewide decisions involving targeted attacks with

circumstances far less compelling than here. All told, the scenario at bar presents precisely the type of senseless assault that the "targeted attack exception" was designed to address, so much so that it would be eliminated entirely if defendant is not granted summary judgment.

Plaintiff's eminent appellate counsel knows this – it's why plaintiffs' brief delays discussing substantive law until page 38 (of 61).

ARGUMENT

REPLY POINT I

PLAINTIFFS' ARGUMENTS REGARDING PRESERVATION ARE UTTER NONSENSE AND CONTARY TO WELL-SETTLED LAW

Simply put, plaintiffs' attempt to torpedo defendant's meritorious appeal on procedural grounds is a complete misfire. As detailed in its opening brief, defendant asserts that this Court should adopt the First Department's long-held, pragmatic approach to targeted attack cases, which was recently re-affirmed in Estate of Murphy, 193 A.D.3d 503 (1st Dep't 2021). In their opposition, plaintiffs would have this Court believe that such argument is "unpreserved" because defendant did not explicitly argue for the First Department's "burden shifting approach" as re-articulated in the recent Estate of Murphy decision.

Plaintiffs' argument is patently meritless. Preliminarily, the Court of Appeals has held that an issue is adequately preserved for appellate review when the arguments made "were sufficient to alert [the] Supreme Court to the relevant question". Geraci v. Probst, 15 N.Y.3d 336, 342 (2010). In doing so, it expressly rejected the notion that the "frame" of the issue dictates preservation. Id. Here, the relevant legal issue, namely, the standard a landowner-defendant must meet to be entitled to summary judgment on the basis of an intervening and superseding event that severed the causal chain in a targeted attack case, was clearly before the

Supreme Court, and therefore, it is immaterial how defendant "framed" their arguments below.

Significantly, the Supreme Court expressly noted that NYCHA argued "that the question of whether the front door was locking properly is immaterial to the instant lawsuit because the injuries stem from an unforeseeable intervening force that severs the causal connection between the negligence alleged (the broken door lock) and the injuries suffered" (R.11). Of course, this argument necessarily entailed the salient legal question of whether, and under what circumstances, a targeted attack severs a causal connection as a matter of law. Further, this issue was also in dispute on appeal as reflected in the parties' briefing and the Second Department's decision addressing the question.

Moreover, plaintiffs' "preservation argument" is not only at odds with this Court's jurisprudence, it is manifestly divorced from reality. Absurdly, plaintiffs' underlying premise is that, to preserve a purely legal issue raised by disagreement between two Appellate Division Departments for review, NYCHA had to somehow predict the exact contours of the January Decision and Estate of Murphy opinion before they were rendered and frame their arguments below accordingly. Unsurprisingly, plaintiffs' cited cases do not support such a ridiculous proposition and do not address the resolution of a conflict between the departments which the Court is called upon to do here.

Finally, plaintiffs contend that defendant's argument on appeal is "inconsistent with the position it asserted below" (Plaintiffs' Brf. at 34). Yet, plaintiffs neither explain how such a conclusory statement supports their "preservation argument" nor provide corroborating legal authority. At the end of the day, plaintiffs cannot escape the simple fact that the identicality between any argument NYCHA made here and the outcome in Estate of Murphy is inconsequential as the relevant legal question was squarely before the Supreme Court and thus preserved for review.

REPLY POINT II

PLAINTIFFS FAILED TO SHOW THAT DEFENDANT'S INTEREPRETATION OF THE FIRST DEPARTMENT'S APPROACH TO TARGETED ATTACK CASES IS INCORRECT OR INCONSISTENT WITH SETTLED LAW

Turning to the "substantive" arguments in opposition, plaintiffs initially postulate that defendant (1) had a duty to maintain a functioning door lock; (2) failed to show that it fulfilled such duty or, alternatively, that such failure was not a proximate cause of the subject injuries; and (3) that the First Department standard for targeted attack cases, as articulated by defendant, is inconsistent with New York jurisprudence. As discussed immediately below, plaintiffs' claims miss the mark entirely and amount to nothing more than a blatant attempt to obfuscate and confuse the pertinent issues before the Court.

A. Plaintiffs' Argument Concerning Defendant's "Duty" To Implement Minimal Security Measures Goes Nowhere And Does Nothing

First, plaintiffs' claim that defendant had a "duty" to take minimal precautions to protect tenants from foreseeable harm is a red herring – the issue is not disputed nor relevant to this appeal, which concerns causation. Plaintiffs seemingly focus on this irrelevant issue because they want to discuss this Court's holding in Jacqueline S. v City of New York, 81 N.Y.2d 288 (1993), a tragic case involving the abduction and rape of a minor girl (Plaintiff's Brf. at 37). However, Jacqueline S. is inapposite, as there is no indication that the assault on the minor plaintiff in Jacqueline S. was

targeted. Indeed, the Court does not even mention, let alone address, the targeted attack rule anywhere in its decision.

Here, defendant does not dispute the truism that "landlords owe a legal duty to their tenants to take minimal security precautions against reasonably foreseeable criminal acts" (Plaintiffs' Brf. at 38). Rather, the critical question is whether the Second Department correctly applied the law to the facts of this case, which, defendant contends, overwhelmingly establishes that there is no causal link between any alleged lapse of this duty and plaintiffs' harms.

B. The Standard Defendant Seeks To Apply Is Not Novel

As detailed in its opening brief, defendant asks the Court to follow and apply the First Department's reasoned "burden shifting approach" for targeted attack cases. Plaintiffs, in opposition, hyperbolically argue both that defendant seeks the creation of new law and that this new law would be somehow catastrophic. While the public policy points raised by plaintiff are addressed later in this brief, it is critical that the standard at issue is in no way novel: it is consistent with existing jurisprudence, properly understood.

As set forth in Estate of Murphy, a landowner carries its *prima facie* burden by establishing that the attack was targeted (which NYCHA has done) while allowing a plaintiff to carry its shifted burden by presenting evidence that minimal security measures would have prevented the attack (which plaintiff has not done).

This rule appropriately recognizes that a targeted attack is itself "truly extraordinary and unforeseeable" and can therefore "serve to break the causal connection between any negligence on the part of the [landlord] and the plaintiff's injuries". Simmons v. Kingston Hgts. Apts. L.P., 2013 WL 2169361, at *4 (Sup. Ct. Kings Co. May 3, 2013) (internal quotations omitted); see also Cerda v. 2962 Decatur Ave. Owners Corp., 306 A.D.2d 169 (1st Dep't 2003) (targeted assault of ex-drug dealer by assassins was intervening superseding cause despite broken lock); Harris v. New York City Hous. Auth., 211 A.D.2d 616, 616-17 (2d Dep't 1995) (targeted murder by "long-time enemy" severed causal nexus between landlord's negligence and injuries sustained). Indeed, the First Department's approach acknowledges that a targeted attack is clearly an intervening, superseding cause which operates upon but does not "flow from the original negligence". Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 315 (1980).

In short, defendant aptly pointed out that the First Department's "general rule" holds "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". Flynn v. Esplanade Gardens, Inc., 76 A.D.3d 490, 494 (1st Dep't 2010). Defendant further explained that (1) in Estate of Murphy, the First Department found that a landowner would not "avoid liability" in targeted attack cases if admissible evidence tended to show that "minimal precautions would have actually prevented a determined

assailant from gaining access"; but (2) that the First Department's "general rule" prevails, because, as the Estate of Murphy Court found, such scenario is "hardly ever the case". Estate of Murphy, 193 A.D.3d at 508. Thus, properly understood, the First Department rule "deems a landowner to have carried its *prima facie* burden by establishing that the attack was targeted, while allowing a plaintiff to carry its shifted burden" by presenting evidence showing that minimal security precautions would have actually thwarted the attack (Defendant's Brf. at 19-20). Such interpretation is patently correct based on a plain reading of Estate of Murphy and applicable First Department jurisprudence.

Based on the foregoing, it is abundantly clear that defendant did not invent "a special, heightened burden" but is simply asking this Court to follow a well-established standard that the First Department applies to targeted attack cases and employ it here. See Cynthia B. v. 3156 Hull Ave. Equities, Inc., 38 A.D.3d 360, 360 (1st Dep't 2007) ("These facts suffice to make a prima facie showing that the infant plaintiff was targeted well in advance by a serial rapist, severing any causal connection between her injuries and defendant's alleged negligence in failing to repair a broken front door lock. Plaintiffs' response that a functioning front door lock would have deterred the rapist is 'most unlikely'") (internal citation omitted); Rivera v. New York City Hous. Auth., 239 A.D.2d 114, 115 (1st Dep't 1997) ("plaintiff cannot prove that defendant's alleged negligence in failing to provide

functioning door locks was the proximate cause of her injuries" because the "preconceived criminal conspiracy to murder plaintiff's stepbrother…renders it most unlikely that any reasonable security measures would have deterred the criminal participants"); Suarez v. Longwood Associates, 239 A.D.2d 250, 250-51 (1st Dep't 1997) ("as a matter of law, the drive-by shooting was an unforeseeable act breaking the chain of causation between defendants' alleged failure to maintain the front door lock, which allegedly prevented plaintiffs from escaping into their building, and plaintiffs' injuries"). In other words, there really is no "targeted attack" rule: it is merely a subset, created by the familiar process of common law, of the workaday rule that a movant for summary judgment can carry its *prima facie* burden in a number of ways, shifting the burden to the non-movant to raise a triable issue of fact.

Here, defendant has satisfied this process. It has shown that Boney committed a targeted, premeditated attack that would not have been deterred by ordinary, minimal security protocols. Plaintiffs have failed to meet their shifted burden by proffering a scintilla of evidentiary proof remotely suggesting that a functioning door would have thwarted his diabolical plan. As such, NYCHA should be granted summary judgment.

C. The Record Evidence Demonstrates That A Functioning Entrance Door Lock Would Not Have Prevented The Targeted Attack

Here, the record evidence demonstrates that there is no triable issue of fact as to causation. This is unsurprising, because, as the First Department aptly noted, it is "hardly ever the case" that there will be evidence that "minimal precautions" can "actually prevent[] a determined assassin from gaining access" to a building. Estate of Murphy, 193 A.D.3d at 508. See also, Estate of Faughey ex rel. Adam v. New 56-79 IG Associates, L.P., 149 A.D.3d 418, 418-19 (1st Dep't 2017) (noting that plaintiffs had no evidence, only speculation, that security measures could have prevented a murder); Buckeridge v. Broadie, 5 A.D.3d 298, 304 (1st Dep't 2004) ("Plaintiff's further contention—that defendant's failure to adequately ascertain the identity of the assailants before allowing them into the house raises an issue of fact as to defendant's negligence—is unavailing. Plaintiff'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"); Cerda, 306 A.D.2d 169 (landlord's negligence in failing to repair broken lock which allowed intruder's entry seriously undermined by evidence of preconceived, carefully planned criminal conspiracy to murder tenant).

This rule, which plaintiffs seek to avoid addressing throughout their brief, has been repeatedly applied in decisions from this Court and the Second Department. See, e.g., Santiago v. New York City Hous. Auth., 63 N.Y.2d 761, 762-63 (1984)

("The negligence of defendant New York City Housing Authority in not repairing a 'jammed' exterior door is not a proximate, or legal cause of the injuries sustained by the plaintiff when she was shot in the leg after being unable to open the exterior door in attempting to reenter her building. Under these circumstances the intervening act of the unknown assailant was extraordinary and unforeseeable as a matter of law, and thus served to 'break the causal connection' between the defendant's negligence and the plaintiff's injuries"); Harris, 211 A.D.2d at 616-17 ("The record reveals that [plaintiff] was the victim of a targeted murder by a long-time enemy who had tried to kill him on at least one prior occasion. Such an intentional act was an unforeseeable, intervening force which severed the causal nexus between the alleged negligence of the NYCHA and the complained-of injury").

Here, the facts do not show the unusual circumstance where evidence exists that the determined assailant would have been deterred by minimal security. To the contrary, they establish that Boney would not have been thwarted, as he was willing to die to achieve his goal.

1. Plaintiffs Cannot Rewrite The Facts To Deny Boney's Suicidal Intent

As an initial matter, defendant stresses that Boney's plan involved his own death by self-immolation. Plaintiffs cannot dispute that Boney doused himself in gasoline and lit himself on fire, and clearly cannot grapple with the implications of this fact for their case, or point to even a shred of evidence that the malign willpower

behind such an act would be cowed by minimal security measures.[1] Their strategy is to downplay Boney's extreme level of determination by contending that his belated "attempt[] to flee the building" while he "was already in flames" shows that he was, in fact, not "bent on 'suicide'" (Plaintiffs' Brf. at 19-20). Defendant will not indulge in ruminations over whether a suicide's contact with the reality of the pain involved in their method of self-extermination can trigger sufficient regret so that the suicide should no longer be deemed a suicide – the issue seems one for a house of worship to unpack.

The relevant issue is Boney's determination *before the attack*. Plaintiffs admit that Bryan Scurry testified that Boney "was throwing [gasoline] on himself and [his] mother" and "then 'flicked' a book of matches" causing "everything" to go "up in flames" (Plaintiffs' Brf. at 19). No evidence suggests that Boney did not understand his actions, and thus, no rational juror could reasonably conclude that Boney was not willing to pay the ultimate price to achieve his evil goal. This, not that the depraved Boney lacked the stoicism to bear the flame in silence, is the relevant consideration, because it informs his willpower to overcome minimal obstacles placed in his path.

[1] Plaintiffs dedicate only one page of their 61-page brief (page 60) to arguing that they carried their shifted burden to raise an issue of fact as to causation, and do not cite to the record for any evidence that they contend demonstrates having carried this burden. Although defendant addresses this section herein, it highlights it here simply to establish that plaintiffs' eggs are entirely in the "NYCHA didn't carry its *prima facie* burden" basket.

While this is the single most compelling piece of evidence establishing that the attack was planned and premediated, and that Boney could not have been deterred by minimal precautions, it is far from alone. Defendant also amply established the targeted nature of Boney's attack via Bryan Scurry's testimony.

2. Defendant Thoroughly Established Its Entitlement To Summary Judgment Through Bryan Scurry's Testimony

As summarized in defendant's prior brief, Bryan Scurry's testimony amply established that Boney's attack was targeted and premeditated (Defendant's Brf. at 4-10). In addition to narrating the history of Boney's relationship with Bridget Crushshon, Bryan personally witnessed Boney's violence against his own daughter (R.332-33), his alcohol abuse (R.148), his attack on Ryan Scurry (R.310) and heard, over the phone, Boney threaten to kill Bridget Crushshon and himself (R.144, 314-15). Bryan also testified that he heard "countless" threatening voice mails from Boney (R.308).

Plaintiffs – who, of course, include Bryan Scurry – cannot deny the significance of this testimony. They therefore deploy two strategies to deny that this testimony could establish that Boney targeted Bridget Crushshon. First, they argue that because Bryan and Brandon Scurry also recounted statements made by Bridget Crushshon, defendant has relied on "hearsay" (Plaintiffs' Brf. at 16, 19). Second, they claim that Brandon Scurry contradicted Bryan Scurry on key points, creating

credibility issues that, on summary judgment, must necessarily be resolved in Plaintiffs' favor (id. at 7, 16-18). Both arguments fail.

First, defendant did not, of course, rely on inadmissible hearsay. Plaintiffs notably fail to identify any alleged "hearsay" statements in advancing this argument. Insofar as this is because the statements of what Bryan witnessed personally obviously suffice to establish that the attack was targeted, this ends the inquiry. But in any case, any statements made under oath that contain the deponent's recollection of Bridget Crushshon's statements would not be inadmissible hearsay, because Bridget Crushshon's statements constitute party admissions.

This Court has held for over a century that "the admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made", specifically applying this rule to party decedents. Reed v. McCord, 160 N.Y. 330, 341 (1899) ("the admissions proved in this case were … facts and circumstances which attended the intestate's injury" and therefore admissible evidence); see also Kwiatkowski v. John Lowry, Inc., 276 N.Y. 126, 130-31 (1937) (admissions of deceased against interest are admissible, since a cause of action which thus survives is the original cause of action which deceased might have maintained in his lifetime); Rothman v. McLaughlin & Stern, LLP, 127 A.D.3d 591, 592 (1st Dep't 2015); Delgado v. Martinez Family Auto, 113 A.D.3d 426 (1st Dep't 2014); Hawkins v. Unterborn, 48 A.D.2d 176 (4th Dep't 1975)

(decedent's admission "should be admissible regardless of where made as inconsistent with the position taken by [his] estate at trial on this issue").

The Second Department case, Smith v. Kuhn, 221 A.D.2d 620 (2d Dep't 1995) is illustrative. In Smith, the infant plaintiff was injured when "he stepped on a pool skimmer lid at the home of his grandmother, Julia A. Brennan, and the lid flipped up, striking him in the groin. The infant plaintiff and his father commenced this action against Brennan, who died prior to the trial". Id. at 620. The Court noted that, at trial, the plaintiffs "attempted to introduce testimony of the infant plaintiff's brother regarding a conversation he had with Brennan several hours after the accident in which she indicated that she was aware of a similar problem with the skimmer lid in the past". Id. at 620-21. Significantly, the Court concluded that "the Supreme Court erred in precluding such testimony, as Brennan's statements constituted an admission". Id. at 621.

Clearly, Bridget Crushshon's estate is a party to this action and, as such, her statements to plaintiffs Bryan Scurry and Brandon Crushshon undoubtedly constitute party admissions. Plaintiffs' "hearsay" argument can thus be ignored.

Plaintiffs' "conflicting evidence" argument fares no better. The conflicts identified between Bryan and Brandon's testimony are not material. It is true, as plaintiffs point out, that Bryan and Brandon differed as to whether Bridget and Boney were engaged, whether Boney had previously lived with them, and whether

a ring had been exchanged (Plaintiffs' Brf. at 18). But plaintiffs strain too far when they claim that Brandon also "contradicted" Bryan as to the core elements of the relationship – Bryan's specific recollections of arguments, threats, violence, and substance abuse (Plaintiffs' Brf. at 18). In fact, there is no contradiction: Brandon did not deny that these events occurred or contradict Bryan, but merely testified that he was unaware of them (R.1249, 1262) or did not recall them (R.1328-32).[2] Given his testimony that he never discussed the incident with Bryan (R.1277) and that he "stayed out of" the Cornelia apartment and "was mostly gone", only coming home once a week or even twice a month (R.1317), this is not particularly surprising and does not represent an actual contradiction. Further, on one crucial point, Brandon *confirmed* Bryan's account: he knew that Boney stalked Bridget and that she wanted to get away from him (R.1242-43).

Thus, plaintiffs' efforts to manufacture doubt as to the violent, targeted, and obsessive nature of Boney's campaign against Bridget Crushshon fail. There is no

[2] Indeed, Brandon candidly testified at his 2014 deposition that he struggled to remember anything from before his mother was killed in 2006 (R.1260) and that the surrounding events were "blurry" to him (R.1289). This is seen throughout his deposition. For example, Brandon did not remember his previous employer's address (R.1223), where he lived at age 13 (R.1229), his mother's job title (R.1231), where his mother had attended college (R.1232), or what kind of car she drove (R.1262). Crucially, Brandon did not remember that he had ever lived with his brother Jason Crushshon (R.1233-34), despite Jason having lived with him at the time of the attack (R.1165), and his having remembered the same in 2008 (R.388). He also testified that his mother kept him out of her relationship with Boney (R.1241-42), although his 2008 testimony confirmed he understood it to be romantic in nature (R.399).

genuine issue of fact here: the undisputed and uncontradicted evidence leaves no room for doubt.

REPLY POINT III

PLAINTIFFS HAVE FAILED TO CONTROVERT THE OBVIOUS FACT THAT DEFENDANT IS PLAINLY ENTITLED TO SUMMARY JUDGMENT UNDER THE WELL-REASONED FIRST DEPARTMENT STANDARD

Plaintiffs finally address the heart of the appeal approximately 3/4 of the way into their opposition. In doing so, they admit that it is "true" that "the Appellate Division has repeatedly ruled that the landlord is not legally responsible where the particular facts of the case indicate that the same fate would likely have befallen the 'targeted' victim with or without minimal security" (Plaintiffs' Brf. at 48). Plaintiffs then try to distinguish the instance case from this admitted rule. Plaintiffs do so by dividing a subsection of the jurisprudence into two categories: (1) cases where the targeted attack defense applied – which plaintiffs contend are factually distinguishable; and (2) cases where the targeted attack exception was "rejected" (Plaintiffs' Brf. at 48-53).

Each tactic fails.

A. Plaintiffs' Factual Distinctions Fail

Initially, plaintiffs allege that the cases they selected where the targeted attack defense applied involved "proof" that, unlike here, "showed that the minimal security of a locked entrance would not have prevented the crime" (Plaintiffs' Brf. at 48). This is, on its face, begging the question. Moreover, plaintiffs fail to provide

any meaningful analysis of the facts in said cases, as would be required for such a comparison.

As set forth supra, NYCHA established that Boney would not have been deterred by a locked door. Plaintiffs attack this showing rhetorically, but have little to offer in terms of facts or logic. They cannot contravene (1) Boney's extensive history of lunacy, including his unrelenting pattern of stalking and threatening behavior against his target prior to the incident; and (2) that Boney was willing, ready and able to (and actually did) sacrifice himself by setting himself ablaze at the time of his murder/suicide and risk killing anyone who came within arm's length in order to carry out his attack. To the extent plaintiffs make the weak point that in Estate of Murphy and certain other cases, the defendant's summary judgment motion was supported by an expert, they fail to connect this argument to anything. Plaintiffs obviously wish to tiptoe up to suggesting that the law requires a movant have expert support, but are unwilling to actually come out and say it, because, of course, it is false.[3] See, e.g., Greenberg v. CBS Inc., 69 A.D.2d 693, 701 (2d Dep't 1979) (noting that there is no requirement that a movant for summary judgment deploy an expert).

[3] Much the same can be said for plaintiffs' various attempts to play "gotcha" by pointing out instances where counsel for NYCHA in prior, unrelated cases presented arguments or proof not asserted here. That an institutional litigant has deployed different strategy at different times is both unremarkable and without bearing on the legal questions at hand.

Thus, the instant case mirrors, or is even more convincing than, the cases plaintiffs claim to be factually distinguishable. See Cynthia B., 38 A.D.3d at 360 ("Plaintiffs' response that a functioning front door lock would have deterred the rapist is 'most unlikely'"); Flores v. Dearborne Mgt., Inc., 24 A.D.3d 101, 101-02 (1st Dep't 2005) ("the evidence also clearly established that the murders were a result of a planned hostage taking and armed robbery, incident to the intended murder of the specific target in his apartment…Such intentional conduct was, as a matter of law, the sole proximate cause of the decedent's death"); Cerda, 306 A.D.2d at 169-70 ("a broken front door" would not have stopped the "coordinated, pre-planned attack"); Rivera, 239 A.D.2d at 115 ("preconceived criminal conspiracy to murder plaintiff's stepbrother…renders it most unlikely that any reasonable security measures would have deterred the criminal participants"); Tarter v. Schildkraut, 151 A.D.2d 414, 416 (1st Dep't 1989) ("the conclusion is inescapable that plaintiff's ex-lover was intent on harming plaintiff. He had stalked her for that purpose. Given the motivation for the assault, his acts were truly extraordinary and unforeseeable and served to 'break the causal connection' between any negligence on the part of the defendants and the plaintiff's injuries").

Simply stated, plaintiffs have not, because they cannot, meaningfully distinguish any of the above-referenced cases from the instant matter. Instead, they merely point out that in two other cases they rely upon, Flynn, supra, and Harris,

supra, the proof showed that a "locked entrance would not have prevented the crime" because "the assailant was a frequent visitor to the building" (Plaintiffs' Brf. at 48-49). But this is obviously just one of many circumstances under which a mere lock could not have deterred the attack, as the many other cases confirm.

B. Plaintiffs' Legal Distinctions Fail As Well

Upon examination, the cases plaintiffs cite as examples of courts "rejecting" the targeted attack rule are nothing of the kind.[4] Plaintiffs mix apples and oranges in comparing the present case with Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507 (1980). In Nallan, plaintiff William Nallan "was shot in the back" as "he leaned over to sign a guest register that had been placed on a desk" at defendant's office building by a "would-be assassin whose purpose was to retaliate against Nallan for his efforts to uncover certain corrupt practices in the labor union in which Nallan was an active member". Id. at 512-13. The Court noted that a lobby attendant was ordinarily stationed at the desk "to sign individuals who arrived at the building after business hours" but was away from his post on the night in question to attend to his

[4] Plaintiffs do not even make a pretextual effort to defend the January Decision's reference to a need to show that an attack "reflects such a degree of preplanning, coordination, and sophistication *that no level of building security would have prevented the crime*" (R.2163) (emphasis added). Indeed, plaintiffs dismiss this language altogether as mere *dicta*, not to be concerned about (Plaintiffs' Brf. at 29).

As such, defendant's arguments regarding the same remain unrebutted. At a minimum, however, should this Court accept that the Second Department's language in question was mere *dicta*, it should say so expressly.

janitorial responsibilities. Id. at 513. Additionally, the Court stated that "there was expert testimony in the record that the mere presence of an official attendant, even if unarmed, would have had the effect of deterring criminal activity in the building's lobby…The clear implication of the expert testimony was that a would-be assailant of any type would be hesitant to act if he knew he was being watched by a representative of the building's security staff". Id. at 521. The Court found that, "[c]ontrary to the reasoning of the majority at the Appellate Division," the deterrent effect "described by plaintiffs' expert witness would exist whether the lobby guard was a 'trained observer' or, as here, was an ordinary attendant with no special expertise in the area of building security, since that fact would make no difference from the potential assailant's point of view". Id. The Court then concluded that "the jury in this case might well have inferred from the available evidence that the absence of an attendant in the lobby at the moment plaintiff Nallan arrived was a 'proximate' cause of Nallan's injury". Id.

Simply put, defendant's proper interpretation of the First Department's targeted attack rule is not at all "inconsistent with this Court's ruling" in Nallan, a case with entirely different factual circumstances. It is beyond cavil that a functioning entrance door lock does not nearly have the same deterrent effect as would a witness present at the exact location of an assassination. Of course, a lobby attendant certainly would have been an eyewitness to the attack in Nallan and could

have actually thwarted the shooting by, among other things, (1) physically stopping the assailant; (2) reporting the assassin to the police; or (3) by simply intimidating the assassin from following through on his plot by virtue of his presence. Moreover, plaintiffs are conveniently failing to distinguish *analogous cases*, including ones involving locks alleged to be defective, where the Court explicitly held that minimal security precautions would not have thwarted the subject attack. See, e.g., Estate of Murphy, 193 A.D.3d 503; Estate of Faughey ex rel. Adam, 149 A.D.3d at 418-19; Flynn, 76 A.D.3d at 490; Cynthia B., 38 A.D.3d at 360; Flores, 24 A.D.3d at 101-02; Cerda, 306 A.D.2d at 169-70; Rivera, 239 A.D.2d at 115; Tarter, 151 A.D.2d at 416; Harris, 211 A.D.2d at 616-17.

Similarly, plaintiffs' contention that Courts "flatly rejected" the targeted attack defense in "other cases where the circumstances materially differed" only supports defendant's argument that such defense applies here (Plaintiff's Brf. at 49-50). First, plaintiff's reliance on Terrero v. New York City Housing Auth., 116 A.D.3d 570 (1st Dep't 2014), is misplaced. In Terrero, plaintiff's granddaughter was sexually assaulted on her building's rooftop by her ex-boyfriend, having fled there in an effort to escape him. In addition to issues of fact as to how he accessed the rooftop, the record contained the assailant's testimony that the crime was one of opportunity, not premeditated. Terrero v. NYCHA, Affirmation in Opposition to Defendant's Summary Judgment Motion, 2013 WL 12453067 at ¶7 (Sup. Ct. N.Y.

Co. Jan. 14, 2013). Plaintiffs expressly distinguished "targeted attack" jurisprudence by pointing out the absence of premeditation (id. at ¶11) and that the assailant, an infant himself, likely would have been deterred by simply precautions, particularly fear of detection during the act (id. at ¶62, 87). These factors, not present here, likely explain why the First Department's decision does not even address targeted attack jurisprudence.

Similarly, Ortiz v. New York City Housing Auth., 22 F.Supp.2d 15 (E.D.N.Y. 1998), involves circumstances that are "materially differe[nt]" from those at bar. In Ortiz, the plaintiff was raped at gunpoint in the stairwell of her building by an assailant who allegedly observed her walking down the street and followed her into her building. Citing Harris, the Court noted that the Second Department has "indicated that evidence of a prior adversarial relationship between victim and assailant may sever the causal connection between the plaintiff's injuries and any negligence on the part of the landlord in respect to the implementation of security measures". Id. at 25. The Court found that, "the evidence of a prior relationship between [plaintiff] and [assailant] was equivocal at best. Both [plaintiff] and [the assailant] testified at trial that they did not know each other before the attack… Accordingly, the Court rejects the Housing Authority's argument that, as a matter of law, [the assailant] was a stalker and that his intentional conduct broke the foreseeability chain". Id. Indeed, the facts of the instant matter could not be more

dissimilar where the record shows that Boney obviously had a "prior [obsessive] relationship" with his ex-fiancé whom he repeatedly stalked and harassed, verbally and physically, before carrying out his premediated attack.

Furthermore, the other cases plaintiffs rely upon do not even involve a targeted attack and, as such, lend no credence to their bogus argument. See Carasquilo v. Macombs Vil. Assoc., 99 A.D.3d 455 (1st Dep't 2012) ("[t]he record did not show evidence of a criminal conspiracy to assault plaintiff that is sufficient to support the conclusion that it is most unlikely that reasonable security measures, such as a functioning magnetic door lock, would have deterred the criminal participants"); Washington v. Montefiore Med. Ctr., 9 A.D.3d 271 (1st Dep't 2004) (no discussion of "targeted attack" or prior relationship between assailant and victim; plaintiff's decedent was fatally stabbed at her workplace by an assailant who had previously been removed from premises "for harassing female staff" and was "observed loitering on the premises shortly before the fatal attack"); Muong v. 550 Ocean Ave., LLC, 78 A.D.3d 797 (2d Dep't 2010) (no discussion of "targeted attack" or prior relationship between assailant and victim in case where plaintiff was attacked and robbed by an assailant in an outdoor passageway within his building).

Finally, plaintiffs' contention that it is "not enough" for a landowner to speculate that a "victim would have been assaulted the next day" or "somewhere else, had he or she not been assaulted at the time and place in issue" is trivial

(Plaintiffs' Brf. at 53). It is not speculation to observe that Boney would not have been deterred by a lock where he simply could have (1) followed a tenant into Bridget Crushshon's building; (2) requested that a tenant provide him access to the building; (3) or gained entry by force. To the contrary, it is the opposite theory, that Boney, a lunatic with an extensive history of sadistic behavior who had purchased gasoline and matches planning a murder-suicide, would have abandoned his premediated plot to set his ex-fiancé on fire that is the epitome of speculation and "most unlikely". Cynthia B., 38 A.D.3d at 360; Rivera, 239 A.D.2d at 115. All told, the evidentiary proof coupled with applicable New York jurisprudence unequivocally demonstrates that plaintiffs cannot possibly show that a functioning door lock would have prevented Boney from carrying out his targeted attack.

C. Plaintiffs' "Public Policy Argument" Falls Entirely Flat

Simply stated, plaintiffs' proposition that defendant's "newly constructed", "landlord-friendly causation" rule would harm New York tenants is preposterous. Preliminarily, and at risk of repeating the obvious, defendant did not invent the First Department's pragmatic approach to targeted attack cases. Rather, it is simply asking this Court to follow this longstanding rule. As reflected in Estate of Murphy, the First Department standard is overtly sensible in that it allows a landlord whose premises merely furnished the occasion for a targeted attack – one that a determined criminal would have carried out eventually on one property or another – to avoid

liability unless actual evidence exists tending to show that minimal measures would have "actually" prevented the attack. Of course, this is not a "special, landlord-friendly causation rule" (Plaintiffs' Brf. at 55).[5] Instead, the First Department's approach properly "balance[s] a tenant's ability to recover for an injury caused by the landlord's negligence against a landlord's ability to avoid liability when its conduct did not cause any injury". Burgos v. Aqueduct Realty Corp., 92 N.Y.2d 544, 548 (1998). Plaintiffs have not pointed to a single instance in which a Court has indicated or a party has had the temerity to argue that this rule "deprive[s] the state's most vulnerable tenants of any expectation of safety in their own homes" (Plaintiffs' Brf. at 53). This is because this longheld rule is manifestly just and equitable for both landowners and tenants.

However, rudimentary security measures, such as working locks, are not meant to prevent coldhearted, deranged killers from committing premeditated and targeted attacks. As the First Department aptly recognized in Estate of Murphy, in the rare case where admissible evidence indicates that minimal protections would have actually deterred such an attack, the matter should go to trial. In cases where, like here, there is no such evidence, the matter should not proceed.

[5] Indeed, the "furnished the occasion" jurisprudence applies in a variety of circumstances, not just to landlords (Defendants' Brf. at 24, collecting cases).

REPLY POINT IV

PLAINTIFFS FAILED TO DEMONSTATE THAT "EXPERT PROOF" IS NECESSARY TO CONFIRM THE COMMONSENSE NOTION THAT BONEY WOULD HAVE COMMITED HIS PREMEDIATED PLOT IRRESPECTIVE OF A WORKING LOCK AND FAILED TO RAISE TRIABLE ISSUES OF FACT CONCERNING PROXIMATE CAUSTION

A. Defendant Is Not Required To Present Expert Proof Showing That An Operable Lock Would Have Discouraged Boney From Carrying Out His Plan

Further grasping at all available straws, plaintiffs posit that expert proof is required to show that Boney would not have taken his prepared tools of terror and carnage and gone home after attempting to twist the knob of the entrance door and realizing that it was locked. At the outset, plaintiffs provide no authority for the proposition that a landowner must retain a "security expert" to confirm what basic logic already holds – that a monstrous assassin so hellbent on burning his ex-fiancé alive that he was willing to suffer the same fate and potentially cause others to as well – would not have simply turned around and called it a night upon learning that he could not open the front entrance door. Plaintiffs have not provided one case showing that an expert's opinion is necessary or even helpful under these circumstances and, consequently, their nonsensical argument should be swiftly rejected.

Plaintiffs would have this Court believe that the fact that Boney had gasoline on him which "smells", forecloses the reasonable possibility that (1) another tenant would have let him in the building or (2) that he could successfully carry out his

planned attack outside of the building without someone "'wonder[ing] or car[ing]' what he was up to" (Plaintiffs' Brf. at 57-58). Plaintiffs' claims are purely speculative, conclusory and nonsensical, and they presume that another tenant would or possibly could have deterred Boney from carrying out his wicked plot.

Plaintiffs also weakly maintain that the "proof suggests only one place where Boney could have lain in wait without fear of detection, and only one way he could have reached that location while carrying a container of gasoline without being noticed" (Plaintiffs' Brf. at 59). Curiously, plaintiffs have not produced any admissible evidence (or expert proof) suggesting that (1) Bridget Crushshon's hallway was the "only" place in the building where he could have "[laid] in wait without fear of detection"; or that, (2) if the front entrance door was inoperable, that Boney would have gone unnoticed (a) upon entering the building; (b) traveling up to the sixth floor; and/or (3) "wait[ing]" outside of Bridget Crushshon's apartment door, all while, as plaintiffs duly point out, carrying a gasoline container (Plaintiffs' Brf. at 58). Beyond this, plaintiffs are assuming that Boney, a monstrous individual who attacked Bridget Crushshon at her workplace (R.143, 300-01, 305) and his own daughter at a party (R.332-33) – in both instances with his bare hands[6], to choke, despite the presence of others and the possibility of criminal consequences – actually

[6] The record also contains evidence Boney had a gun (R.328-29, 421).

cared whether he was "noticed" before killing his ex-fiancé and setting the sixth-floor hallway ablaze.

B. Plaintiffs' Argument That They Submitted "Unrebutted Proof" Raising A Triable Issue Of Fact Concerning Proximate Causation Carries No Weight

Finally, plaintiffs conclude their opposition with a conclusory, "catch all" argument that if the Court finds that defendant established its entitlement to judgment as a matter of law, "plaintiffs' opposition proof" raised a triable issue of fact regarding whether defendant's conduct proximately caused the accident (Plaintiffs' Brf. at 60). However, plaintiffs fail to provide this Court with any record cite identifying what "opposition proof" they refer to nor any analysis whatsoever as to exactly how such proof raised an issue of fact with respect to proximate causation. Accordingly, this Court should disregard plaintiffs' unsubstantiated argument on this basis alone.

CONCLUSION

For the foregoing reasons, the Court should modify the order appealed from to grant (1) defendant's motion for summary judgment dismissing plaintiffs' complaint in its entirety; and (2) such other and further relief as the Court deems just and proper.

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using WordPerfect.

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Dated: August 5, 2022

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