To Be Argued By:
Brian J. Shoot
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Court of Appeals

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.

(Additional Caption on the Reverse)

BRIEF FOR PLAINTIFFS-RESPONDENTS

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Date Completed: July 21, 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

The defendant New York City Housing Authority (hereinafter "Housing Authority" or "defendant") argues that the Second Department's unanimous denial of its motion for summary judgment essentially "requires turning every apartment building, school, restaurant, and gathering place into a fortress" and was rendered "in defiance of all prior authority." Deft. Current Br. at 29-30.

The Housing Authority further argues that the First Department's purportedly "long-held" and "recently articulated" rule, which it asks this Court to "adopt," "deems a landowner to have met its *prima facie* burden of refuting liability" merely by "establishing that an attack at its property was targeted," at which point it then becomes the plaintiff's burden to prove that "minimal security precautions would or could have actually thwarted the attack." *Id.* at 3-4.

Yet, those arguments are premised upon misrepresentation of the Second Department's clear ruling in this case, misrepresentation of the First Department's subsequent ruling in *Estate of Murphy v New York City Hous. Auth.*, 193 AD3d 503 [1st Dept 2021], and misrepresentation of the very grounds on which defendant sought summary judgment in the lower courts.

Contrary to what is now urged by defendant, no one in this case ever contended that the Housing Authority was obligated to turn its building into a "fortress" or to provide anything more than a front door entrance that actually locked, a safeguard which this Court characterized as the "most rudimentary" security in *Jacqueline S. by*

Ludovina S. v City of New York, 81 NY2d 288, 295 [1993]. In particular, the Second Department's decision, which defendant pejoratively calls the "January Decision," *expressly noted* that a landlord's only common-law duty is "to take minimal precautions to protect tenants from foreseeable harm" (R.2158-2159). The point was that defendant's own records showed that the door of the building's only entrance was "O/O/O" — meaning Out of Order (R.1434) — for 42 of the 52 preceding days for which defendant provided records (R.1810-1919). *See* pages 10-15, below. And that was the more favorable-to-the-defendant version of the facts, for the plaintiffs' testimony was that the front door lock had been broken for months (R.317-318, 1182).

Contrary to what is now urged by defendant, it did not contend in the lower courts that the "long-held rule" holds that the landlord's proof of targeting shifts the burden of proof and requires the assault victim to establish proximate causation or suffer summary judgment. The defendant's argument both in Supreme Court and in the Appellate Division was that it was purportedly "well settled 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," period (R.35, 2144-2145; Deft. App. Div. Br. at 2, 14, 17, 18, 21; Deft. App. Div. Reply Br. at 2, 9, 12-13). *See* pages 21-22 and 25-27, *infra*.

Contrary to what defendant now argues in this Court, there is no "gulf" between the rule followed in the First Department and that followed in the Second Department.

Both courts rejected what defendant *below* characterized as the long-settled rule: namely, that the landlord prevails as a matter of law, no matter what the facts, if the assault victim was "targeted" (R.35, 2144-2145). The difference was that the Second Department accepted that such was the First Department's rule but rejected it as inconsistent with this Court's rulings and broader tort principles, whereas the First Department thereafter denied that such had ever been its rule in the first place. *See* pages 27-32, *infra*.

Contrary to what defendant now argues, the First Department did not rule in *Murphy* or in any prior decision that proof that the victim was "targeted" shifts the burden of proof and requires the victim to prove proximate causation on the *defendant's* motion for summary judgment. Nor does the ruling contain the very term "burden of proof." Nor did the decision turn on any failure of proof on the plaintiff's part. The *Murphy* Court ruled as it did based upon its perception that the defendant's proof *affirmatively established* the subject assault would have occurred even with a working front door lock. *See* pages 30-32, *infra*.

Most of all, while defendant urges that this Court should now adopt a special causation rule governing summary judgment motions in so-called premises security cases, this Court specifically ruled in *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 551 [1998] that there is "no need … to create a special [causation] rule for premises security cases" inasmuch as the same rules generally applied in tort cases struck "the desired

balance." This Court also ruled, in *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 520-521 [1980], that those rules equally applied where the victim was targeted — in that case by "a would-be assassin" (50 NY2d at 512-513).

Ultimately, what is "well settled" is that the same principles that govern proximate causation in other tort contexts also govern proximate causation in so-called premises security cases. That being so, there should be no doubt that the Second Department correctly rejected the argument defendant advanced in both lower courts and has since disowned (*i.e.*, that "[o]nce a criminal act can be characterized as as targeted attack … it will be deemed the intervening cause of the victim's injuries as a matter of law …" [Deft. App. Div. Reply Br. at 12-13]). Nor should there be any doubt that defendant was correctly denied summary judgment in this case in which, a) defendant's own proof established that the building's *only* security device was chronically "O/O/O," and, b) defendant neither proved nor claimed to have proven that the same assault would have occurred even with the rudimentary protection of a functioning entrance lock (R.19-36).

Questions Presented

1. Where,

   a) defendant did not advance its present thesis — namely, that proof that the assault victim was "targeted" purportedly "shift[s] the burden of proof" to the party opposing the motion for summary judgment (App. Br. at 2-3, 12-13, 18-20) — at any point in its Supreme Court motion papers (R.19-36) or its Appellate Division briefs,

   b) defendant instead proclaimed that the supposedly "well settled" law established that the landlord cannot be held liable if the assault victim as "targeted" (*see* pages 21-23 and 25-27, *infra*),

   c) both of defendant's successive inventions as to the supposedly "well settled" rule are flatly inconsistent with Court of Appeals rulings which it (again) declines to acknowledge,

should this Court nonetheless accept defendant's invitation to create a special, landlord-friendly causation rule specific to so-called premises security cases?

Plaintiffs submit that, for the reasons stated in Points I and II of this brief, the answer should be No.

2. Where,

   a) defendant did not adduce any expert or other proof that the same assault would have occurred even if it had bothered to provide a functioning entrance lock,

b) defendant's moving affirmation *did even allege* that the same assault would have occurred even if it had provided a functioning front door (R.19-36),

c) defendant instead urged that it *did not matter* whether a working lock would likely have prevented the crime inasmuch as it purportedly was "well settled" that a landlord can bear no legal responsibility if the victim was "targeted" (R.20, 35, 2144-2145),

did the lower courts err in ruling that the defendant-movant failed to establish its negligent maintenance of the building's sole entrance was *not* a proximate cause of the subject assault?

Plaintiffs submit that, for the reasons stated in Point III of this brief, the answer should be No.

3. Where plaintiffs submitted unrebutted proof establishing it was unlikely that the assailant could have successfully carried out his alleged plan — a plan which entailed immolating decedent — anywhere *other than* defendant's chronically unprotected building, did the lower courts err in ruling that such proof sufficed to raise triable issues of fact concerning proximate causation?

For the reasons stated in Point IV of this brief, plaintiffs submit the answer should be No.

Statement Of Facts

Familiar law holds that the proof must be construed in favor of the party *opposing* a motion for summary judgment. *Valente v Lend Lease (US) Const. LMB, Inc.*, 29 NY3d 1104, 1105 [2017]; *De Lourdes Torres v Jones*, 26 NY3d 742, 762-763 [2016]. Defendant does the very opposite in its brief to this Court.

Witnesses whose testimony contradicts defendant's factual claims — most notably including plaintiff Brandon Crushshon — are simply ignored. *See* pages 18-19, *infra*. Even the defendant's own documentary records are transformed almost beyond recognition. *See* pages 10-15, *infra*.

Decedent Bridget Crushshon And Her Family

Bridget Crushshon was born in South Carolina, moved to Brooklyn, and by the time of the subject events was a single mother with four teenaged sons (R.1106). She was 37 years old when she was murdered (R.1106).

Bridget worked two jobs to support herself and her four sons. She worked full-time at nights as an assistant manager at a facility for the mentally ill (R.152-153). She also worked part-time, during the days, in a similar capacity at another facility (R.1127-1128). She was leaving for her night job, having come home to change her clothes between jobs, when she was killed (R.152-153, 340-341, 1137-1138).

Nineteen-year-old Brandon Crushshon, decedent's oldest son, worked in a Pathmark store and was on his way home from work when his mother was killed

(R.1135, 1140-1141). Bridget's youngest son, Jason Crushshon, then a high school student (R.1165), was also home when the incident occurred (R.1165). Eighteen-year-old Bryan Scurry, who attended Kingsborough Community College (R.126), was home, in the subject apartment. Ryan Scurry, Bryan's twin, was visiting family in South Carolina (R.129).

The Cypress Hills Housing Project, And The Subject Apartment

Cypress Hills Houses, located in Brooklyn, consisted of 15 apartment buildings (R.1393-1394) and housed "at least 3,400 residents" (R.1460). The subject building, 730 Euclid Avenue, had seven floors and contained 49 apartments (R.27, 1460) served by a single elevator (R.157-158, 347-358).

According to the NYPD's records, there were 37 crimes against persons in Cypress Hill Houses in 2006 and 42 crimes against persons the following year (R.1755, 1764).[1] Four of those crimes, all in 2007 (the year of the subject incident), were murders (R.1755, 1764). The project was located in the 75th police precinct which, according to NYPD statistics, had 3,267 felony FBI index reported crimes in 2007, inclusive of 33 murders or manslaughters and 44 rapes (R.1759, 1764).

[1] Those totals include rapes, robberies, felonious assaults, and murders. They exclude crimes against property, such as burglaries.

Bridget rented a sixth-floor apartment (R.1232). The color photographs reproduced at R.1779 to R.1781 of the Record show the hallway, inclusive of the sixth-floor elevator landing, outside her apartment. From the vantage point of the apartment, the hallway turned at a right angle just past the elevator (R.157-158). Defendant below conceded that the assailant secreted himself around that corner because, as defendant put it, such was "the only place Ms. Crushshon would not have immediately seen him after opening the door [of her apartment]" (R.30).

The Plaintiffs' Testimony That The Only Lock On The Building's Only Entrance Had Been Broken For Months

Bridget and her children moved into the apartment in April of 2006 (R.26, 128-129, 148, 319). The building had a single, ground floor entrance (R.367, 853). Photographs of the building entrance are reproduced at Record pages R.2098 and R.2099.

The building's entrance door was equipped with an electromagnetic lock (R.789-790, 953, 1768, 1768-1770). The lock essentially consisted of two magnetically charged plates called armatures (R.1769-1770).

Plaintiff Brian Scurry testified that the front door lock worked "for maybe like a month or two" after they moved in (R.319). From then on, it remained broken (R.317-318). It was, moreover, obviously and visibly broken (R.317-318). The magnets that

were supposed to secure the door were instead hanging off the door, allowing "[a]nybody" to walk in (R.318).

Plaintiff Brandon Crushshon testified that he never got a key to the building in which he lived because an extra key cost $26 and was not needed to enter the building (R.1182).

The Defendants' Own Daily Inspection Reports, Confirming That The Door Was Chronically "Out Of Order"

Defendant tells the Court that its records "establish" "that the lobby door was regularly inspected and maintained" (Deft. Current Br. at 11) and that it was operating perfectly when the subject assault occurred (*id.*). The so-called proof that it was functioning properly was, a) there was purportedly no record of any post-incident repair of the door (*id.* at 11), and, b) the door was noted to be "okay" on October 23, 2007 (*id.* at 11 n.2), which was the last entry prior to the subject incident that defendant managed to find (*id.*).

Defendant additionally asserts that there was only "one instance between September 7, 2007 and December 27, 2007" for which "an emergency work ticket was issued for the lobby door," that such occurred on October 3, 2007 (about three weeks before the subject accident), and that "the door was fixed the same-day" (*id.* at 12). It even represents that there is "no record evidence" that "NYCHA had notice" that the lock was not functioning properly (*id.*).

Those claims are truly remarkable, and yet unsurprising given this defendant asserted the same claims in another action arising from a *prior* assault in the subject building.[2]

Defendant compiled records that related to the maintenance of the building and, more particularly, of the front entrance door (R.993-1001, 1810-1914, 1915-1928). Those records included: 1) a work ticket for October 3, 2007 (R.999), and, 2) a number of documents that purported to chronicle the daily inspections of the building's front door (R.1810-1919). Each of the latter documents bore the heading "Main/Rear Entrance Door Daily Inspection Sheet" (R.1810-1919), henceforth the "Daily Inspection Sheets."

Starting with the work ticket, the Housing Authority's Edward Esslinger, the superintendent for the subject building (R.935), testified any repair of the front entry door would involve generation of a work ticket commemorating the event (R.942). That testimony was contradicted by property manager Michael Jones, who said there would "[m]aybe or maybe not" be any "paperwork generated" by such a repair (R.1433).

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[2] The assault in *Ortiz v. New York City Hous.Auth.*, 22 FSupp2d 15 [EDNY 1998], *aff'd* 198 F3d 234 [2d Cir 1999] — which is not cited in defendant's brief to this Court — occurred in the same building. There too, there was eyewitness testimony that the front door lock had been "chronically broken for years" (*id.* at 30). There too, the defendant Housing Authority nonetheless insisted that "the locks on the front doors of each of the Housing Authority buildings were inspected each morning and repairs were made as soon as possible." *Ortiz*, Brief of Defendant-Third-Party-Plaintiff-Third-Party-Defendant-Appellant New York City Housing Authority, at 10.

Esslinger's testimony was also contradicted by assistant building superintendent Freddie Gaillard, who testified it was "[n]ot necessarily" the case that "for every instance in which there is an entry that the door at 730 Euclid Avenue was out of order there should be a ticket for someone to repair the door" (R.819).

In its motion papers below, the Housing Authority resolved that conflict in favor of Esslinger's view (*i.e.*, there would be a work ticket for each repair), albeit without revealing that two of its witnesses actually testified to the contrary (R.33-34). It then further assumed that any work tickets that related to the subject door had been kept (R.33-34). Based on those assumptions and the fact that the only work ticket it purportedly found for the subject door was a "Tenant Request[ed]" "Fuse/Reset" of the "Building Lobby Door" on October 3, 2007 (R.999), defendant represented that the door was just fine when decedent was killed on the night of October 24, 2007 and, indeed, at all times other than October 3, 2007 (R.33-34).

However, the Daily Inspection Sheets, which were very conspicuously *not* adduced in support of defendant's motion, told a radically different story.

Housing Authority property manager Michael Jones testified that the daily reports would be completed each morning (R.1447). There were two possible entries regarding the front door: "Okay" and "O/O/O" (R.1434-1435). The latter meant "Out of Order" (R.1434).

Defendant purportedly produced all the Daily Inspection Sheets it could find that related to the subject door for the span from July 13, 2007 to October 24, 2007 (*i.e.*, the date of the assault). However, many of the reports were missing (R.1008-1009), including that for the day of the incident. The Daily Inspection Sheets (reproduced at R.1810-1914) chronicled the condition of the entrance door as follows:

July 2007

Date	Entry	Date	Entry	Date	Entry
13	Out of Order	20	Out of Order	27	Out of Order
14	No report	21	No report	28	No report
15	No report	22	No report	29	No report
16	Out of Order	23	Out of Order	30	Out of Order
17	Out of Order	24	Out of Order	31	Out of Order
18	Out of Order				
19	Out of Order				

August 2007

Date	Entry	Date	Entry	Date	Entry
1	Out of Order	12	No report	23	Out of Order
2	No report	13	Out of Order	24	Out of Order
3	Out of Order	14	No report	25	No report
4	No report	15	No report	26	No report
5	No report	16	Out of Order	27	Out of Order
6	Out of Order	17	No report	28	No report
7	Out of Order	18	No report	29	Out of Order
8	No report	19	No report	30	No report
9	Out of Order	20	Out of Order		
10	Out of Order	21	Out of Order		
11	No Report	22	Out of Order		

September 2007

Date	Entry	Date	Entry	Date	Entry
1	No report	11	Out of Order	21	Out of Order
2	No report	12	Out of Order	22	No report
3	No report	13	Out of Order	23	No report
4	No report	14	Out of Order	24	Out of Order
5	Out of Order	15	No report	25	Out of Order
6	No report	16	No report	26	No report
7	No report	17	Out of Order	27	No report
8	No report	18	Out of Order	28	No report
9	No report	19	Out of Order	29	No report
10	Out of Order	20	Out of Order	30	No report

October 2007

Date	Entry	Date	Entry	Date	Entry
1	No report	9	No report	17	OK
2	No report	10	OK	18	OK
3	OK	11	OK	19	Out of Order
4	No report	12	OK	20	No report
5	No report	13	No report	21	No report
6	No report	14	No report	22	OK
7	No report	15	OK	23	OK
8	No report	16	OK	24	No report

Thus, over the time span for which defendant provided records, the door was noted to be "OK" on only 10 days and Out of Order on 42 days. There were, in addition, 51 days for which there was no report, meaning that there were almost as many days for which the report was missing (*i.e.*, 51 days) as for which it was not missing (*i.e.*, 52 days).

Yet, if the reports are believed, the condition of the door suddenly and markedly improved during the month decedent was murdered. After not being reported "OK" *for even a single day* during July, August and September of 2007, the door became "OK" on October 3, 2007 and for much of that month, or so the records say.

Still more curiously, the door supposedly *repaired itself* sometime between October 19, 2017 and October 22, 2017 (R.1907, 1909-1910). According to the Daily Inspection Sheets, the door was "O/O/O" on October 19, 2017 (R.1907) but "OK" on October 22, 2017 (R.1909-1910), with the interim reports missing. Yet, there is no work ticket for any time after October 3, 2017 and defendant's assumption below (R.11-12) and in its current brief (Deft. Current Br. at 11) is that the absence of any work ticket connotes the absence of any repair (even though two of its own witnesses said differently [R.819, 1433]).

The Defendant's Employee-Witnesses, Who All Testified Under Oath That They Could Not Remember A Single Occasion On Which The Door Was Out Of Order

Despite the fact that the Housing Authority's own records said the door was "O/O/O" for 42 of the 52 days for which Daily Inspection Sheets were produced (R.1810-1914), all three of the Housing Authority witnesses who were involved with the door's maintenance claimed that they could not remember it *ever* being out of order.

The Housing Authority's Freddie Gaillard, the building's assistant superintendent (R.784), testified he could not remember the door *ever* being out of order (R.802).

Cassandra Newkirk, the supervisor of caretakers and the person who typically filled out the "monthly" reports for the subject building (R.944), similarly testified she could not remember *any* "occasions when the door was not operable" (R.856-857).

Edward Esslinger, the building superintendent, testified he was not aware "of *any* occasions when the front door to 730 Euclid Avenue was not operable [emphasis added]" (R.959).

The Two Diametrically Opposed Versions Of Decedent's Relationship With Walter Boney, As Told By Her Sons Bryan and Brandon

The only Record evidence concerning Walter Boney, using the term evidence in its broadest sense, is mostly hearsay and comes from plaintiffs Bryan Scurry and Brandon Crushshon. Their respective recollections on that subject radically differed. Defendant obviously prefers Bryan's version, which it relates as if it were undisputed. Deft. Current Br. at 4-9.

Bryan testified that his mother and Walter Boney lived together "[m]aybe for six months" in East New York on Wyona Avenue (R.134). Boney worked as a flagger for the New York City Transit Authority, had his own carpeting business, and owned a building which he leased out (R.1356-136, 150).

According to Bryan's testimony, his mother was engaged to marry Boney (R.297) but broke off the engagement before the family moved into the Cypress Hills apartment because Boney "just started flipping" (R.147-148). His mother told him that "Walter" "took a variety of medications" and was also "a heavy drinker" (R.147).

Bryan testified that "Walter" was "never allowed" to come to the new apartment and evidently did not attempt to do so for some period of time (R.149-150, 312-313). However, the subject incident was then presaged, according to Bryan's testimony concerning his conversations with his mother, by two altercations.

One occurred "[m]aybe like a month before" the murder when his mother "gave Walter a ride" in her car and "[Walter] physically grabbed the steering wheel" and threatened, "'Bitch, I'll kill us both'" (R.144-145). Bryan said that he did not know where his mother picked Boney up or where they were headed (R.145).

The other incident occurred "[t]wo or three days before the fire happened" at one of his mother's two workplaces (R.142, 300-341). His mother told him that Boney "physically attacked" and "choked her" (R.142).

Apart from those two altercations, Bryan testified he observed Boney "driving really slow around the neighborhood" and "guess[ed]" Boney "was looking to see if my mom was home or not" (R.150). Bryan also testified Boney left "[a] lot" of threatening voicemails on his mother's cellphone (R.307-309).

Virtually all of Bryan's testimony concerning his mother's relationship with Walter Boney was contradicted by his older brother, Brandon. Brandon testified his mother and Boney were never engaged, Boney never gave his mother a ring, and they also never lived together (R.1255). Brandon further testified he never saw his mother have any arguments with Boney (R.1269), she never told him of any such arguments (R.1269), and he was not aware of any threatening voicemails (R.1249, 1252). Brandon also said he was not aware of the alleged incident in the car (R.1262-1263) or of Boney accosting his mother at her job (R.1330-1331) or of Boney stalking his mother after their move to Cypress Hills (R.1269).

However, several conclusions may be drawn with certainty. First, the brothers' testimony cannot be reconciled. For example, it cannot be true that their mother lived with Boney (R.134) and never lived with Boney (R.1255).

Second, defendant's summary judgment absolutely depended on crediting of Bryan's testimony (which it presented as undisputed fact) and rejection of Brandon's testimony (which it did not mention at all and still does not mention).

Third, there was no independent proof of *either* brother's testimony. For example, there is no proof of the prior attack at decedent's workplace *apart from* Bryan's testimony as to what his mother purportedly told him.

Finally, while some of Bryan's testimony was based upon his own observations, much of his testimony concerning his mother's history with the assailant was pure

hearsay (for the most part, what his mother told him had occurred). Defendant urged in its Supreme Court reply papers that the testimony was admissible as "circumstantial evidence of his mother's state of mind" (R.2150) and/or "as circumstantial evidence of Boney's state of mind" (R.2150).

The Subject Events Of October 24, 2007

There was only one surviving witness as to the events that occurred on the evening of October 24, 2007: Bryan Scurry. The defendant's current version of those events differs from Bryan's testimony, and also from defendant's own lower court description of those events (at R.30-31), in two principal respects.

First, contrary to what is said in defendant's brief, the attack did not occur "immediately outside her [decedent's] apartment" (Deft. Current Br. at 37), an "improvement" that enables defendant to disown its lower court concession that Boney was stationed around a corner of the hallway and that such was a crucial part of his plan (R.30).

Second, while defendant conspicuously omits any and all mention of Boney's attempted escape, apparently because to do so would contradict its new-for-this-appeal claim that Boney was bent on "suicide" and did not care if he was caught (Deft. Current

Br. at 2, 10, 12-13),[3] Bryan testified (R.157), and defendant's own motion papers acknowledged (R.30-31), that Boney afterwards attempted to flee.

Bryan testified his mother arrived home at approximately 10:00 p.m. to shower, change, and head out to her "overnight job" (R.152-153). It was, he said, around 10:25 or 10:30 p.m. when his mother left the apartment (R.153).

Bryan locked the door, headed back to his room, and then heard his mother scream (R.153, 343). He initially thought "maybe she fell or something" (R.153).

Upon emerging from his apartment, Bryan saw that Walter was "holding my mom, like holding her against the wall" (R.344). There was "this liquid everywhere and it smelled like gas, it was all on the floor, it was everywhere, on the walls" (R.153). Walter "was throwing it on himself and my mother" (R.153).

Bryan ran towards Walter, to try "to push him off of my mother" (R.153). He succeeded in separating Walter from his mother, and she fell to the floor (R.153). But Walter then "flicked" a book of matches … and "everything just went up in flames" (R.153).

[3] Although defendant now characterizes the crime as a "murder/suicide," the very word "suicide" does not appear in defendant's motion papers or anywhere else in the Record.

Walter ran to the staircase, apparently to flee from the building, but he was already in flames (R.157). Bryan felt his face burning and "started rolling to try to put the fire out" (R.153). He eventually blacked out (R.155).[4]

The Proceedings Below

The Defendant's Motion For Summary Judgment: Wherein Defendant Neither Proved Nor Claimed To Have Proven That The Assault Would Have Occurred Even With A Functioning Entrance Lock

The defendant's moving affirmation is reproduced at pages R.19 to R.36 of the Record. The defendant did not therein *claim* to have proven that the subject assault would have occurred even if the front door lock had not been broken. Nor did defendant therein claim that proof that the victim was targeted shifts the burden of proof, which is defendant's current thesis.

Rather, defendant argued the subject attack was "premeditated and targeted" (R.20) and "it is well settled 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" (R.35).

[4] While defendant tries to curry favor by characterizing Bryan's conduct as "valiant" and "heroic" (Deft. Current Br. at 2, 10), the Housing Authority's never-amended answer even now charges that Bryan was comparatively negligent and also assumed the risk of injury (R.56-57).

Defendant advanced the same thesis in its lower court Reply Affirmation (R.2143-2151). Defendant there proclaimed that if the tenant was targeted "a landlord simply cannot – and therefore is not required to – provide protection" (R.2144).

More than that, while plaintiffs had adduced expert proof to the effect that a working lock would probably have deterred the assailant in this particular case (R.1760-1771, 1775-1776, 1799-1806), defendant argued in reply that such was "beside the point" and that plaintiff's discussion thereof was "simply intended to distract" (R.2144). The point, according to defendant's *then* asserted position, was that it was supposedly "well settled" that there can be no liability where, as was purportedly true here, the victim was targeted (R.2145).

Plaintiffs' Opposition, Including Plaintiffs' Utterly Unrebutted Proof Of Causation

Plaintiffs urged in opposition that,

> it was "indisputable that assailant Walter Boney was neither resident, invitee nor guest in 730 Euclid Avenue" (R.1006),
>
> even assuming defendant's records were accurate, they showed the entrance door was *usually* "O/O/" (R.1008, 1011-1012),
>
> particularly because much of defendant's proof was inadmissible hearsay (R.1024, 1027-1028), defendant had failed to prove decedent was a "targeted victim" (R.1025-1026), and,

> even assuming Boney had "targeted" decedent, defendant "ha[d] not submitted any evidence whatsoever that Boney would have been undeterred by a locked front door," which plaintiffs urged was of itself "fatal to defendant's application for summary judgment" (R.1032).

Plaintiffs' opposition papers included affirmations from four expert witnesses. Retired NYPD captain Walter Signorelli noted, *inter alia*, that the defendant's own records showed the entrance door was out of order on October 19, 2007 and did not contain any indication of a subsequent repair prior to the subject assault (R.1763). He added: "Locked building doors often serve, as in this case, as the sole perimeter defense to criminal activity and, when maintained properly, effectively deter criminal entry by anyone" (R.1766).

Locksmith Barak Ron said the electro-magnetic locking system on the door was effective when maintained in proper working order but not when only one of the two armatures is "present or working properly" (R.1770). In the latter case, "an individual of reasonable strength could merely pull or yank on the door handle to cause it to open and gain entry" (R.1770). Based primarily on the Housing Authority's own records, he concluded the Housing Authority "failed to properly inspect and maintain its door and electro-magnetic locking system both prior to and on the date of the subject incident" and such "failures allowed the unwanted and unauthorized entry of Walter Boney into the premises …" (R.1771).

Retired NYPD lieutenant Lous G. Mancuso said that, upon arriving at the premises to photograph the door, he found not only that the upper part of the magnetic armature was missing but also that one of the door's hinges "was in disrepair and not supporting the door" (R.1776).

Engineer Nicholas Bellizzi averred, *inter alia*, that the plaintiffs' testimony that the "door could be opened by pulling or yanking" was "consistent with the absence of an armature and/or the failure of one or both magnetic contacts to function properly for an unreasonable period of time" (R.1803).

Supreme Court's Denial Of Summary Judgment

The Honorable Bernard J. Graham (Supreme Court, Kings County) accurately summarized defendant's position as being that the "fact" that the subject assault was a "premeditated and targeted attack" of itself entitled it to summary judgment (R.10).

Justice Graham noted that the defendant's own records showed the front door "was reported as 'out of order' for 13 days in July 2007," for "16 days in August 2007," and "for 13 days in September 2007" (R.12) … and there was "no corresponding proof that repair tickets were issued in response to the dates in which the door was listed as 'out of order'" (R.12).

As for defendant's thesis that decedent had been "targeted" and that such rendered all other facts irrelevant, the motion court's analysis was rather straightforward. Settled law held that "[t]he proponent of a summary judgment motion

must make a prima facie showing of entitlement to judgment as a matter of law" and "[f]ailure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition" (R.14).

Here, it was "open to question" "whether Mr. Boney's actions may be considered a 'targeted' attack" (R.14). Even assuming that Boney targeted Bridget Crushshon, "the facts available to this Court" did not "preclude the reasonable possibility" that "the often-broken front door" was a proximate cause of the subject injuries (R.14-15).

The Defendant's Appellant Division Briefs: Again Asserting That The "Fact" That The Tenant Had Been "Targeted" Of Itself Entitled It To Summary Judgment

The Housing Authority's Appellate Division argument was very simple … and very different from the argument it now advances in this Court. Starting at the very outset of its principal brief, defendant again and again proclaimed not that proof of targeting shifts the burden of proof, but instead that it was "long recognized" 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." Deft. App. Div. Br. at 2; *see also* Deft. App. Div. Br. at 14, 17.

In response, plaintiffs urged that there was "no special rule specific to 'targeted' attacks." Plaintiffs' App. Div. Br. at 29. There was "merely the general tort rule" that "a defendant can stand liable only for the harm it proximately caused," a rule that had

enabled building owners to escape liability in those cases where the proof established "the same targeted attack would have occurred irrespective of the defendant's alleged negligence." *Id.* Plaintiff also noted that the courts, including this Court, had imposed liability in a fair number of cases in which the victim had been targeted but in which a jury could nonetheless find that the building's lack of minimal security was a concurrent cause of the assault. *Id.* at 34-40.

Beyond that, plaintiffs stressed that the defendant had here "presented no actual proof that the same event would have occurred even with the 'most rudimentary' protection [citation omitted] of a functional front entrance lock" (Plaintiffs' App. Div. Br. at 52) and that "the only actual proof as to whether the event would have occurred even with minimal security supported the opposite conclusion" (*id.* at 53).

Far from responding that landowners can sometimes be held liable for targeted attacks on a tenant but that the proof at bar negated any causal link, defendant again argued in its Appellate Division reply brief that there simply could be no liability, ever, if the tenant had been targeted. Deft. App. Div. Reply Br. at 2, 9, 12-13. Defendant thus proclaimed:

> Having conceded that this case involves a targeted murder, respondents cannot argue that a negligently maintained lock on the building's entry door was also a substantial cause of the injuries.

Id. at 9.

As for plaintiffs' point that the very nature of the subject assault was such that it could not have been accomplished anywhere else, defendant proclaimed in its Appellate Division reply brief that the facts *did not matter* because, "[c]ontrary to respondents' assertions otherwise, questions of foreseeability and proximate cause only arise when there is insufficient evidence from which to conclude that a tenant was the victim of a targeted attack as a matter of law." Deft. App. Div. Reply Br. at 13.

The Second Department's Consideration, And Rejection, Of Defendant's Now Disowned Lower Court Arguments

Justice Dillon's signed opinion on behalf of the unanimous Second Department panel framed the legal issue as "whether a 'targeted' attack by a perpetrator against a victim on premises, as distinguished from a 'random' attack on premises, is, by definition, an independent intervening cause that insulates the property owner from liability for negligent security measures, as a matter of law" (R.2156). In thus framing the issue, the Court was responding to defendant's *then* asserted argument that such was the law and, indeed, the "long settled" rule. *See* pages 25-27, above.

Notwithstanding defendant's current claims to the contrary, the Second Department *expressly noted* a landlord's only common-law duty was "to take minimal precautions to protect tenants from foreseeable harm" (R.2158-2159). But, citing this Court's ruling in *Nallan*, 50 NY2d 507, the Second Department observed "the criminal conduct of a third person, which might otherwise be an intervening cause … may

nevertheless expose the landowner to liability if the criminal conduct was itself foreseeable" (R.2159).

As the Second Department here saw it, while defendant here relied on First Department rulings which ostensibly indicated that the causal nexus between the landlord's negligence and the subject assault was "severed as a matter of law" if the victim was "targeted" (R.2160), that "binary dichotomy" "between 'targeted' and 'random' attacks … fails to account for the myriad of facts that may be present in a given case" (R.2162).

In reaching that conclusion, the Second Department relied on two "fundamental" principles in civil litigation, each of which was supported with multiple citations to Court of Appeals rulings. One was that "there may be more than one proximate cause of an occurrence," a precept "so fundamental to the state's decisional authority that the concept appears using varying phraseologies and nomenclature in several hundreds of reported cases" (R.2162). The other "[e]qually fundamental" principle was "that the party moving for summary judgment—here, NYCHA—bears the initial burden of demonstrating its prima facie entitlement to judgment as a matter of law" (R.2162).

Here, the key point was that "NYCHA provided no evidence in support of its motion for summary judgment dismissing the complaint that its alleged negligently maintained front door played no concurrent role in enabling Boney's criminal conduct

at the specific date, time, and place of his crime, however premeditated that criminal conduct might have been" (R.2163).

Additionally, even assuming that Boney here "targeted" decedent, review of the particular facts of the case indicated that "a jury could conceivably conclude that the chronically broken lock at the building's front door provided Boney with an opportunity to attack the decedent in a manner that might not otherwise have been possible …" (R.2163). This was especially so given that, in contrast to some of the cases on which defendant relied, "no evidence was presented that he [Boney] had friends or acquaintances who would have given him access to the interior of the building, even if there had been a working lock on the front door" (R.2161).

Although defendant claims that the Appellate Division here said that the moving defendant can meet its burden as a summary judgment movant only by showing "no level of building security would have prevented the crime" (Deft. Current Br. at 2, 25), which defendant then proceeds to construe as requiring that "every apartment building, school, restaurant, and gathering place" be turned "into a fortress" (*id.* at 29-30), there was no such ruling. Quite the contrary, the *very paragraph* from which defendant fashions that "ruling" acknowledged that "a property owner is not an insurer of the safety of its tenants," that a property owner can prevail on summary judgment, and that there "may be any variety of actions" in which such may occur (R.2163). The Court then "illustratively" gave several such examples, *one of which* was where the "criminal activity

reflects such a degree of preplanning, coordination, and sophistication that no level of building security would have prevented the crime" (R.2163).

The First Department's Subsequent Ruling In *Murphy*

Defendant also misstates the substance of the First Department's subsequent ruling in *Murphy*, 193 AD3d 503.

In contrast to this case in which the defendant Housing Authority adduced literally no proof that the same assault would have occurred had the entrance lock actually worked (R.19-36), the defendant Housing Authority there adduced "an affidavit by a security management consultant" who averred, *inter alia*, "that no security device would have deterred committed individuals like Brockington and Cartagena [the assailants] …" *Murphy*, 193 AD3d at 506. What is more, while defendant *here* proclaims that "[t]he facts in Estate of Murphy are inescapably similar to those here" (Deft. Current Br. at 33), this same defendant therein opposed the plaintiff's Court of Appeals' motion for leave to appeal on the stated ground:

> Apart from misapprehending the law concerning targeted assault cases, *Scurry* is factually distinguishable in that that there was no evidence presented that there were individuals who could have provided the assailant with access to the interior of the building had there been a working lock on the front door.

Murphy, Deft's Aff. In Opposition to Motion For Leave to Appeal dated June 22, 2021, pp. 13-14, emphasis added.

In resolving the issue of whether defendant was properly granted summary judgment, the *Murphy* court did not, contrary to what defendant now says, disagree with the Second Department's conclusion as to the correct legal rule. Rather, it disagreed with the contention, stated *ad nauseum* in the defendant Housing Authority's papers both here and in *Murphy*, that it had ever said or held that there could be no liability for a targeted attack (193 AD3d at 508).

There are at least two possible conclusions one can draw from the *Murphy* Court's reading of the First Department's jurisprudence:

> 1) while the First Department may have previously *said* "under the precedents of this Court, it is well settled 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" — those exact words, in *Flynn v. Esplanade Gardens, Inc.*, 76 AD3d 490, 494 [1st Dept 2010], amongst other cases — it never *meant* that "a targeted attack on a resident … does not give rise to liability," or,
>
> 2) the First Department panel that decided *Murphy* realized that a rule which provided there could be no liability no matter what the circumstances if the plaintiff-victim had been targeted could not be reconciled with, a) the leading Court of Appeals' decisions concerning premises liability, or, b) the broader principles governing tort actions — and therefore decided to re-interpret rather than defend *Flynn* and its progeny.

In either case, it remains that *both* Departments rejected the rule which defendant claimed to be law both here and in *Murphy*: specifically, "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" (Deft. App. Div. Br. at 14).

It also remains that the First Department did not say or suggest that there is a special rule in so-called targeted assault cases, such that proof of targeting shifts the burden to the plaintiff to prove that "minimal security measures" would have "'actually prevented'" the attack and not merely have "'shifted'" it "'to another time or place'" (Deft. Current Br. at 19, purportedly quoting from … somewhere).

Nor was the First Department's ruling of *Murphy* premised upon any failure of proof on the plaintiff's part. It was premised upon the facts established by the defendant-movant's proof.

In the *Murphy* Court's estimation, defendant's proof "establishe[d] that Murphy's killers were intent on gaining access to the building" and that they would have been able to do so even with a working lock "considering that at least one other person … entered the building at the same time" (193 AD3d at 508). Such proof "negate[d] the unlocked door as a proximate cause of the harm that befell Murphy" (*id.*).

Thus, the *Murphy* Court essentially applied the same legal standard as was applied in *Scurry* but reached a different result in factual circumstances which the Housing Authority *there* acknowledged were distinguishable from those at bar.

POINT I

THE DEFENDANT'S CURRENT ARGUMENT MUST BE REJECTED FOR THE SIMPLE REASON IT WAS NOT ASSERTED BELOW AND FLAT-OUT CONTRADICTS THE ARGUMENTS IT ASSERTED BELOW.

The defendant Housing Authority now argues,

1) the First Department's purportedly "pragmatic, sensible and well-reasoned approach" is that proof of targeting shifts the burden of proof and requires the plaintiff-victim to prove "absent minimal security precautions would or could have 'actually' thwarted the attack" (Deft. Current Br. at 3-4, 19-20),

2) that purportedly "balanced" "approach" is supposedly consistent with this Court's precedents (*id.* at 21-22), and,

3) the Second Department's ruling in what defendant pejoratively calls the "January Decision" instead requires the landlord to prove that "no level of security" could have prevented the attack (*id.* at 24-26).

In reality, the Second Department's ruling expressly acknowledged a landlord need only "take minimal precautions to protect tenants from foreseeable harm" (R.2158-2159). Nor did the First Department's ruling in *Murphy* say anything remotely similar to the "rule" the Housing Authority purports to glean from the opinion.

Be that as it may, the threshold problem is that defendant's argument is unpreserved. It did not argue for any such "burden-shifting approach" in the lower

courts. It argued, both in Supreme Court and in the Appellate Division, that landlords cannot be held liable for targeted assaults, period. *See* pages 21-22 and 25-27, above.

This Court has repeatedly said that it lacks jurisdiction to consider unpreserved issues and that such is so even when the Appellate Division elected to address the unpreserved issue. *Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 423 [2013]; *Bennett v St. John's Home*, 26 NY3d 1033, 1034 [2015]; *Elezaj v P.J. Carlin Const. Co.*, 89 NY2d 992, 994-995 [1997].

This applies even where the claim first asserted on appeal is a so-called "pure issue of law." *Bingham v New York City Tr. Auth.*, 99 NY2d 355, 358-359 [2003].

Here, moreover, the defendant's argument is not only unpreserved, but also patently inconsistent with the position it asserted below. Whereas defendant *now* seeks summary judgment on the thesis that plaintiffs bore an evidentiary burden they allegedly failed to meet, its argument in the lower courts was that it *did not matter* what plaintiffs proved because, as defendant then put it, "[c]ontrary to [plaintiffs'] assertions otherwise, questions of foreseeability and proximate cause only arise when there is insufficient evidence from which to conclude that a tenant was the victim of a targeted attack as a matter of law." Deft. App. Div. Reply Br. at 13.

POINT II

DEFENDANT'S NEW THESIS — THAT PROOF THE VICTIM WAS "TARGETED" OF ITSELF REQUIRES THE PLAINTIFF TO PROVE PROXIMATE CAUSATION OR ELSE SUFFER SUMMARY JUDGMENT — IS MANIFESTLY INCONSISTENT WITH LONG SETTLED LAW.

The Housing Authority now argues that the First Department's "long-held rule" holds that the defendant in a premises security case establishes its *prima facie* entitlement to summary judgment merely by proving "the attack was targeted," at which point the plaintiff-victim must "carry its [sic] shifted burden" by proving that "minimal security measures" "'would have actually prevented' the attack, where 'prevented' means 'prevented,' not 'shifted to another time or place.'" Deft. Current Br. at 3, 19-20. Defendant further argues such rule is "sensible" and "balance[d]" and this Court should therefore "adopt" it. *Id.* at 3-4, 17, 19-20.

In reality, there is no such First Department rule. The *Murphy* Court did not purport to alter the usual burden of proof. The very term "burden of proof" does not appear in the opinion. Also, some of the language defendant purports to quote from the opinion, including the phrase "shifted to another time or place" (Deft. Current Br. at 19), does not exist in the opinion. Yet, that is actually the least of the problems with defendant's newly invented rule.

Plaintiffs below demonstrate:

1) this Court's rulings establish that landlords have a duty to provide minimal security and that such duty entails provision of a building entrance that actually locks where, as here, prior crimes suggest that the tenants are at risk (Point IIA, *infra*),

2) this Court's rulings further established that a tort defendant who seeks summary judgment must *prima facie* establish that it did not act negligently or that its negligence did not proximately cause the plaintiff (or decedent) harm (Point IIB, *infra*),

3) this Court has considered and flatly rejected defendant's present thesis that a premises security defendant should bear a special and lesser burden than applies in any other tort case (Point IIC, *infra*), and,

4) defendant's new-for-the-appeal "rule" is the very opposite of "sensible" and "balance[d]," for it would deprive the most vulnerable tenants of any expectation of safety in their homes (Point IID, *infra*).

A. Defendant Had A Duty To Take "Minimal Precautions" To Protect Its Tenants From "Foreseeable Harm," A Duty Which Plainly Entailed Provision Of A Functioning Lock On The Apartment Building's Sole Entrance.

Back in *Jacqueline S.*, 81 NY2d 288 [1993], this Court was confronted with a case in which "a 14–year-old resident of the Wagner Houses public housing project in upper Manhattan, was abducted in the lobby of her apartment building, taken to a utility room on the roof of the building and raped" (81 NY2d at 291). One of the defendant

Housing Authority's own police officers testified that she had personally responded to several reports of forcible rape in the Wagner Houses and "to '20 or more' forcible robberies" (*id.*). "Despite these conditions, as well as numerous complaints from tenants, neither the door to the lobby nor the door to the utility room on the roof was locked and no security personnel were stationed in the building" (*id.*).

The Housing Authority nonetheless urged in *Jacqueline S.* that, a) it owed no common law duty to do so much as provide a working entrance lock absent prior similar crimes *in that particular building* (*id.* at 294), and, b) whatever duty it may have owed at common law was superseded by Multiple Dwelling Law § 50-a[3], a statute which mandated installation of self-closing, self-locking doors in certain circumstances but not at the time and place in issue.

This Court rejected both arguments. The Court instead ruled: "Irrespective of the absence of a statutory obligation, the landlord remains subject to the common-law duty to take minimal precautions to protect tenants from foreseeable harm" (*id.* at 293-294). In doing so, the Court characterized the defendant's failure to provide a locking entrance door as a "conceded failure to supply even the most rudimentary security." *Jacqueline S.* 81 NY2d at 295.

To be sure, the duty noted in *Jacqueline S.* is merely to provide "minimal" safety precautions, nothing more, when harm is reasonably foreseeable. *James v Jamie Towers*

Hous. Co., Inc., 99 NY2d 639, 641 [2003] (defendant discharged its duty "by providing locking doors, an intercom service and 24-hour security").

Yet, with that caveat, this Court has ruled time and again that landlords owe a legal duty to their tenants to take minimal security precautions against reasonably foreseeable criminal acts. *Mason v U.E.S.S. Leasing Corp.*, 96 NY2d 875, 878 [2001]; *Bennett v Twin Parks Northeast Houses, Inc.*, 93 NY2d 860, 861 [1999]; *Burgos*, 92 NY2d at 548; *Torres v New York City Hous. Auth.*, 93 NY2d 828, 830 [1999]; *Cortes v New York City Hous. Auth.*, 92 NY2d 973, 974 [1998]; *Hargett v. New York City Housing Auth.*, 92 NY2d 975 [1998].

Notwithstanding the Housing Authority's present complaint that it should not be required to make its building into a "fortress," the only protection plaintiffs here alleged to be required in the exercise of reasonable care, and the only protection discussed in the so-called "January Decision," was a working lock on the sole entrance door of the 49-unit building. This Court's prior rulings firmly establish that such is not too much to ask of a landlord.

B. As A Movant Seeking Summary Judgment, It Was Defendant's Burden To Make A *Prima Facie* Showing That It Fulfilled Its Duty Of Care, Or, Alternatively, That Its Failure To Do So Was Not A Proximate Cause Of The Subject Injuries.

The point is so familiar as to be a cliché. Yet, it is precisely what defendant has belatedly placed in issue with its new-for-this-appeal argument.

This Court has repeatedly said that, when a tort defendant moves for summary judgment, it is the moving defendant's burden to prove either that it was not negligent or that its negligence did not cause the plaintiff (or decedent) harm — and also that the plaintiff bears no burden to prove anything at all until the defendant thus establishes a *prima facie* entitlement to summary judgment. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] ("The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case … Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers"); *Pullman v Silverman*, 28 NY3d 1060, 1062 [2016] (same); *Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] (same).

C. Defendant's New-For-This-Appeal Thesis — To The Effect That Proof That The Tenant-Victim Was "Targeted" Of Itself Shifts The Burden Of Proof And Requires The Plaintiff To Prove Proximate Causation — Is Inconsistent With Long Settled Law.

1. The General Rules Concerning Proof Of Causation In A Negligence Case.

Because assailant Walter Boney died and there are no known witnesses who saw him enter the building, the proof as to how he did so is necessarily circumstantial. Likewise, and as in every other instance in which a jury is called upon to decide what likely *would have occurred* had the defendant *not* acted negligently (*e.g.*, had the defendant-doctor followed accepted standards of medical practice, or had the defendant-driver *not*

been speeding), any determination as to what would have likely occurred had defendant provided a working entrance lock is, by definition, hypothetical. Yet, while some (including defendant in this case) denigrate circumstantial proof as inferior, Dean Prosser famously observed, "there is still no man who would not accept 'dog tracks' in the mud against the sworn testimony of a hundred eye-witnesses that no dog has passed by." Prosser on Torts (4th ed. 1971), at 212.

This Court has time and again addressed the applicable standard, in a tort case, in which the causal proof is circumstantial. In doing so, the Court has repeatedly said that, even at the trial itself (at which point the plaintiff would of course bear the burden of proof), the plaintiff's burden is merely to show that it is "more likely" that the defendant's negligence proximately caused harm and that the plaintiff need not "positively exclude" all alternatives. *Gayle v City of New York*, 92 NY2d 936, 936-937 [1998]; *Schneider v Kings Highway Hosp. Ctr., Inc.*, 67 NY2d 743, 744-745 [1986]; *Humphrey v State*, 60 NY2d 742, 743-744 [1983]; *Wragge v Lizza Asphalt Const. Co.*, 17 NY2d 313, 316 [1966]; *Betzag v Gulf Oil Corp.*, 298 NY 358, 361-364 [1949].

For example, in *Betzag*, 298 NY 358, decedent, "a driver of an oil tank trailer truck," "fell to the ground from a catwalk on the oil truck" (298 NY at 361). Plaintiff contended decedent had been caused to fall by the breaking of a valve cord that he had tried to turn, the proof of which was that he had a piece of the broken valve cord in his hand. Defendant countered it was "equally open to the inference that plaintiff's rubber

boots caused him to slip on some slippery substance on the catwalk immediately before he pulled the cord to open the valve; or that he slipped after the valve cord broke and not as a result of the breaking of the cord; or that after he slipped he exerted a stronger pull on the cord than was necessary to keep the valve open and that in doing so he broke the cord by his own weight" (*id.* at 364). This Court ruled, ""The plaintiff was not required to offer evidence which positively excluded every other possible cause of the accident"" (*id.*, *quoting Rosenberg v Schwartz*, 260 NY 162, 166 [1932]). It was "enough that plaintiff upon the trial came forward with evidence of facts and conditions from which the defendant's negligence and 'the causation of the accident by that negligence may be reasonably inferred"' (*id.* at 265, *quoting Dillon v Rockaway Beach Hosp. & Dispensary*, 284 NY 176, 179 [1940]).

In *Schneider*, 67 NY2d 743, decedent, who afterwards had no recollection of the event, was found on the floor beside her hospital bed with the bedrails down. Defendant urged decedent could well have lowered them herself, an argument the Appellate Division deemed persuasive. This Court ruled that "the jury could reasonably conclude that it was more likely that a hospital staff person had lowered the bed rails than that plaintiff's decedent, a weak and elderly patient who required assistance in getting out of bed …" (*Schneider*, 67 NY2d at 745). In doing so, it observed: "we have on numerous occasions upheld or reinstated a jury's verdict where the logic of common experience itself, as applied to the circumstances shown by the evidence, led to the

conclusion that defendant's negligence was the cause of plaintiff's injury [emphasis added]" (*id.*).

In *Gayle*, 92 NY2d 936, plaintiff's car "skidded on a wet roadway and collided with a parked trailer" (92 NY2d at 937). "There were no eyewitnesses to the accident, and, as a result of injuries sustained in the accident, [plaintiff] had a limited recollection of the accident" (*id.*). "[P]laintiffs argued that a large puddle formed on the roadway due to defendant's negligence in maintaining a proper drainage system and that this was a proximate cause of the accident." Defendant urged such "speculation" could not establish liability. This Court unanimously concluded that "[t]he Appellate Division erred in determining that plaintiffs were required to rule out all plausible variables and factors that could have caused or contributed to the accident" (*id.*).

Here, the issue is in essence whether the above-quoted principles equally apply here or whether there should instead be, per defendant's belated suggestion, a special and more exacting burden in so-called premises security cases. Yet, this Court has already addressed that very question, and it unambiguously said there should not be any such special standard.

2. This Court's Determination That The Same Rules Which Govern Proof Of Causation In Other Tort Contexts Should Also Govern In So-Called Premises Security Cases, And That There Is "No Need … To Create A Special Rule For Premises Security Cases."

This Court specifically considered, in *Burgos*, 92 NY2d 544, whether there should be a "special rule" governing proof of proximate causation in "premises security cases." It answered in the negative, unanimously.

Burgos actually concerned two different cases that were joined for purposes of Court of Appeals review: *Gomez* and *Burgos* itself. In each case, a tenant was assaulted in a common area of the apartment building in which she lived. The two assailants in *Burgos* beat and robbed the plaintiff. The single assailant in *Gomez* raped and sodomized the 12-year-old plaintiff.

In each instance, the defendant-landlord's alleged negligence was its failure to secure the building's entrance doors. In each instance, the defendant urged that it was "speculative" to assume the never identified assailant(s) were neither tenants nor guests of tenants and also "speculative" to assume that working entrance locks would have prevented the crime. In each instance, the defendant-landlord urged there should be a special causation rule — "special" as in more advantageous to landlords who fail to provide "minimal security" — specific to "premises security" cases. There was one significant difference between the two cases: *Gomez* arose from a post-verdict dismissal

after a jury had found for the plaintiff, whereas *Burgos* arose from a grant of summary judgment to the defendant.

In ruling that neither dismissal was warranted, the *Burgos* Court first reviewed the general principles established in *Schneider*, 67 NY2d 743, *Humphrey*, 60 NY2d 742, *Wragge*, 17 NY2d 313, and *Gayle*, 92 NY2d 936. The Court then concluded that there was no need for a "special" causation standard for "premises security" cases inasmuch as those cases struck the correct balance (92 NY2d at 551). In particular, it was enough, even at the trial itself, for the plaintiff to prove that it was "more likely or more reasonable than not" that defendant's negligent maintenance of the building's entrance was a proximate cause of the subject assault (*id.*). The *Burgos* Court put it this way:

> Clearly, there is a need to balance 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. There is no need, however, to create a special rule for premises security cases, since the burden regularly placed on plaintiffs to establish proximate cause in negligence cases strikes the desired balance. The rule expressed in *Schneider, Humphrey, Wragge* and *Gayle* fairly balances the competing interests …

Burgos, 92 NY2d at 551, emphasis added.

This Court added that a "blanket rule" of the kind the defendants sought in *Burgos* and *Gomez* "would place an impossible burden on tenants" in those instances in which "the attacker remains unidentified" and "would undermine the deterrent effect

of tort law on negligent landlords, diminishing their incentive to provide and maintain the minimally required security for their tenants" (*Burgos*, 92 NY2d at 551).

So, in *Gomez*, where the assailant "made no attempt to conceal his identity" and multiple witnesses "all testified that they did not recognize the assailant," this Court concluded it could not say there was no evidentiary basis for the jury's finding of proximate causation (*Burgos*, 92 NY2d at 552).

In *Burgos* itself, the plaintiff's proof was not as strong as that in *Gomez*, for the plaintiff was the only witness who saw the assailant and her entire causation argument rested on her affidavit claim "that she did not recognize her assailants, although she lived in a relatively small building and was familiar with all of the building's tenants and their families" (92 NY2d at 551). The point, however, was that "[w]hen faced with a motion for summary judgment on proximate cause grounds, a plaintiff need not prove proximate cause by a preponderance of the evidence, which is plaintiff's burden at trial" (*id.* at 550). "Instead, in 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" (*id.*). The Court deemed the plaintiff's own affidavit statements sufficient to meet that lesser burden (*id.* at 551).

Burgos does not stand alone. This Court has repeatedly reaffirmed that the same "more likely" or "more reasonable than not" standard that generally governs all other

tort cases also governs "premises security" cases. *Torres*, 93 NY2d at 830; *Bennett*, 93 NY2d at 861.

This Court has also specifically held that the same standard which governs the causation issue in cases like *Burgos* and *Gomez* where the assailant was never identified also applies when the issue is whether "minimal security" would have likely prevented a known assailant from committing the subject assault. That ruling came in *Price v New York City Hous. Auth.*, 92 NY2d 553 [1998], decided the same day as *Burgos*, wherein the Court also addressed the role that expert testimony may play in resolving that causation issue.

Like *Gomez*, *Price* arose from a jury trial. "[T]he jury found that defendant was negligent, but additionally found that defendant's negligence was not a proximate cause of plaintiffs' injuries" (92 NY2d at 557). It ostensibly reached that conclusion on the basis of proof that was here wholly lacking from defendant's motion papers: expert opinion that the assailant would have overcome minimal security.

In *Price*, the defendant Housing Authority adduced testimony from one Peter Smerick. Smerick testified that assailant Ronnie Matthews "was a predatory serial rapist and a calculating career criminal who would not have been deterred by a lock on the door" (Dissent, 92 NY2d at 562). Over a dissent (which would have deemed the expert proof inadmissible), this Court ruled:

1) the standards set forth in *Burgos* also applied in this case with a known assailant and "delineates the standard for establishing proximate cause in suits against landlords for negligently secured premises by tenants injured as a result of a third party's criminal attack" (*Price ex rel. Price*, 92 NY2d at 557),

2) the trial court did not abuse its discretion in allowing Smerick's testimony that "minimal security" "would not have deterred plaintiff's attacker, Ronnie Matthews" (*id.* at 558), this notwithstanding that "Smerick did not have formal training in psychology or the behavioral sciences" (*id.* at 559), and,

3) the jury verdict in the defendant's favor should therefore stand.

In sum, while defendant now argues for adoption of a special, heightened burden of proving proximate causation specific to premises security cases, it remains that this Court considered and flatly rejected that argument back in *Burgos*. It also remains that this Court applied the very same causation standard in *Price*, a case where the assailant's identity was known, as in *Burgos* and *Gomez*, where the assailant was never identified.

3. The Rules Actually Applied In "Targeted Victim" Cases, Particularly By This Court.

As defendant would have it, the First Department's "long-held rule," supposedly "re-articulated" in *Murphy*, holds that a premises security defendant establishes a prima

facie entitlement to summary judgment just by proving that the tenant victim was "targeted." Deft. Current Br. at 2-3, 14, 17-18.

Plaintiffs have already demonstrated that the decision in *Murphy* said nothing of the sort. Be that as it may, the rule defendant now conjures from nothing is inconsistent with settled law.

It is admittedly true that the so-called premises security plaintiff must prove at trial, just like any other plaintiff, that the incident or injuries would probably not have occurred but for the defendant's negligence. It is also 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. *Flynn*, 76 AD3d 490; *Cynthia B. v 3156 Hull Ave. Equities, Inc.*, 38 AD3d 360 [1st Dept 2007]; *Flores v Dearborne Mgt., Inc.*, 24 AD3d 101 [1st Dept 2005]; *Cerda v 2962 Decatur Ave. Owners Corp.*, 306 AD2d 169 [1st Dept 2003]; *Rivera v New York City Hous. Auth.*, 239 AD2d 114 [1st Dept 1997]; *Harris v New York City Hous. Auth.*, 211 AD2d 616 [2d Dept 1995]; *Tarter v Schildkraut*, 151 AD2d 414 [1st Dept 1989].

However, when one examines those cases more closely, as plaintiffs did at pages 42 to 47 of their Appellate Division brief, one finds that they involved materially different proof. In each case the point was not merely that there was a failure or proof on the plaintiff's part. The point was that the proof also showed that the minimal

security of a locked entrance would not have prevented the crime. For example, in both *Flynn*, 76 AD3d at 491 and *Harris*, 211 AD3d at 617, the assailant was a frequent visitor to the building.

The courts, including the Appellate Division for the First Department, flatly rejected the "targeted" victim defense in other cases where the circumstances materially differed. *Terrero v New York City Hous. Auth.*, 116 AD3d 570, 570-571 [1st Dept 2014]; *Carasquilo v Macombs Vill. Assoc.*, 99 AD3d 455 [1st Dept 2012]; *Washington v Montefiore Med. Ctr.*, 9 AD3d 271 [1st Dept 2004]; *Ortiz*, 22 F Supp 2d at 23; *Muong v 550 Ocean Ave., LLC*, 78 AD3d 797, 798-799 [2d Dept 2010].

In *Terrero*, 116 AD3d 570, for example, the 14-year-old plaintiff was sexually assaulted by an intruder who, according to the plaintiff, "gained access to the building as a result of a broken lock at the front entrance door." 116 AD3d at 571. The key point is that the assailant was the plaintiff's "ex-boyfriend." *Id.* at 570-571. Citing many of the same cases on which it here principally relied, the defendant Housing Authority argued in *Terrero* that there could be no liability where the victim was "targeted." *Terrero*, Memorandum of Law in Support of Defendant New York City Housing Authority's Motion for Summary Judgment, 2012 WL 12830094, pp. 2-3. In contrast to the case at bar, the Housing Authority adduced expert proof to the effect "that this criminal act, committed by a young person obsessed with the infant plaintiff, could not have been

prevented by security measures within the duty of a landlord." *Id.* at 4. The motion court rejected the argument and the First Department thereafter affirmed.

The "Targeted Victim" defense was also tried unsuccessfully in *Ortiz*, 22 F Supp 2d 15, with respect to the very same building as is involved in this case. In *Ortiz*, the plaintiff, "a 47–year old grandmother, was raped at gunpoint …" 22 F Supp 2d at 19. Apart from arguing that it had no idea why the building might require a working lock on its front door, the Housing Authority argued in *Ortiz* "that Henriques [the assailant] was a stalker and that the Housing Authority could therefore not be held liable for his conduct." *Ortiz*, Brief of Defendant-Third-Party-Plaintiff-Third-Party-Defendant-Appellant New York City Housing Authority [Filed February 2, 1999] at 25. It also argued that the plaintiff had "failed to demonstrate that a functioning lock would have prevented the assault" (*id.* at 23). In asserting the latter argument, the Housing Authority relied upon the testimony of Peter Smerick, the same expert upon whom it relied in *Terrero* and, before that, in *Price*. Smerick testified that the assailant's "long history of criminal activity" indicated that he "would not have been 'deterred by a locked door, by locks, by cameras, or even the presence of other individuals'" (*id.* at 8). The District Court rejected those arguments.

So, viewed as a whole, the "Targeted Victim" defense proved successful in some instances and unsuccessful in others — all depending on the facts. Yet, even in those cases in which the defendant prevailed, no court ever articulated or "re-articulated"

defendant's current thesis: namely, that proof of targeting of itself shifts the burden of proof and requires the plaintiff to prove proximate causation in order to successfully oppose the landlord's motion for summary judgment.

More importantly, defendant's newly imagined rule is inconsistent with this Court's rulings, in *Burgos* and *Price*, that there is no "special" causation rule in premises security cases. Defendant's thesis is also inconsistent with this Court's still earlier ruling in *Nallan*, 50 NY2d 507, where all parties agreed that the plaintiff had been the victim of a targeted "hit."

In *Nallan*, the plaintiff was shot in the lobby of defendant's building. All assumed that the never-identified assailant "was 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." *Nallan*, 50 NY2d at 512-513. The plaintiff alleged that the lobby in which he was shot was generally staffed by an unarmed lobby attendant, that defendant had thus assumed a duty to provide such an attendant, and that the presence of the attendant would likely have deterred the assailant. *Id.* at 513, 520. The last assertion was based upon expert testimony to the effect "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" even if the crime "was a deliberate, planned 'assassination' attempt such as apparently occurred in this case." *Id.* at 521.

The defendant in *Nallan* argued, *inter alia*, that as a matter of law the absence of a lobby attendant could not be deemed a proximate cause of the alleged assassination attempt. This Court rejected that claim, observing that "[t]he clear implication of the [plaintiff's] 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." *Nallan*, 50 NY2d at 521.

There is thus no basis in law for the Housing Authority's present thesis that proof the victim was targeted of itself establishes the landlord's entitlement to summary judgment. As for the Housing Authority's further argument that it is not even sufficient for a premises security plaintiff to prove that *the subject assault* would likely not have occurred absent the defendant's negligence, and that the victim must additionally prove that she or he would not have been assaulted *anywhere, at anytime*, such would impose a burden that is utterly unprecedented in tort law — as the First Department cogently explained in rejecting a similar argument that had been made in the World Trade Center bombing case. *Nash v. Port Auth. of New York and New Jersey*, 51 AD3d 337, 352 [1st Dept 2008], *rev'd on other grounds* 17 NY3d 428 [2011].

New York law has long held that, where the alleged negligence consisted of a failure to take precautions to prevent some particular event, "[i]t is not enough to speculate 'that the same harm might possibly have been sustained had the actor not been negligent.'" *Rugg v State*, 284 AD 179, 182-183 [3d Dept 1954], *quoting* Restatement

(First) of Torts § 432 (1934), comment (c); *see also Alexander v Eldred*, 63 NY2d 460, 467-468 [1984].

Were the rule otherwise, negligent failure to provide security would never be actionable, for it is always conceptually possible that the victim would have been assaulted the next day, or that the victim would have been assaulted somewhere else, had he or she not been assaulted at the time and place in issue. Similarly, in a case in which the plaintiff was injured due to the defendant's negligent maintenance of a stairway or some other area, it is always theoretically possible that the plaintiff would have been injured at the *next* stairway, the *next* intersection, or the *next* elevator had the accident in issue not occurred.

More concretely, the defendant's newly invented rule is inconsistent with this Court's ruling in *Nallan*, 50 NY2d 507, where the assailant was assumed to be an assassin hired to kill the plaintiff.

D. Adoption Of Defendant's Purportedly "Sensible" Rule Would Deprive The State's Most Vulnerable Tenants Of Any Expectation Of Safety In Their Own Homes.

Defendant argues that the rule set forth in the so-called January Decision requires that every "gathering place" be turned into a "fortress." Deft. Current Br. at 29-30. The reality is that neither the plaintiffs nor either of the lower courts called upon this defendant to do anything more than equip the building's entrance with a functioning lock, this as opposed to providing an entrance door which, depending on which proof

is credited, was *usually* "O/O/O" (according to defendant's own records) or *virtually always* Out of Order (according to the plaintiffs' testimony). *See* pages 9-15, above.

Of course, there is always *some* reason why the Housing Authority's failure to provide even the most rudimentary security is purportedly non-actionable as a matter of law, but that reason changes from case to case. If the assailant was a tenant or invitee, then the assailant had a right to enter and the absence of a working lock was immaterial. If the assailant was never identified, then it is allegedly "speculative" to assume that he or she was not a tenant or invitee, with the same result. If the assailant was identified and proven not to have lived in the subject building, then it is purportedly "speculative" to assume that he or she entered via the broken front door, or it is alternatively speculative to assume that he or she would not have been able to circumvent a functioning lock.

If, as here, the assailant knew the victim, then the event was purportedly a "targeted attack" and there is a different reason why the building owner's failure to provide even the most rudimentary security cannot give rise to liability. Defendant here argues that its newly constructed "rule" for "targeted" attacks would constitute good "public policy." Deft. Curr. Br. at 19-20, 29.

It is, concededly, often difficult to determine what would have occurred had circumstances been different. Would the accident have occurred even if the puddle wasn't there (*Gayle*, *supra*), even if the driver had not been drinking (*Humphrey*, *supra*),

even if the valve cord had not been broken (*Betzag*, *supra*). Yet, there is a reason why responsible landlords provide entrances that actually lock. And there is a very simple way that this defendant can avoid imposition of liability in all future cases of this kind. It need only provide a front door lock which is *not* chronically "O/O/O," in which event no one would have to wonder what would have occurred had the defendant bothered to provide the "rudimentary security" of a functioning lock.

In any event, this Court previously considered and rejected this defendant's call for a special, landlord-friendly causation rule specific to premises security cases. That rejection was premised in part on a public policy concern which is wholly foreign to the Housing Authority's analysis, but which this Court deemed significant. "[S]uch a rule," this Court said, "would undermine the deterrent effect of tort law on negligent landlords, diminishing their incentive to provide and maintain the minimally required security for their tenants." *Burgos*, 92 NY2d at 551.

POINT III

THE DEFENDANT'S MOTION WAS CORRECTLY DENIED FOR THE SIMPLE REASON THAT THE HOUSING AUTHORITY FAILED TO ADDUCE ANY PROOF WHATSOEVER THAT THE ATTACK WOULD HAVE OCCURRED EVEN IF IT HAD PROVIDED ITS TENANTS WITH MINIMAL SECURITY.

Defendant's moving affirmation for summary judgment is reproduced at pages R.19 to R.36. Review of those pages will confirm that, in contrast to cases like *Price* and *Murphy*, defendant adduced no proof whatsoever that the subject assault would have occurred even if it had bothered to provide a functioning entrance lock.

Defendant *now* argues, nonetheless, that the facts herein are "inescapably similar" to those in *Murphy* (Deft. Current Br. at 33). And it does so even though it argued in *Murphy* that *Scurry* was "factually distinguishable" in that that there was here "no evidence presented that there were individuals who could have provided the assailant with access to the interior of the building had there been a working lock on the front door." *Murphy*, Deft's Aff. In Opposition to Motion For Leave to Appeal dated June 22, 2021, pp. 13-14.

Towards that end, defendant's counsel, not any arguably qualified security expert, now pronounce that, had there been a functioning front door lock, "Boney could, quite clearly, have simply prepared his ambush outside the lobby door" (Deft. Current Br. at 37) and/or "he could have merely picked another spot to lie in wait" and "[t]he only differences would be trivial ones of time and space" (*id.*). Defendant further argues that

Boney could have entered "by following a tenant into the building" (*id.*) and/or by "simply ask[ing] a tenant outside the building to let him in" (*id.* at 38).

There are three problems with such claims. *First*, while this Court ruled in *Price*, 92 NY2d at 559 that the Housing Authority could adduce opinions such as those now offered by its counsel from a witness who "did not have formal training in psychology or the behavioral sciences" but whose "skill, training, knowledge and experience were adequate to support an assumption that the opinion he rendered was reliable," it did not say that the opinions could just as well come from the party's counsel.

Second, if a landlord could obtain summary judgment based upon speculation that the intruder could have alternatively gained access "by following a tenant into the building" or by "simply ask[ing] a tenant … to let him in," then that covers literally every case in which the landlord fails to provide the "rudimentary" protection of a locked entrance door. While defendant no doubt regards that outcome as "sensible," it is also the outcome which this Court squarely rejected in *Jacqueline S.*, *Burgos*, and *Bennett*, amongst other decisions. *See* pages 43-47, above.

Finally, defendant's current speculations as to how the assailant would have "easily" circumvented a functioning entrance lock fail to account for the undisputed facts recited in defendant's own brief to this Court.

If the assailant had a gun and intended to shoot decedent, he presumably could have done that out in the street. Of course, that could also be said of the "would-be

assassin" in *Nallan*, 50 NY2d at 512-513. Also, while defendant may deem the difference "trivial," a shooting at some other time and place would not have left Bryan Scurry with horrific burn injuries.

However, there is no proof that Boney had a gun. And defendant's own brief says that his "preconceived plan to murder his ex-fiancee" entailed dousing her with gasoline and setting her aflame. Deft. Current Br. at 33, 37-39.

Although defendant purports not to notice, gasoline smells exactly like … gasoline. Is defendant's theory that Boney could have patiently waited for his victim "outside the lobby door" (Deft. Current Br. at 37) and that no one, not a single one of the "225 residents" (*id.* at 37), would have wondered or cared that, per defendant's brief, there was a "lunatic" (*id.* at 40) holding a container of gasoline? Is the Court supposed to accept — on the defendant's motion for summary judgment — that a resident would have let the intruder in without wondering or caring that the "monstrous individual" (*id.* at 39) happened to be carrying a container of gasoline into a building that had no interior parking lot?

The same considerations apply to defendant's appellate proclamation that Boney "could have simply ambushed her in a different place at a different time." Deft. Current Br. at 40. Does defendant suppose that Boney could have waited indefinitely on some street corner without anyone noticing or caring that the "lunatic" was armed with a

container of gasoline? Or is the theory that he could have waited indefinitely at decedent's workplace?

Ignoring that defendant produced no opinions other than those of its counsel, its counsel's theory, even now, addresses none of the actual details and is little more than the conclusion itself. 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. In any event, the defendant-movant offered literally no proof that a functioning lock would *not* have prevented the crime.

POINT IV

ASSUMING THAT DEFENDANT SOMEHOW ESTABLISHED A *PRIMA FACIE* ENTITLEMENT TO SUMMARY JUDGMENT, PLAINTIFFS' UNREBUTTED PROOF PLAINLY RAISED A TRIABLE ISSUE OF FACT CONCERNING PROXIMATE CAUSATION.

The point is perfectly obvious and need not be belabored. Defendant understandably produced no proof whatsoever that the same assault would have occurred had the entrance lock actually worked. We say it "understandably" produced no proof because its position until now was that it was purportedly "well settled 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," period (R.35).

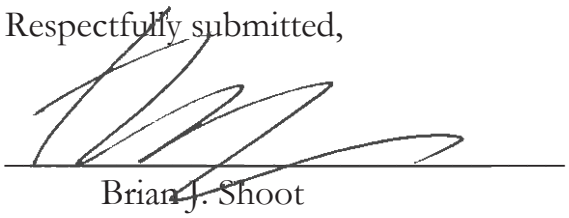
Assuming, *arguendo*, that defendant's current conclusory pronouncements are sufficient to prima facie establish that a functioning lock would have made no difference, plaintiffs' opposition proof, which included contrary opinions from actual experts, plainly sufficed to "raise a triable issue of fact regarding whether defendant's conduct proximately caused plaintiff's injuries." *Burgos*, 92 NY2d at 550 ("[w]hen faced with a motion for summary judgment on proximate cause grounds, a plaintiff need not prove proximate cause by a preponderance of the evidence, which is plaintiff's burden at trial … a plaintiff need only raise a triable issue of fact regarding whether defendant's conduct proximately caused plaintiff's injuries").

Conclusion

For the reasons stated above, the order appealed from should be affirmed.

Dated: New York, New York
July 21, 2022

Respectfully submitted,

By: 

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