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Patrick J. Lawless
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2020-01722

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.

(Additional Caption on the Reverse)

BRIEF FOR DEFENDANT-RESPONDENT

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THE NEW YORK CITY HOUSING AUTHORITY,

Third-Party Plaintiff,

against

TERIQUE COLLINS,

Third-Party Defendant.

TABLE OF CONTENTS

Page

Table of Authorities ... iii

Preliminary Statement ... 1

Questions Presented ... 3

Facts ... 3

The Alleged Incident ... 3

Cartagena's Criminal Trial ... 4

NYCHA's Maintenance and Inspection Procedures ... 9

The Instant Action ... 9

NYCHA's Motion for Summary Judgment ... 10

The Order Appealed From ... 12

Argument ... 15

Point I NYCHA Cannot be Held Liable as a Matter of Law Because the Decedent was the Victim of a Targeted, Premeditated Attack ... 15

A. NYCHA Demonstrated it Prima Facie Entitlement to Summary Judgment by Submitting Unrefuted Eyewitness Testimony Which Showed that the Decedent was Targeted by Cartagena and Brockington ... 15

B. In Opposition to NYCHA's Prima Facie Showing that the Decedent was Targeted by Cartagena and Brockington, the Plaintiff Failed to Raise an Issue of Fact ... 21

Point II NYCHA did not Have Actual or Constructive Notice that the Door Lock had Been Broken at the Time of the Incident 26

Conclusion 33

Printing Specifications Statement 34

TABLE OF AUTHORITIES

Page

Cases

Anzalone v. Pan–Am Equities,
271 A.D.2d 307 (1st Dep't 2000) 26

Batista v. City of New York,
108 A.D.3d 484 (1st Dep't 2013) 26

Buckeridge v. Broadie,
5 A.D.3d 298 (1st Dept. 2004) 17

Burgos v. Aqueduct Realty Corp.,
92 N.Y.2d 544 (1998) 26

Cerda v. 2962 Decatur Ave. Owners Corp.,
306 A.D.2d 169 (1st Dep't 2003) 15, 20, 25

Cook v. New York City Hous. Auth.,
248 A.D.2d 501 (2d Dep't 1998) 26

Euro-Central Corp. v. Dalsimer, Inc.,
22 A.D.3d 793 (2d Dep't 2005) 32

Faughey v New 56-79 IG Assoc., L.P.,
149 A.D.3d 418 (1st Dep't 2017) 18, 20, 25

Flores v. Dearborne Management, Inc.,
24 A.D.3d 101 (1st Dept. 2005) 17

Gordon v. American Museum of Natural History,
67 N.Y.2d 836 (1986) 27

Harris v. New York City Hous. Auth.,
211 A.D.2d 616 (2d Dep't 1995) 15

James v. Jamie Towers Hous. Co.,
99 N.Y.2d 639(2003) 26

Leyva v. Riverbay Corp.,
206 A.D.2d 150 (1st Dep't 1994) 26

Love v. New York City Hous. Auth.,
82 A.D.3d 588 (1st Dep't 2011) 28

Maheshwari v. City of New York,
2 N.Y.3d 288 (2004) 16, 26

Nallan v. Helmsley–Spear, Inc.,
50 N.Y.2d 507 (1980) 26

Pagan v. New York City Hous. Auth.,
121 A.D.3d 622 (1st Dep't 2014) 28

Pfeuffer v. New York City Hous. Auth.,
93 A.D.3d 470 (1st Dep't 2012) 28

*Piacquadio v. Recine Realty Cor*p.,
84 N.Y.2d 967 (1994) 27

Ramirez v. BB and BB Management Corp.,
115 A.D.3d 555 (1st Dep't 2014) 27

Rivera v. New York City Hous. Auth.,
239 A.D.2d 114 (1st Dept. 1997) 23, 24

Rodriguez v. New York City Hous. Auth.,
102 A.D.3d 407 (1st Dep't 2013) 28

Roldan v. New York City Hous. Auth.,
171 A.D.3d 418 (1st Dep't 2019) 12, 13, 15, 18

Singer v. St. Francis Hosp.,
21 A.D.3d 469 (2d Dep't 2005) 27

Tarter v. Schildkraut,
151 A.D.2d 414 (1st Dept. 1989) 16, 21, 25

Wong v. Riverbay Corp.,
139 A.D.3d 440 (1st Dep't 2016) 15, 18

Zuckerman v. City of New York,
49 N.Y.2d 557 (1980) 31

Preliminary Statement

This brief is submitted on behalf of defendant-respondent New York City Housing Authority ("NYCHA"), in opposition to the appeal brought by plaintiff-appellant Tephanie Holston, as adminitratrix of the estate of Tayshana Murphy. By this brief, NYCHA respectfully requests that this Court affirm in all respects the order of the Supreme Court, New York County (Kalish, J.), dated July 17, 2019, which granted NYCHA's motion for summary judgment dismissing the plaintiff's complaint.

This action arises out of the fatal shooting of 18-year-old Tayshana Murphy (the "decedent"), on Sunday, September 11, 2011, at around 4:00 a.m., inside the building located at 3170 Broadway in Manhattan. The building is part of a NYCHA residential housing development known as the Grant Houses. The decedent, who was a resident of the subject building, was shot and killed by defendants Robert Cartagena and Tyshawn Brockington in revenge for an earlier altercation between Cartagena and the decedent and her friends.

The plaintiff alleges NYCHA was negligent in failing to provide adequate security, in particular, functioning door locks. As will be discussed in further detail below, the trial court properly granted NYCHA's motion for summary judgment because the undisputed evidence shows that the decedent was the victim of a

11101214v.1

targeted, premeditated assault, thus severing any causal connection between the shooting and any alleged negligence on NYCHA's part.

The evidence further shows that NYCHA did not have constructive notice that the lock to the door through which Cartagena and Brockington entered the building was inoperable. NYCHA's maintenance records showed that on Saturday, September 10, 2011, all entrance and exit doors to the subject building were inspected and found to be working properly, and that NYCHA did not have constructive notice that any of the doors had malfunctioned in the between the time that maintenance staff left for the day at 1:30 p.m. on September 10, 2011, and the time of the shooting at 4:00 a.m. on September 11, 2011.

In light of the foregoing, the order appealed from should be affirmed in all respects.

11101214v.1

Questions Presented

Question # 1:	Did the court below properly grant NYCHA's motion for summary judgment where the unrefuted evidence shows that the plaintiff was the victim of a premediated, targeted attack?
Answer:	Yes.
Question # 2:	Did the court below properly grant NYCHA's motion for summary judgment where the unrefuted evidence shows that the last time that the doors to the subject building were inspected, they were found to be working properly, and that NYCHA did not have constructive notice that any of the doors had malfunctioned between the last time they were inspected and the time of the shooting?
Answer:	Yes.

Facts

The Alleged Incident

On September 11, 2011, at approximately 4:00 a.m., the decedent, a resident of NYCHA's Grant Houses, was murdered by Cartagena and Brockington in retaliation for an earlier altercation between Cartagena and the decedent and her friends. The earlier altercation and subsequent shooting were connected to a longstanding feud between rival youth gangs from the Grant Houses and a neighboring NYCHA residential housing development known as the Manhattanville Houses. (R. 790-792, 1057-1058, 1461-1462, 1466-1467).

11101214v.1
11101214v.1

Cartagena's Criminal Trial

At Cartagena's criminal trial, the following eyewitness testimony established that he and Brockington targeted the decedent as part of a premeditated criminal conspiracy to commit murder:

Grant residents Robert Nelson, Eric Pierce, Paul Washington, Steven Reynoso, and the decedent's brother Taylonn "Bam" Murphy were members of a youth gang called Three Stacks. (R. 790-792, 838, 1057-1058, 1461-1463). The decedent, also known as "Chicken," was closely affiliated with Three Stacks. (R. 792-793, 1322). Nelson and Pierce considered the decedent to be "family" and their "sister," and hung out with her nearly every day. (R. 784-785, 792, 1050-1051, 1067-1068). The Three Stacks' main rivals were a gang made up of Manhattanville residents called the Make it Happen Boys. (R. 790-792, 838, 1057-1058, 1234, 1461-1463).

Nelson knew Cartagena from seeing him around the complex and Brockington through his brother. (R. 788-790). Reynoso and Pierce did not like Brockington, also known as "Tata," because he was from Manhattanville. (R. 1057, 1479). Pierce did not like Cartagena, whom he considered "sneaky," because while Cartagena had lived at both Grant and Manhattanville, he was more loyal to Manhattanville. (R. 1102). Nelson, Pierce and Reynoso were aware that Brittany

11101214v.1

Santiago, who resided at the Grant Houses in September 2011, was Cartagena's girlfriend. (R. 787-788, 1149, 1231, 1235-1236).

On September 10, 2011, Reynoso and other Grant residents got into a bottle-throwing altercation with Manhattanville residents near the C-Town supermarket located on 550 General Grant Houses Street, and again at Old Broadway and West 126th Street. (R. 1466-1469, 1472-1476, 1478, 1484-1485). During this altercation, Reynoso picked up a paint can and threw it at Brockington. (R. 1479, 1481). After the police arrived, everyone "went about their business." (R. 1479).

On September 11, 2011, at approximately 1:30 a.m., the decedent, Nelson, Pierce, Washington, Reynoso, Bam, and others were hanging out in front of 3170 Broadway with. (R. 796-797, 1068). At some point, they walked towards C-Town and encountered a young man lying on the ground with a bloody face. (R. 798, 1070-1071, 1488-1490). The young man, who was a resident of the Grant Houses, told the group that the "Manhattanville Boys had jumped him." (R. 822-823).

Pierce then walked towards Manhattanville to fight the individual(s) from that development who were responsible for attacking the young man with the bloody face. The decedent walked part of the way with him. (R. 1072-1074). After Pierce scanned the area to see if he could "catch somebody" from Manhattanville, they walked back towards 3170 Broadway. (R. 1075-10).

11101214v.1

While Pierce and the decedent were walking on 125th Street, they saw other Three Stacks members chasing Cartagena and his girlfriend. (R. 1100-1102). Pierce and the decedent joined in the chase to prevent Cartagena from getting away. (R. 1101-1102). The group taunted Cartagena as they chased him. (R. 1103).

Reynoso, who also participated in the chase, grabbed an empty bottle from the street and threw it at Cartagena. (R. 1504-1505, 1509-1510). Another Three Stacks member punched Cartagena, knocking him to the ground. (R. 1510-1511). As Cartagena tried to escape, the group continued to chase him. Someone threw a small bike at Cartagena, while others punched and kicked him. (R. 1511-1512).

At that same time, Nelson observed the decedent and other Three Stacks members chasing Cartagena. (R. 802-804, 895). Soon thereafter, Cartagena got into a fight with one of the Three Stacks members that was chasing him. (R. 804, 934-836, 997).

Santiago recognized the decedent as part of the group from the Grant Houses who were chasing and throwing bottles at her and Cartagena. (R. 1269-1270, 1272, 1274). Prior to the altercation, Santiago had known the decedent and her brother Taylonn for around five years, and was friendly with the both of them. (R. 1456-1458). Cartagena attempted to fight with the group, but then he and Santiago ran away. (R. 805-806, 1103, 1273). The chase was not abandoned until Santiago and Cartagena arrived in front of the nearby police precinct. (R. 1473-1474). The

11101214v.1

decedent, Nelson, Pierce, Reynoso, Washington, and Bam then returned to the front of 3170 Broadway. (R. 806, 1103, 1512, 1515-1516).

After the altercation, Santiago and Cartagena walked towards Santiago's apartment, when they met Brockington, who told them that he was almost jumped by a group from the Grant Houses. (R. 1274-1276). Cartagena then called his friend, Terique "Streets" Collins. (R. 1276). Santiago, Cartagena, and Brockington then met Collins in the hallway outside of his apartment. (R. 1277). Santiago observed Collins hand Brockington a handgun, which Brockington put in his waistband. (R. 1278-1279). Collins and Brockington exited through the front of Collins' apartment building, and Santiago and Cartagena exited through the back of the building. (R. 1280).

They all met up in front of Santiago's building, went inside, and took the elevator the Santiago's apartment. (R. 1281-1282). While inside Santiago's apartment, Santiago heard Cartagena say "We are going to smoke somebody." (R. 1283-1284). Thereafter, Cartagena, Brockington and Collins left the apartment. (R. 1283-1284).

At around 4:00 a.m., the decedent, Nelson, Pierce, Reynoso, Bam, Washington, were talking in front of 3170 Broadway, when Nelson observed Cartagena and Brockington walking towards the building. (R. 807-808, 1086, 1521, 1525-1529). Nelson warned the group that Cartagena and Brockington were

11101214v.1

coming. (R. 808). The decedent, Nelson, Pierce, Reynoso, Bam and Washington then ran into the building because Nelson believed that Brockington had a gun. (R. 809, 1087, 1529, 1531). However, there were other Grant residents hanging out in front of the building who did not run away. (R. 806, 810, 1080). Before and after entering building, members of the group taunted Cartagena and Brockington. (R. 811-812, 855, 951, 957. 1087, 1530).

Shortly after entering the building, the group split up. (R. 1087). The decedent, Pierce and Reynoso ran up the stairs to the fourth floor and waited for the elevator. (R. 1087, 1530). While they were waiting for the elevator, Pierce and the decedent looked down the staircase to see if anyone was coming. (R. 1087). While Pierce was in the fourth floor hallway, he heard the decedent say in a loud, nervous voice "I'm not with them," and then someone responding "I don't give a fuck." (R. 1088, 1096). Pierce then heard two gunshots. (R. 1088).

Reynoso, who had walked down the fourth floor hallway to the opposite stairwell and then started to run up the stairs, heard the decedent repeatedly say "I had nothing to do with it." (R. 1544). As he reached the fifth floor, he heard three gunshots. (R. 1544). Nelson, who was in the elevator with Bam going up to the decedent and Bam's fifteenth floor apartment, also heard three gunshots. (R. 812-813, 1530).

11101214v.1

During summation, the prosecution noted that shortly after the murder, Cartagena added the following post to his Facebook page boasting about the murder: “Ville up hoe.” (R. 1799). The prosecutor explained that that the term “Ville” referred to the Manhattanville Houses, and the pejorative term “hoe” referred to the decedent. (R. 1799). At the conclusion of the trial, the jury found Cartagena guilty of second degree murder. (R. 1912-1913).

NYCHA’s Maintenance and Inspection Procedures

NYCHA’s maintenance staff worked between the hours of 8:00 a.m. and 4:30 p.m. on weekdays, and between 8:00 a.m. and 1:30 p.m. on weekends and holidays. (R. 1936). As part of their duties, NYCHA’s maintenance staff performed daily inspections of all entrance and exit doors to NYCHA buildings to make sure that they were locking properly. (R. 1936, 1978-1979). NYCHA’s Daily Caretaker Checklist for Saturday, September 10, 2011, indicates that Caretaker J Pugh inspected the entrance and exit doors to 3170 Broadway and found that they were locking properly. (R. 1936, 1978). NYCHA’s Daily Caretaker Checklist for Monday, September 12, 2011 also indicates that the building’s entrance and exit doors were locking properly. (R. 1979).

The Instant Action

On December 7, 2011, the decedent’s father, Taylonn Murphy, Sr., as proposed administrator, served a notice of claim on NYCHA, which alleged, *inter*

11101214v.1

alia, that NYCHA negligently provided security, surveillance, and policing services. (R. 77-78).

Around November 30, 2012, the decedent's mother, plaintiff Tephanie Holston, as administratrix of the decedent's estate, commenced this action against NYCHA, Cartagena, Brockington, and Collins. (R. 04-111). The complaint alleged, *inter alia*, that NYCHA was negligent in failing to have properly functioning door locks, and in failing to provide adequate security. (R. 108).

NYCHA answered the complaint, denying the material allegations of the complaint, and asserted cross-claims against Cartagena, Brockington, and Collins. (R. 114-124). Thereafter, NYCHA commenced a third-party action against Collins. (R. 175-188).

Around June 14, 2014, the plaintiff served a bill of particulars which alleged that at the time of the shooting, the front entrance doors and intercom system to 3170 Broadway were not working properly, and that NYCHA was negligent in failing to provide adequate security. (R. 167).

NYCHA's Motion for Summary Judgment

By notice of motion dated January 25, 2019, NYCHA moved for summary judgment dismissing the complaint against it. (R. 56-57). Among the materials that NYCHA submitted in support of its motion were copies of the certified transcripts of Cartagena's criminal trial (R. 377-1918), and an affidavit from security expert J.

11101214v.1

Lawrence Cunningham. (R. 1931-1938). Cunningham concluded that the eyewitnesses' testimony at Cartagena's criminal trial established that Cartagena and Brockington shot the decedent pursuant to a premeditated plan to commit murder in revenge for an earlier altercation, and that no security measures would have prevented Brockington and Cartagena from committing the crime. (R. 1934-1935, 1937). Cunningham further concluded that the decedent's murder was an unforeseeable, intervening event, especially given that the crime statistics for the 26th Precinct in which the Grant Houses are located for 2009 through 2011 show a relatively low homicide rate when compared to other precincts around the City. (R. 1937).

Cunningham also noted that NYCHA's maintenance records and the deposition testimony of NYCHA's employees show that NYCHA's maintenance staff regularly checked the entrance and exit doors to make sure that they were working properly, and that this met the standard of care with respect to apartment buildings in New York City. (R. 1936). In fact, NYCHA's Daily Caretaker Checklist dated September 10, 2011, shows that on that day, at some point between 8:00 a.m. and 1:30 p.m., Caretaker J Pugh inspected all entrance and exit doors to 3170 Broadway and found that they were working properly. (R. 1936). There are no records indicating that NYCHA had any notice that any door malfunctions between September 10, 2011 at1:30 p.m., when Caretaker Pugh would have left for

11101214v.1

the day, and September 11, 2011 at 8:00 a.m., the next time that the caretaker on duty would have reported for work. (R. 1936).

In opposition, the plaintiff's counsel argued that the decedent was not the victim of a targeted attack. However, he failed to refute any of the eyewitness testimony which established that the decedent was part of the group which chased and assaulted Cartagena prior to the shooting, and that Cartagena and Brockington shot the decedent out of revenge for the earlier altercation. (R. 1948-1949). The plaintiff's counsel further argued that NYCHA somehow had notice that the side door to the subject building was not operating properly at 4:00 a.m. on September 11, 2011, despite that it had been observed as working properly by the caretaker on duty on September 10, 2011, and that no NYCHA staff was present in the building between 1:30 p.m. on September 10, 2011 and 8:00 a.m. on September 11, 2011. (R. 1949-1953).

The Order Appealed From

In an order dated July 17, 2019, trial court granted NYCHA's motion. (R. 8). After hearing oral argument, the trial court held that NYCHA could not be held liable because the decedent was the victim of a targeted, pre-planned attack. (R. 49-55). The trial court noted that the facts of this case are stronger with respect to the issue of targeting than this Court's recent decision in *Roldan v. New York City Hous. Auth.*, 171 A.D.3d 418, 419 (1st Dep't 2019), wherein it was held that

11101214v.1

NYCHA could not be held liable for the shooting of the plaintiff inside its building because the plaintiff was the victim of a targeted attack by the alleged assailant. (R. 48-49). The trial court noted that in *Roldan*, the altercation which was the motivation for the attack had occurred just moments earlier, whereas in this case, the targeted shooting of the decedent "*took time and planning*." (R. 48-49).

The trial court noted that after Cartagena was assaulted, he met Brockington, and the two of them then went to a third person to get a gun. The two men then took the gun and went looking for the group that had chased after and assaulted Cartagena. (R. 49). They found the group, as demonstrated by the surveillance video, which showed six people, including the decedent, running into the building away from Cartagena and Brockington. (R. 49). Thus, the court concluded, from the standpoint of planning, "this case is a much stronger case that this is a targeted attack." (R. 49-50).

The trial court rejected the plaintiff's counsel's argument that this is not a targeting case because it did not involve a one on one altercation between the victim and the assailant:

> In this situation, the testimony that is unrefuted, and the evidence before the Court, is that there was this dispute between these two groups, and that the Three Stacks group, in this situation, the group that was being targeted, the group. But any one of those group, whether it was all six of them could be shot or any one of them, it was the group was targeted.

11101214v.1

> And the Court does not see any distinction, as the plaintiff would have the Court believe because its only one of six, and that there need not have been a plan, that there's a plan, a mental plan, that they're going to kill all six, but rather, in this situation, Cartagena and Brockington went after this group. It happened to be six. They found one. And that's who they shot.
>
> (R. 49-50).

The trial court further held that NYCHA established the door through which the perpetrators entered the building was operating properly on September 10, 2011, between 8:00 a.m. and 1:30 p.m., and that there was no indication that the door was not operational for a sufficient time to repair it, if it needed to be repaired. (R. 51-52).

After being served with an entered copy of the trial court's order, the plaintiff served and filed a timely notice of appeal. (R. 2-7).

Further facts will be subsumed in the argument portion of this brief.

11101214v.1

Argument

Point I: NYCHA Cannot be Held Liable as a Matter of Law Because the Decedent was the Victim of a Targeted, Premeditated Attack

A. *NYCHA Demonstrated it Prima Facie Entitlement to Summary Judgment by Submitting Unrefuted Eyewitness Testimony Which Showed that the Decedent was Targeted by Cartagena and Brockington*

It is well-settled that a landlord is not liable to a tenant who is injured by intentional, premeditated, criminal conduct, particularly against a specifically targeted victim. *See Roldan v New York City Hous. Auth.*, 171 A.D.3d 418, 419 (1st Dep’t 2019) (the plaintiff was the victim of a targeted attack by the alleged assailant, thus severing the causal nexus between NYCHA's alleged negligence and plaintiff's injuries); *Wong v. Riverbay Corp.*, 139 A.D.3d 440 (1st Dep’t 2016) (defendant did not proximately cause the injuries, since the record shows that the assailant specifically targeted the plaintiff and his brother); *Cerda v. 2962 Decatur Ave. Owners Corp.*, 306 A.D.2d 169, 169 (1st Dep’t 2003) (the landlord's negligence in failing to repair a broken front door lock thereby allowing the intruder-perpetrator’s entry, is seriously undermined by strong evidence of the unforeseeable existence of a preconceived criminal conspiracy to murder the tenant, such that “it [is] most unlikely that any reasonable security measures would have deterred the criminal participants”) (citations and internal quotation marks omitted); *Harris v. New York City Hous. Auth.*, 211 A.D.2d 616, 616-617 (2d

11101214v.1

Dep't 1995) (no liability where the decedent was the victim of a targeted murder by a long-time enemy who had tried to kill him on at least one prior occasion; such an intentional act was an unforeseeable, intervening force which severed the causal nexus between the alleged negligence of the NYCHA and the complained-of injury); *see also Maheshwari v. City of New York*, 2 N.Y.3d 288 (2004) (affirming this Court's order and holding that the sole proximate cause of plaintiff's injuries was the independent, intervening criminal act of third-parties).

In *Tarter v. Schildkraut*, 151 A.D.2d 414 (1st Dept. 1989), the plaintiff's jilted lover followed her into the vestibule of her apartment building where she resided and shot her at point blank range with a shotgun. The lock on the outer door of the vestibule was not functioning at the time, but the inner door was equipped with a functioning lock. *Id*. at 414-415. This Court held that the landlord could not be held liable for the plaintiff's injuries because the plaintiff's ex-lover's premeditated criminal act was unforeseeable as a matter of law:

> We might also add that the conclusion is inescapable that plaintiff's ex-lover was intent on harming plaintiff. He had stalked her for that purpose. Given the motivation for the assault, his acts were truly extraordinary and unforeseeable and served to 'break the causal connection' between any negligence on the part of the defendants and plaintiff's injuries.

Id. at 416.

11101214v.1

In *Buckeridge v. Broadie*, 5 A.D.3d 298 (1st Dept. 2004), this Court reversed an order denying a homeowner's motion for summary judgment, finding that the intervening, intentional criminal act severed the causal nexus between the owner's alleged negligence and the plaintiff's injuries. The plaintiff, a handyman working in defendant's house, was attacked by an unknown man and woman who gained entry to the house by posing as environmental protection workers investigating a water main break in the area. *Id*. at 299. In dismissing the plaintiff's complaint against the defendant, this Court held that:

> Plaintiff's injury was the result of an intervening, intentional criminal act of sophisticated armed robbers disguised as agency workers, who targeted defendant and his home in advance. The intentional criminal act at issue was an unforeseeable, intervening force which severed the causal nexus between the alleged negligence and the complained-of injury.

Id. at 300.

In *Flores v. Dearborne Management, Inc*., 24 A.D.3d 101, 102 (1st Dept. 2005), this Court reversed an order denying summary judgment to the landlord in a case where a tenant was murdered. This Court found that evidence established that the murder was a result of a planned attack to execute a particular resident of a particular apartment and leave with any money they could find. This Court held that, "such intentional conduct was, as a matter of law, the sole proximate cause of the decedent's death." *Id*. at 102.

11101214v.1

In *Faughey v New 56-79 IG Assoc., L.P.*, 149 A.D.3d 418 (1st Dep't 2017), a case where the decedent was murdered by the assailant in the office suite leased and owned by the defendants, this Court held that the defendants' alleged negligence was not a proximate cause of decedent's death because the decedent was the victim of a targeted, premeditated attack. This Court further held that under the circumstances, it was unlikely that any reasonable security measures would have deterred assailant. *Id*. at 418-419.

As the trial court correctly noted, the facts of this case are stronger than many of the cases cited above with respect to the issue of targeting. For example, in both *Roldan, supra,* and *Wong*, *supra*, the attacks occurred instantaneously after the victims' initial encounter with their assailants. Here, the unrefuted evidence shows that the animosity between Grant residents and Manhattanville residents predated the shooting, and that Cartagena and Brockington's assault of the decedent took time and planning. (R. 790-792, 1057-1058, 1234, 1277-1279, 1461-1463, 1466-1467).

The eyewitness testimony presented at Cartagena's criminal trail establishes the decedent was affiliated with the Three Stacks gang; that she was present when other There Stacks members assaulted Cartagena earlier that morning; and that she participated in chasing and tormenting Cartagena. (R. 784-785, 790-792, 804-805, 1101-1102, 1057-1058, 1269-1270, 1272, 1274, 1461-1463). This same evidence

11101214v.1

establishes that after being chased, taunted and assaulted by the Three Stacks gang, Cartagena met up with Brockington, and the two men entered into a conspiracy to "smoke" any Three Stacks member or affiliate that was connected with the earlier altercation. (R. 1277-1279, 1283-1284).

As part of their plan, Cartagena and Brockington met with Collins to obtain a handgun. (R. 1277-1279). Thereafter, Cartagena and Brockington walked over to 3170 Broadway to exact their revenge. (R. 807-808, 1086, 1521, 1525-1529). Only those individuals who were present during the earlier assault on Cartagena, including the decedent, ran into the building as Cartagena and Brockington approached. (R. 809, 1087, 1529, 1531). Other individuals who were not connected with the earlier assault did not run away, but remained outside of the building. (R. 810, 1936).

Cartagena and Brockington entered the building through the side door and found the decedent on the fourth floor. They murdered her even though she maintained that she was "not part" of the earlier assault of Cartagena. Evidently, her affiliation with the other members of the Three Stacks gang assaulted Cartagena was enough. (R. 1088, 1096, 1544).

The unrefuted opinion of NYCHA's security expert, Lawrence J. Cunningham, further establishes that the targeted assault on the decedent was not foreseeable, and severed any causal connection between any alleged negligence on

11101214v.1

the part of NYCHA and the decedent's murder. Cunningham noted that the crime statistics for the area where the subject building is located for 2009 to 2011 showed an average of around two murders a year, which was a comparatively low rate compared to other precincts around the City, and would not have put NYCHA on notice of the possibility that a revenge murder would take place at the subject building. (R. 1937).

Cunningham further established that, under the circumstances of this case, it is unlikely that any reasonable security measures would have deterred Cartagena and Brockington from committing the murder. *See Faughey*, 149 A.D.3d at 418-419; *Cerda*, 306 A.D.2d 169. Cartagena and Brockington were determined to "smoke" anyone connected with the earlier altercation, and they were not concerned with the potential consequences of their actions. (R. 1935-1937). Cartagena lived at the Grant Houses and Brockington lived at the Manhattanville Houses just a few blocks away. As a result, both men were known to residents of the Grant Houses. (R. 1057, 1102, 1479). Significantly, Cartagena and Brockington did not attempt to conceal their identities despite the presence of security cameras, as well as people standing outside of the subject building who could have identified them. (R. 810, 1935).

Even if all doors to the subject building were locked at the time of the incident, Cartagena and Brockington could have gained access to the building from

11101214v.1

one of the people who were standing outside of the building at the time, the intercom system, or some other method. (R. 1937). Moreover, given that Cartagena and Brockington obviously knew where the decedent lived, they could have simply waited until the next time she went outside the building to assault her. *See Tarter*, 151 A.D.2d at 416 ("We find it equally likely that had the outer door been locked, the plaintiff would have been assaulted outside of the building").

B. *In Opposition to NYCHA's Prima Facie Showing that the Decedent was Targeted by Cartagena and Brockington, the Plaintiff Failed to Raise an Issue of Fact*

The plaintiff argues that the decedent was not specifically targeted by Cartagena and Brockington, and that Cartagena and Brockington could have shot any one of the thousands of residents of the Grant Houses. This argument is based entirely on the prosecutor's opening statements in Cartagena's criminal trial, which does not in any way refute the eyewitness testimony which shows that the decedent was present when other members of the Three Stacks assaulted and threw bottles at Cartagena; that the decedent participated in chasing and taunting Cartagena; and that Cartagena and Brockington entered into a criminal conspiracy to "smoke" anyone associated with the altercation. (R. 784-785, 790-792, 804-805, 1101-1102, 1057-1058, 1269-1270, 1272, 1274, 1461-1463).

The plaintiff's specious contention that the decedent's shooting was a random act is further undermined the surveillance video shows that as Cartagena

11101214v.1

and Brockington approached 3170 Broadway, the decedent[1] and her companions ran into the building, but the other people who were hanging out in front of the building and who had no connection to the earlier altercation did not run away. The surveillance also shows that as the group was running into the building, a young woman calmly walked towards the entrance and then into the lobby, completely unaware or unconcerned that Cartagena and Brockington were approaching. *See* Playlist_2012_08-22_2051 at 6:38:12-22; Playlist_2012_08-22_2051-1 at 6:38:12-22. Significantly, the surveillance video shows that Cartagena and Brockington completely ignored the other people standing outside the building, and instead focused their attention exclusively on the decedent and her companions. *See* Playlist_2012_08-22_2053 at 6:39:07-11; Playlist_2012_08-22_2054 at 6:38:05-11.

The surveillance video further establishes that the decedent and her companions knew that they were being targeted by Cartagena and Brockington by immediately running into the building when they observed Cartagena and Brockington walking towards them, and then once inside, looking out the window and opening the door to see if Cartagena and Brockington were following them. *See* Playlist_2012_08-22_2052 at 6:38:22-53.

[1] The decedent was identified as wearing a red hooded sweatshirt in the surveillance video. (R. 212, 962, 1072-1073).

11101214v.1

That the decedent said to Cartagena and Brockington "I'm not with them," and "I had nothing to do with it" provides additional confirmation that she was aware that she was being targeted. (R. 1088, 1096, 1544). If, as the plaintiff suggests, the decedent was a random victim and was truly unaware why Cartagena and Brockington were following her, how could she then deny that she had "nothing to do with it?" That Cartagena and Brockington shot the decedent three times likewise demonstrates that she was specifically targeted, especially since the first two shots did not result in fatal injuries. (R. 277, 812-813, 1530, 1544).

To the extent that the plaintiff argues that this is not a targeting case because Cartagena and Brockington sought revenge against the group of individuals who were connected with the earlier altercation, but not any specific member of this group, such argument is without merit. As the trial court correctly noted, "[I]n this situation, Cartagena and Brockington went after this group. It happened to be six. They found one. And that's who they shot." (R. 49-50).

The plaintiff's argument is further undermined by this Court's decision in *Rivera v. New York City Hous. Auth.*, 239 A.D.2d 114 (1st Dept. 1997), a case in which the plaintiff sustained serious injuries when two assailants entered her apartment and stabbed her multiple times. The plaintiff in *Rivera* alleged that NYCHA was negligent in failing to provide adequate security, including a functioning lock on the building's front door. *Id*. at 114-115. The perpetrators

11101214v.1

gained entry to the apartment by means of a ruse, but there was no evidence as to how they entered the building other than the plaintiff's surmise that the broken lock on the front door afforded them access. *Id*. at 115. In reversing the trial court's denial of NYCHA's motion for summary judgment, this Court held, *inter alia*, that NYCHA did *not* proximately cause the plaintiff's injuries given "the clear evidence that this attack was motivated by a pre-conceived criminal conspiracy to murder *plaintiff's stepbrother*, who lived with her in the apartment." *Id*. (emphasis added). This Court further held that "[t]his criminal design, admitted by one of the participants, renders it most unlikely that any reasonable security measures would have deterred the criminal participants." *Id*.

The facts of case more strongly favor dismissal. In *Rivera*, even though the plaintiff was not the main target of her assailants' premeditated conspiracy to murder her step-brother, this Court nevertheless held that there was no liability. 239 A.D.2d at 115. Here, the undisputed evidence shows that the decedent was a member of the group that Cartagena and Brockington specifically targeted, and was not a random victim of opportunity.

There is not one shred of evidence in this record to support the plaintiff's characterization of Cartagena and Brockington's behavior at the time of the shooting as "brief rage" which would have dissipated over time. Once again, the plaintiff ignores the eyewitness testimony, specifically that of Cartagena's

11101214v.1

girlfriend Brittany Santiago, that after his altercation with Three Stacks, Cartagena and Brockington plotted their revenge, which included going to meet with an associate to obtain a handgun. (R. 1276-1284). As the trial court noted, "this took time and planning." (R. 48-49). Moreover, Cartagena celebrated the murder on his Facebook page a short time thereafter, which not only demonstrates a complete lack of remorse. (R. 1799). Most important, Cartagena and Brockington were convicted of premeditated murder, and not manslaughter. (R. 1912-1913).

Finally, there is no merit to plaintiff's contention that Cunningham's opinion is speculative and must be ignored by this Court. For the most part, Cunningham's opinion is based on the unrefuted eyewitness testimony that was presented at Cartagena's criminal trial which, by itself, was sufficient to establish that the decedent was targeted by Cartagena and Brockington. Rather than address this testimony, the plaintiff has simply chosen to ignore it.

In sum, because Cartagena and Brockington targeted the decedent pursuant to a premeditated criminal conspiracy to commit murder in revenge for the earlier assault, NYCHA cannot be held liable as a matter of law. *See Faughey*, 149 A.D.3d at 418-419; *Cerda*, 306 A.D.2d at 169; *Tarter*, 151 A.D.2d at 416. Accordingly, the trial court properly granted NYCHA's motion for summary judgment.

11101214v.1
11101214v.1

Point II: NYCHA did not Have Actual or Constructive Notice that the Door Lock had Been Broken at the Time of the Incident

A landlord has a common-law duty to take minimal precautions to protect tenants from a third party's foreseeable criminal conduct. *Burgos v. Aqueduct Realty Corp*., 92 N.Y.2d 544, 548 (1998). A landlord, however, is not an insurer of tenant safety. *Maheshwari v. City of New York*, 2 N.Y.3d 288, 294 (2004); *Nallan v. Helmsley–Spear, Inc*., 50 N.Y.2d 507, 519 (1980); *Cook v. New York City Hous. Auth*., 248 A.D.2d 501 (2d Dep't 1998).

While a landowner must provide reasonable security measures, it need not provide "optimal [or] the most advanced security system available." *Leyva v. Riverbay Corp*., 206 A.D.2d 150, 152 (1st Dep't 1994) (citations omitted). A landlord discharges its duty to provide a minimal level of security by providing locked doors with a functioning intercom system. *See James v. Jamie Towers Hous. Co.,* 99 N.Y.2d 639, 641(2003); *Batista v. City of New York*, 108 A.D.3d 484, 486 (1st Dep't 2013); *Anzalone v. Pan–Am Equities*, 271 A.D.2d 307, 309 (1st Dep't 2000).

In this case, NYCHA met its duty by providing a locked entrance door with an intercom system. (R. 1936, 1978-1979). NYCHA's maintenance records show that the building's entrance and exit doors were working properly on September 11, 2011, and that NYCHA did not receive any complaints about the building's entrance and exit doors between 1:30 p.m. on September 10, 2011, when

11101214v.1

maintenance staff left for the day, and 4:00 a.m. on September 11, 2011, when the shooting occurred. (R. 1936, 1978-1979).

In order to hold a landlord liable for injuries resulting from a hazardous condition upon its premises, the plaintiff must establish that the landlord either created the condition, or had actual or constructive notice of it. *See Piacquadio v. Recine Realty Cor*p., 84 N.Y.2d 967, 969 (1994); *Gordon v. American Museum of Natural History,* 67 N.Y.2d 836 (1986); *Singer v. St. Francis Hosp*., 21 A.D.3d 469 (2d Dep't 2005). In order to prove constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [the owner's] employees to discover and remedy it." *Gordon*, 67 N.Y.2d at 837. In this case, the plaintiff does not allege that NYCHA created or had actual knowledge of the alleged malfunctioning door lock. Thus, the issue is whether NYCHA had constructive notice of same.

Assuming that the lock to the side door through which Cartagena and Brockington entered the building was not operational at the time of the incident, the evidence shows that NYCHA did not have constructive notice of this condition. *See Ramirez v. BB and BB Management Corp*., 115 A.D.3d 555 (1st Dep't 2014) ("while plaintiff testified that the front door lock had been broken, he could not say for how long, and there is no evidence that defendants were notified of the broken lock"). The incident happened more than 14 hours after NYCHA's maintenance

11101214v.1

staff left for the day on September 10, 2011, and four hours before NYCHA maintenance staff would report to work on September 11, 2011. (R. 1936). As this Court has repeatedly held, NYCHA does not have a duty to patrol its premises 24-hours a day. *See Pagan v. New York City Hous. Auth.*, 121 A.D.3d 622, 623 (1st Dep't 2014); *Rodriguez v. New York City Hous. Auth.*, 102 A.D.3d 407, 408 (1st Dep't 2013); *Pfeuffer v. New York City Hous. Auth.*, 93 A.D.3d 470, 472 (1st Dep't 2012) *Love v. New York City Hous. Auth.*, 82 A.D.3d 588 (1st Dep't 2011).

The plaintiff and her expert speculate that because the lock on the side door was not operating at 4:00 a.m. on September 11, 2011, it must not have been operating properly the previous day, despite the notation to the contrary in NYCHA's Caretaker Checklist for September 10, 2011. (R. 1979). However, they ignore the likely possibility that the lock to the side door was tampered with sometime after 1:30 p.m. on September 10, 2011. (R. 2002).

The plaintiff and her expert further speculate that NYCHA work orders dated March 31, 2011 and April 5, 2011 somehow indicate that the side door was not operating properly *five months later*.

The March 31, 2011 work order indicates that the main entrance door to 3170 Broadway is DML, that is, damaged or missing. (R. 1991). The work order contains the typed notation "Also side door" and the following handwritten notation "Also both doors need elect. No power, welder, bracket for armature." (R.

11101214v.1

1980). The work order also contains a handwritten checkmark indicating that the work was completed. (R. 1980).

The April 5, 2011 work order indicates “Magnet DML000 and states: “Door maintenance - electron.” The April 5, 2011 work order further indicates that NYCHA electrician Robert Loomis started the work on that same day at 3:30 p.m. and completed it at 5:30 p.m., that the repair was made, and that the ticket was closed. (R. 1981).

The plaintiff and her expert attempt to create an issue of fact where none exists by conflating the two the work orders. However, it appears that the work orders deal with separate issues. While the March 31, 2011 work order indicates that there are issues with the entrance and side doors, the April 5, 2011 work order indicates that there was an electrical issue with only the entrance door. (R. 1981). There is no indication in the April 5, 2011 work order that there were any issues with the side door, or that the armature brackets to the doors needed further repair. (R. 1981). Contrary to the expert’s contention, there is no reason why the April 5, 2011 work order would identify the welder who performed the welding work described in the March 31, 2011 work order, or the manner in which the armatures to the doors were repaired.

Significantly, the plaintiff’s expert cannot state, without engaging in speculation, what prevented the lock to the side door from operating properly at the

11101214v.1

time of the shooting, as he never personally inspected the subject door. He states that each of the documented issues in the work orders, i.e., lack of electrical power or an improperly attached or missing armature, would result in the electromagnetic lock to the side door not operating properly. (R. 1976). However, fails to indicate what actually caused the lock to the side door to malfunction at the time of the shooting. (R. 1976). He does not address, let alone exclude the possibility, that the lock to the door became inoperable as the result of someone tampering with it at some point after the door was inspected on September 10, 2011 and before the shooting. This oversight is particularly noteworthy given that vandalism of the doors was a constant problem. (R. 2002).

The plaintiff's affidavit, in which she alleges that when she entered the building through side door on September 10, 2011, the lock was not working, is equally unavailing. The plaintiff fails to indicate what time of day this happened or whether she reported it to NYCHA. (1970). As noted above, NYCHA maintenance staff would have left work that day at 1:30 p.m. (R. 1936). Therefore, if this incident happened at some point after that time, NYCHA would have no way of knowing about it.

The plaintiff and her expert further contend that despite that the Caretaker Daily Checklist for September 10, 2011 indicates that the doors to the subject building were inspected and found to be operating properly, no such inspection

11101214v.1

was ever performed. However, this contention is based on pure conjecture and surmise, which is insufficient as a matter of law to raise an issue of fact. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 (1980) (mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat summary judgment).

The plaintiff's argues that Loomis' inability to recall performing the work described in the April 5, 2011 work order, and the fact that a NYCHA worker named George Torres who was identified on that same work order did not work at the Grant Houses in 2011, somehow establishes that NYCHA's maintenance records are not reliable. This argument is completely without merit. It is not surprising that Loomis could not recall performing the work described on the April 5, 2011 work order given that it was issued six years before his deposition. Further, NYCHA investigated the discrepancy with respect to George Torres' name appearing on the April 5, 2011 work order, and concluded that this was a mere clerical error. In any event, it is clear that NYCHA completed the work described on the April 5, 2011 work order, as the undisputed evidence shows that at the time of the incident, the front entrance door to the subject building was locking properly. *See* Playlist_2012_08-22_2053 at 6:39:07-11; Playlist_2012_08-22_2054 at 6:38:05-11.

11101214v.1

Finally, the plaintiff's argument regarding NYCHA's inability to locate certain maintenance records is without merit. The plaintiff has failed to demonstrate these records, including Caretaker Daily Checklists for March and April 2011, are even relevant. Moreover, NYCHA demonstrated that it conducted a diligent search for these records, but was unable to locate them. It is well-settled that "[a] party cannot be compelled to produce documents which do not exist or are not in his possession." *Euro-Central Corp. v. Dalsimer, Inc.*, 22 A.D.3d 793, 793 (2d Dep't 2005).

Accordingly, affirmance of the order appealed from is warranted for the additional reason that the evidence shows that the entrance and exit doors were working properly on the day before the alleged incident, and that NYCHA did not have constructive notice that the lock to the side door through which Cartagena and Brockington entered the building had malfunctioned at the time of the incident.

11101214v.1

Conclusion

In light of the foregoing, the order appealed from should be affirmed in all respects.

Dated: New York, New York
September 8, 2020

Respectfully submitted,

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11101214v.1
11101214v.1

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11101214v.1