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Steven Pecoraro
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Supreme Court of the State of New York
Appellate Division: First Department

In the Matter of TAYSHANA MURPHY
by its Administratrix, TEPHANIE HOLSTON,
Plaintiff-Appellant,

-against-

THE NEW YORK STATE HOUSING AUTHORITY,
Defendant-Respondent,

-and-

TYSHAWN BROCKINGTON, ROBERT CARTAGENA,
and CLC COMMUNICATIONS INC.,
Defendants.

**Appellate
Division
Docket No.
2020-01722**

THE NEW YORK CITY HOUSING AUTHORITY,
Third-Party Plaintiff,

-against-

TERIQUE COLLINS,
Third-Party Defendant.

BRIEF FOR PLAINTIFF-APPELLANT

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Supreme Court, New York County, Index No. 158442/2012

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QUESTIONS PRESENTED

1. Did the Trial Court err in granting defendant-respondents' motion for summary judgment, which was based upon the targeted victim defense in this defective security lock action, when the record established that the decedent victim was not specifically targeted?
2. Did the Trial Court err in concluding that there was no issue as to Notice?
3. Did the Trial Court otherwise err in granting summary judgment to the defense?

All questions must be answered "Yes."

PRELIMINARY STATEMENT

By Order dated July 17, 2019, the Trial Court erred in granting defendant-respondent's motion for summary judgment, which was based upon the targeted victim defense in this action alleging a non-working security lock in a New York City Housing Authority exit-only door at the front entrance of its building. Police surveillance video, which was submitted and reviewed by the Court, established that the decedent victim was one of six people fleeing her killers into the defendant-respondent New York City

Housing Authority's building where she lived, and that the perpetrators entered the building due to the automatic locking mechanism of the emergency exit-only door failing to lock.

As an incidental finding, the Court also claimed that notice of the defective lock was not established.

STATEMENT OF FACTS

The Trial Court held:

“So the Court sees two issues, as you [defense counsel] are pointing out ... One, whether the defendant has notice of a dangerous condition in terms of whether the lock was working or not working. And the second, is whether this was a targeted attack.”

R 20, line 24 – R 21, line 6.

A. Facts as to the Murder

This suit arises out of a non-working locking mechanism in an exit-only door, which was designed to lock automatically upon closing. The building was part of the Grant Houses, owned by the defendant-respondent New York City Housing Authority (“Housing Authority”). The 18 year old decedent, resided in Apartment 15I with her mother. The Bill of Particulars alleged a failure to comply with multiple statutes and regulations requiring self-locking doors in the building. R 231-234.

Surveillance videos installed by the New York City Police Department captured the decedent and five other individuals fleeing the decedent's two killers. These videos were obtained from the District Attorney's Office and exchanged in the course of discovery. R 1964-1968. A disc containing the videos are being provided to the Court with a hard copy of this brief. The videos show the decedent and five other individuals fleeing into her building, one of whom pulled shut the exit-only door, which was supposed to be self-locking (some portions of the record incorrectly refers to the number of individuals fleeing the perpetrators. The videos speak for themselves and the Court is encouraged to view them). Per the deceased's mother's deposition testimony, in the video identified as playlist 2012-8-22_2052, the deceased is the girl in the red sweatshirt. The deceased's mother gives commentary on the exchanged videos shown to her at her deposition, which show her daughter and others fleeing into the building, followed by the convicted killers Brockington and Cartagena. She describes how the videos shows how the two killers initially attempted entry via the main entrance door, by the intercom, but were unable to open it, as it was apparently, and appropriately, locked. The videos then show the perpetrators tried the door at issue, "the side door, pulled it open, walked in with no problem.... It always does that." The inside camera video shows that they pulled the exit-only door open by the grating

over its single window, as it did not have a door knob on the outside, due to the fact that it was designed as an exit-only door. R 1974-1977. See also the inside video, which shows the door bouncing after it is closed, and outside videos showing perpetrators walking in.

The videos were submitted and relied upon by the Trial Court, and referred to extensively in the record. R 11-55, 1950, 1964-1968.

The two killers were defendants Tyshawn Brockington and Robert Cartagena, who were convicted of the 18 year old decedent's murder as she begged for her life. R 1234-1235, 1908, 1954-1963. The record further established that there was an ongoing feud between certain residents of the Manhattanville Houses, where the perpetrators resided, and certain residents of the Grant Houses, where the decedent Tayshana Murphy resided. Defendant-respondent submitted evidence in its underlying motion that Brockington and Cartagena wanted to kill "anyone from Grant [Houses]" but that it was the 18 year old decedent who the perpetrators came upon and shot dead. R 66. Per the criminal trial testimony of Eric Pierce that defendant-respondent relied upon and quoted, before being shot after the killers came upon her in the fourth floor stairwell, the decedent pleaded with her killers, stating "I'm not with them," one of the killers responding "I don't give a fuck" and was then shot twice. R 1234-1235. Per criminal trial testimony of Steven

Reynoso, also relied upon by defendant- respondent, the decedent pleaded “I didn’t have nothing to do to with it. I didn’t have nothing to do with it. I had nothing to do with it” before he heard three shots. R 1908.

While the surveillance video shows that Tayshana was one of six fleeing the perpetrators it was never established that the perpetrators specifically targeted her (as opposed to anyone associated with the Grant Houses, or even anyone of the six persons fleeing), until the moment that it happened to be Tayshana they came upon and murdered. The defendant-respondent quoted the prosecution’s closing argument in its underlying papers, stating that “They [the perpetrators] reduced her to an address. You are from Grant. We got attacked by kids from Grant, by younger kids with bottles, so we’re gonna come back with a gun and because she was from Grant, she died in Grant in a hallway shot by three bullets by Tyshawn Brockington and Robert Cartagena.” R 71-72.

(The criminal records and death certificate reflect the murder taking place at about 4:00 a.m. R 1954-1963. The time on the Police surveillance videos appear to be off, reflecting the time just before the murder as after 6:00 a.m.)

While the criminal trial record established that on the day before the murder, the decedent was present while one of the perpetrators fought one of,

and was chased by members of, the Three Stacks group, it was never established that she took part in any violence against either of the perpetrators. R 70-71.

In its underlying papers and at oral argument the defendant-respondent incorrectly claimed that some of the fleeing six young people taunted the killers while in the lobby of the building, but the Trial Justice correctly pointed out on the record that the surveillance video does not show that, and in any event, it speaks for itself. R 18, line 24 – R 19, line 9.

B. Facts as to Notice

In opposition to the underlying motion, the affidavit of Tephania Holston, the mother of the deceased, established that the exit-only door at issue never locked automatically as it was supposed to. She entered through the door at issue on both Friday September 9th and Saturday September 10, the two days before her daughter's murder, and it was not locked. The murder occurred the early morning hours of Sunday, September 11th. She also states, consistent with her deposition testimony, that she made multiple complaints concerning the door not locking. R 1969-1971. The records includes two photos of the door at issue which she identifies, one taken from the outside

(the door at issue is the one on the left), and one from the inside (the door at issue is the one on the right) R 1972-1973.

Also in opposition to the motion was the affidavit of locksmith Barry Gasthalter, who concludes that the door was not properly functioning at the time, and that this is consistent with the door having never been fixed since the Housing Authority was aware of the non-working locking mechanism back in March, six months before the shooting. He notes the door bouncing after closing in the video. His affidavit refers to his examination of the door and his review of the respondent's records, as well as the surveillance video. R 1974-1977.

Notwithstanding that the video surveillance clearly shows that the door did not lock and was not locked at the time the perpetrators entered, the Housing Authority's "SUPERVISOR OF CARETAKERS - DAILY CARETAKER CHECKLIST" (hereinafter "Checklist") forms for the day before the murder and the day after, claim the door was properly functioning, without any records claiming a repair after the shooting! R 1978-1979

The Housing Authority's Work Order 16701419 establishes that the door was non-functional March 3 through March 31, 2011. The record reflects that major work was required. It indicates "Also side door [the door at issue]" and in handwriting states:

“ALSO BOTH DOORS NEED ELECT. NO POWER
WELDER, BRACKET FOR ARMATURE
Electrician Ticket Created
3-31 [2011]”

R 1980.

The next Housing Authority Work Order, 17095235, claims that electrical work was done on April 5, 2011. R 1981. These aforesaid Work Orders establish that at the very least the door at issue was not locking from March 3 through April 5, 2011. Plaintiff-appellant sought the Housing Authority’s Checklist records for this time period, because if the doors were legitimately checked, they would each reflect that the door at issue was not locking during this time period. The Court ordered that they be provided. Pursuant to the Court’s directive, the Housing Authority performed a search these documents for this time period. The its affidavit produced pursuant to Court Order claimed that they could not be located. R 1982-1984.

No records were ever proffered that the welding work was performed and the armature bracket was fixed or otherwise installed. In his deposition transcript, Housing Authority electrician Robert Loomis was identified in the Work Order of April 5th, but acknowledged that he does not weld, and that welding is performed by another trade employed by NYCHA. R 1989, page

11, lines 6-20. He also testified that he has no recollection of the work performed with respect to the two Work Orders (including his supposed own work). R 1989, page 12, line 23 – page 13, line 18.

Robert Loomis testified that the other Housing Authority employee working with him would have been an electrician's helper. R 1999, page 52, lines 15-20. The April 5th Work Order identifies the co-worker as George Torres. However, after repeated attempts to depose him, it was acknowledged by the Housing Authority that George Torres did not work at the Grant Houses at the time of the purported repair! The affidavit by Housing Authority Human Resources personnel, required per Court Order, states:

“The time as recorded on the Kronos timeclock is the employee's official time record of where the employee starts and ends their work day... A review of the Kronos records reveal that Mr. George Torres did not swipe on or out at the Grant Houses in April 2011 [the month for which the Court Order required a search].”

R 2019-2021.

A summary of the above reflects missing records (Daily Caretaker Checklists from March 3 – April 5, 2011), incredulous records (the September 10 and September 12, 2011 Daily Caretaker Checklists claiming a properly functioning door, in contradiction to the video evidence, affidavit of the deceased's mother, and locksmith's affidavit) and fraudulent records (the

April 5, 2011 Work Order claiming George Torres was involved in the repair, when in fact he was not working at the Grant Houses for - at least - the entire month of April).

ARGUMENT

I.

The Targeted Victim Defense Does Not Apply when the Specific Decedent was Not Targeted Well Before the Moment of Assault

The Trial Court's reliance on Roldan v. New York City Housing Authority, 171 AD3d 418, 97 NYS 3d 122 (2019) was wrong. Notwithstanding the Trial Court's claim, the Appellate Court did not dismiss Roldan based upon the targeted victim defense, but rather, because the defendant Housing Authority "lacked notice of the broken lock" and because the plaintiff failed to rebut the defense claim that the assailant an invited guest.

The findings in Cerda v. 2962 Decatur Owners Corp, 306 AD2d 169, 761 NYS2d 220 (1st Dept 2003) are limited to a scenario in which the victim is specifically targeted. In the case before us, there is no evidence that up until the time the perpetrators came upon the decedent, that she was their specific target. There is no evidence that the perpetrators intended to kill every one of the tenants of the Grant Houses, or even every one of the six individuals who was running from them. It just so happened that the decedent

was the random one of the six that the killers came upon, and at that moment, decided to kill. This is not the scenario of Cerda. The targeted victim defense as described in Cerda and similar cases should not be expanded to provide a defense to the killing of individuals who are not specifically targeted. What if the killers randomly chose to kill another Grant Houses tenant (not one the six who fled), or multiple others, only because they were one of the thousands who lived at Grant Houses? Under the defendant-respondent's interpretation, this would provide the Housing Authority a blanket defense, with no obligation to provide working door locks to any of the tenants.

II. Minimal Security Measures are Required

In his affidavit, locksmith Barry Gasthalter states "Self-locking doors is standard and expected security in multiple family dwellings such as the building at issue, and were so at the time of the murder." R 1975. That this was required security was not disputed in the record.

In Tarter v. Schildkraut, 151 Ad2d 414, 542 NYS2d 626 (1st Dept 1989) this Appellate Court has held that "A landlord has a duty to take "minimal" precautions to protect tenants... (Miller v State of New York, 62 N.Y.2d 506, 513; Iannelli v. Powers, 114 A.D.2d 157, 161, lv denied 68 N.Y.2d 604.)" In

Schildkraut the Appellate Court held that having a working door lock is such a minimal precaution.

In Jacqueline S. v. City of New York and The New York City Housing Authority, 81 NY2d 288, 598 NYS2d 160 (1993), the Court of Appeals stated:

“We hold merely that, in the circumstances, given the Authority's conceded failure to supply even the most rudimentary security -- e.g., locks for the entrances -- it was error to grant summary judgment.”

Now 41 years later, it is time to acknowledge, without reservation, that such a minimal requirement is expected in multi-family dwellings such as the Housing Authority's Grant Houses, and at the very least, that there is a question of fact on the issue.

III. Respondent Failed to Refute Notice

The transcript of the oral argument in the underlying Court reflects that it overwhelmingly involved the applicability of the Targeted Victim defense. That notwithstanding, the Trial Court also held that notice of the defective locking mechanism was not established.

Respondent's underlying papers failed to establish that the locking mechanism to the front entrance emergency door was properly functioning, and in fact never even argued that it was properly functioning.

It is the plaintiff's contention, that the door at issue was never checked, and that the line referring to exit doors not locking properly on the "SUPERVISOR OF CARETAKERS - DAILY CARETAKER CHECKLIST" (hereinafter "Checklist") forms were left at "NO" on default. Supporting this contention (in addition to plaintiff's affidavit and testimony that the door never locked) is the fact that notwithstanding that the video surveillance clearly showing that the door did not lock and was not locked at the time the perpetrators entered, the Checklist for the day before the murder and the day after claim the door was properly functioning, without any records claiming a repair! R 1978-1979.

That the door was non-functional from March 3rd to April 5th is unrefuted. NYCHA's Work Order 16701419 establishes that the door was non-functional March 3 through March 31, 2011. The record reflects that major work was required. It indicates "Also side door [the door at issue]" and in handwriting states:

"ALSO BOTH DOORS NEED ELECT. NO POWER

WELDER, BRACKET FOR ARMATURE

Electrician Ticket Created

3-31 [2011]"

R 1980.

The next Housing Authority Work Order, 17095235, claims that electrical work was done on April 5, 2011. R 1981. These Work Orders establish that at the very least the door at issue was not locking from March 3 through April 5, 2011. However, the Checklist records for this time period, which, if the doors were legitimately checked, would each reflect that the door at issue was not locking during this time period, were missing without explanation. R 1982-1984. This allows a negative inference to be made against the party which cannot find them. Based on this alone, the defense' lack of notice argument must be denied.

Furthermore, the Housing Authority's claim that the work required by the Work Order was performed is suspect, not only based upon Mrs. Holston's testimony, but because no records were ever proffered that the welding work was performed and the armature bracket was fixed or otherwise installed, and due to testimony of the electrician Robert Loomis. He is identified in the Work Order of April 5th. R 1981. He testified that he does not weld, and that any welding is performed by another trade employed by the Housing Authority. R 1989, page 11, lines 6-20. He also testified that he has no recollection of the work performed with respect to the two Work Orders, including his own. R 1989, page 12, line 23 – page 13, line 18. Furthermore, it was establish per the Housing Authority's affidavit, that notwithstanding

the April 5th Work Order, identifying Robert Loomis' co-worker as George Torres, repeated attempts to depose him, it was acknowledged by the Housing Authority that George Torres did not work at the Grant Houses at the time of the purported repair! The affidavit by Housing Authority Human Resources personnel, required per Court Order, states:

“the Kronos timeclock is the employee’s official time record of where the employee starts and ends their work day... A review of the Kronos records reveal that Mr. George Torres did not swipe on or out at the Grant Houses in April 2011 [the month for which the Court Order required a search].”

R 2019-2021.

We now have missing records (Daily Caretaker Checklists from 3/3 – 4/5/2011 and no evidence of the necessary welding repair), we have incredulous records (the 9/10 and 9/12/2011 Daily Caretaker Checklists claiming a properly functioning door, in contradiction to the video evidence and affidavit of the deceased’s mother), and we have fraudulent records (the 4/5/2011 Work Order claiming George Torres was involved in the repair, when he was not working at the Grant Houses for - at least - the entire month of April). Under these circumstances, at the time of trial there will undoubtedly be a spoliation charge, and a Falsus in Uno charge. Looking at all of this in the light most favorable to the party opposing summary judgment, it is reasonable to conclude that the work necessary to repair the non-locking

door was never performed, and the door was never properly checked, and that the movant has otherwise failed to meet its burden as to lack of notice.

**IV.
Respondent's Expert's Affidavit is Speculative, Conclusory,
and Without Adequate Basis in Fact**

The affidavit of defendant-respondent's purported expert is both speculative and conclusory, without adequate basis in fact, and the expert, without adequate experience. R 1931-1938. He claims the malfunctioning door lock was properly checked without any background in locksmithing, and while ignoring the evidence of fraudulent, inaccurate, and missing records. He avoids the question of whether it was properly fixed on April 5, 2011 to begin with. Then he speculates that "no security device such as a working lock... would have deterred Tyshawn Brockington and Robert Cartagena..." notwithstanding that the first door they tried was locked and deterred them, and that there was no evidence that they had burglar tools with them to break through a locked door, and even if so, ignores that by that time the decedent would likely have not been found by them in the 4th floor stairwell. He never alleged that the perpetrators intended to kill all the residents of the Grant Houses, or even all of the six young adults running from them, which leaves open the likely possibility that even if their plan was not one of brief rage

which would have dissipated over time, it could well have been someone else from Grant Houses, or someone else from the group of six fleeing young adults, who they would have murdered – perhaps Steven Reynoso, who admitted to throwing a bottle at Cartagena, or perhaps someone else who actually was involved in a physical altercation with either of the perpetrators, as opposed to the decedent, who has only been identified as being present during the prior altercations with the perpetrators.

Finally, without including his records or referring to any trend within them, the purported expert conclusorily claimed that with “only” an average of two murders per year in 2009, 2010, and 2011 in the precinct covering the Grant Houses, a murder due to non-functioning door locks was not foreseeable. To the contrary, a reasonable jury can conclude this statistic makes a murder foreseeable – isn’t this why we have locks on our doors to begin with? Aren’t there many precincts throughout the state and country with no annual murders? Furthermore, he is silent as to any trend (perhaps steadily increasing 2009 – 2011?) or how many attempted murders, shootings, and assaults occurred, and why he was reporting to such a short window (perhaps prior years did not help his argument?), or whether the murders took place in Housing Authority projects, or even in the Grant Houses. His affidavit is conclusory, speculative, and self-serving.

CONCLUSION

Based on the foregoing, the Trial Court erred in expanding the targeted victim defense to include to random shooting of the decedent who happened to be one in a group of six, erred in concluding that there was no issue as to the Housing Authority's notice of the non-working locking mechanism on the exit-only door, and otherwise erred in granting the defendant-respondent summary judgment.

As a result of the foregoing, the Trial Court's decision granting summary judgment to the defense, must be reversed.

Dated: New York, New York
 June 3, 2020

Respectfully Submitted,



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PRINTING SPECIFICATIONS STATEMENT
PURSUANT TO 22 NYCRR § 1250.8[j]

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Supreme Court of the State of New York
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THE NEW YORK STATE HOUSING AUTHORITY,

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-and-

TYSHAWN BROCKINGTON, ROBERT CARTAGENA,
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Defendants.

THE NEW YORK CITY HOUSING AUTHORITY,

Third-Party Plaintiff,

-against-

TERIQUE COLLINS,

Third-Party Defendant.

STATEMENT PURSUANT TO CPLR 5531

1. Supreme Court, New York County, Index No. 158442/2012.
2. The full names of the original parties are the same; there has been no change.
3. Action commenced in Supreme Court, New York County.
4. Action was commenced by the filing of a Notice of Claim, dated December 5, 2011, and a Summons and Complaint, dated November 26, 2012. Action was joined by the filing of an Answer, dated January 9, 2013.
5. Nature of action: Civil Action — Torts.
6. This appeal is from the Decision and Order of the Hon. Robert David Kalish, dated July 17, 2019.
7. Appeal is on the Record (reproduced) method.