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Appellate Division, First Department Docket No. 2020-01722
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Court of Appeals

STATE OF NEW YORK

The Estate of TAYSHANA MURPHY,
by its administratrix, TEPHANIE HOLSTON,
Plaintiff-Appellant,

against

THE NEW YORK CITY HOUSING AUTHORITY,
Defendant-Respondent,

and

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

(Additional Caption on the Reverse)

BRIEF FOR DEFENDANT-RESPONDENT THE NEW YORK CITY HOUSING AUTHORITY

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Date Completed: August 30, 2022

THE NEW YORK CITY HOUSING AUTHORITY,

Third-Party Plaintiff,

against

TERIQUE COLLINS,

Third-Party Defendant.

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Preliminary Statement

This brief is submitted on behalf of defendant-respondent New York City Housing Authority ("NYCHA"), which respectfully requests that this Court affirm in all respects the order of the Appellate Division, Frist Department, dated April 13, 2021, which affirmed the order of the Supreme Court, New York County (Kalish, J.), dated July 17, 2019, granting NYCHA's motion for summary judgment dismissing the complaint.

This action arises out of the fatal shooting of 18-year-old Tayshana Murphy, on Sunday, September 11, 2011, at around 4:00 a.m., inside her apartment building located at 3170 Broadway in Manhattan. The building is part of a NYCHA residential housing development known as the Grant Houses. Murphy was shot and killed by defendants Tyshawn Brockington and Robert Cartagena in revenge for an earlier altercation between two rival street gangs. Brockington and Cartagena were members of a gang known as the "Make it Happen Boys," which is based in the nearby Manhattanville Houses development. Murphy was closely affiliated with the "Three Stacks" gang based in the Grant Houses. Her brother, Tylonn, Jr. (also known as "Bam"), was a member of Three Stacks, while other Three Stacks members considered her a "sister" and "family".

Around three hours before the shooting, Murphy was present while members of the Three Stacks chased Cartagena and his girlfriend, Brittany Santiago, and

assaulted Cartagena. At some point thereafter, Cartagena and Santiago met up with Brockington, who complained that he "almost got jumped" by residents of the Grant Houses. Cartagena then called an acquaintance named Terique Collins. Brockington, Cartagena and Santiago went to Collins' apartment, where Collins gave Cartagena a handgun that the two had purchased together. After procuring the handgun, Brockington and Cartagena announced their intent to "smoke somebody." Brockington and Cartagena then approached the Three Stacks members who had previously chased assaulted Cartagena, in front of Murphy's apartment building. Murphy and her companions ran inside the building. Several minutes later, Brockington and Cartagena followed them inside the building and shot Murphy three times. Thereafter, Murphy's mother, plaintiff-appellant Tephanie Holston, commenced this action against NYCHA, alleging that NYCHA was negligent in failing to provide adequate security, in particular, functioning door locks.

In affirming the dismissal of the action against NYCHA, the First Department correctly held that the murderous intent of Brockington and Cartagena were the only proximate cause of this tragic incident, and that any minimal security precautions taken by NYCHA would have not have prevented the attack. *See Estate of Murphy v. New York City Hous. Auth*., 193 A.D.3d 503, 508-509 (1st Dep't 2021).

The plaintiff argues that this Court should reject the First Department's well-reasoned decision, and instead, adopt the flawed rationale employed by the Second Department in *Scurry v. New York City Hous. Auth*., 193 A.D.3d 1, 10 (2d Dep't 2021). As discussed in further detail below, the *Scurry* Court's line of reasoning should be rejected by this Court, as it is based on a misapprehension and oversimplification of the targeted victim defense. In addition, the *Scurry* Court places a new, onerous burden on landlords which is directly contrary to the well-settled principle that a landlord is not an insurer of its tenants' safety.

The plaintiff further argues that even if this Court rejects the *Scurry* Court's rationale, it should nevertheless reverse the First Department's decision because Murphy was the victim of a random act of violence, and not a premeditated, targeted attack. This argument, of course, is preposterous. The unrefuted evidence in the record shows that Murphy was specifically targeted for her participation in the earlier altercation with Cartagena and her close affiliation with the Three Stacks gang.

Next, the plaintiff argues that this Court should review and reverse the trial court's determination that NYCHA did not have any notice of a malfunctioning door lock prior to the attack. However, because the First Department declined to reach the issue of notice on the ground that it was academic, it is not properly before this Court. In any event, were this Court to exercise its judicial discretion

and reach the issue, the trial court's finding in this regard should be affirmed. The evidence demonstrates that on Saturday, September 10, 2011, a NYCHA caretaker inspected the locks to the building's doors at some point before leaving for the day at 1:00 p.m., and found them to be operating properly. The plaintiff failed to refute this evidence with any admissible evidence of her own. Instead, she relied entirely on conjecture and speculation.

Finally, the plaintiff argues that the opinion of NYCHA's security expert which was submitted in support of NYCHA's motion for summary judgment should be disregarded. However, the First Department's findings were based on its own independent review of the admissible evidence in the record, and not expert opinion. In any event, to the extent that the First Department considered the opinion of NYCHA's security expert, such consideration was proper since the expert's opinion was based on the same objective facts and evidence relied upon by the court.

In sum, the plaintiff has failed to come forward with any basis to disturb First Department's April 13, 2021 decision. Accordingly, this Court should affirm the decision in all respects.

Questions Presented

Question: Did the First Department properly hold that NYCHA could not be liable as a matter of law for Murphy's murder where the evidence showed that she was the victim of a targeted, premeditated attack, such that minimal safety precautions would not have prevented the attack?

Answer: Yes.

Facts

The Alleged Incident

On September 11, 2011, at approximately 4:00 a.m., Murphy, a resident of NYCHA's Grant Houses, was murdered by Cartagena and Brockington in retaliation for an earlier altercation between Cartagena, Murphy and her companions. The earlier altercation and subsequent shooting were connected to a longstanding feud between the Three Stacks gang from the Grant Houses and the Make it Happen Boys gang from the neighboring Manhattanville Houses. (R. 790-792, 1057-1058, 1461-1462, 1466-1467).

The Sworn Testimony Elicited at Cartagena's Criminal Trial

The Three Stacks consisted of Murphy's brother, known as "Bam", Robert Nelson, Eric Pierce, Paul Washington, and Steven Reynoso. All members of Three Stacks were residents of the Grant Houses. (R. 790-792, 838, 1057-1058, 1461-1463). Murphy, also known as "Chicken," was closely affiliated with the Three

Stacks. (R. 792-793, 1322). Nelson and Pierce considered Murphy 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 the Make it Happen Boys from the nearby Manhattanville Houses. (R. 790-792, 838, 1057-1058, 1234, 1461-1463).

Nelson knew Cartagena from seeing him around the Grant Houses, 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 the Grant Houses and Manhattanville Houses, he was more loyal to the Manhattanville Houses. (R. 1102).

Nelson, Pierce and Reynoso were aware that Santiago, who resided at the Grant Houses at the time of the incident, was Cartagena's girlfriend. (R. 787-788, 1149, 1231, 1235-1236). Santiago was familiar with both Murphy and her brother. (R. 1285, 1322).

During the afternoon of 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). Reynoso admitted to picking up a paint can and throwing 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., Murphy, 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 the Manhattanville Houses to fight the members of that development who were responsible for attacking the young man with the bloody face. Murphy 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).

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

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 this same time, Nelson observed Murphy and the 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 Murphy, who she also knew as "Chicken", as part of the group from the Grant Houses who were chasing and throwing bottles at her and Cartagena. (R. 1269-1272, 1274, 1322). According to Santiago, a couple of the members of the group were saying get "Low," which is a reference to Cartagena's street name. (R. 1271). 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). Murphy, 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, Collins. (R. 1276). Santiago, Cartagena, and Brockington then met Collins in the hallway outside of his apartment. (R. 1277). Santiago observed Collins give

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., Murphy, 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 coming. (R. 808).Murphy, 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 people 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). Murphy, 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, Murphy and Pierce looked down the staircase to see if anyone was coming. (R. 1087). While Pierce was in the fourth floor hallway, he heard Murphy 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 Murphy 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).

After Cartagena and Brockington left her apartment, Santiago waited for around 10 minutes and then called Cartagena. (R. 1285). Around this time, Santiago sent texts to her friend Christina and her brother that she and Cartagena almost got jumped, that she was concerned that someone would get hurt, and that Cartagena went out with Brockington and Collins. (R. 1287-1288). Santiago then left her apartment to go to the Manhattanville Houses. (R. 1285).

As Santiago walked down 126th Street towards Old Broadway, she encountered the "Grant boys" who were "screaming about something." (R. 1285). She recognized one of them to be Murphy's brother, Bam, whom she knew from

living at the Grant Houses. (R. 1285). At this time, Bam was yelling "I'm going to kill Brittany." (R. 1286). Santiago texted Cartagena that the Grant boys were threating to shoot her. (R. 1288-1289). She then met Cartagena in front of Brockington's apartment building at1420 Amsterdam Avenue and then walked with Cartagena over to his mother's apartment at 545 West 126th Street. (R. 1292). At some point after the murder, Cartagena bragged about it on his Facebook page. (R. 1799).

Cartagena was ultimately convicted of second-degree murder and sentenced to 25 years to life in prison. (R. 1806). Brockington was likewise convicted of second-degree murder and sentenced to a prison term of 25 years to life. *Estate of Murphy v. New York City Hous. Auth*., 193 A.D.3d at 505, n. 1.

Surveillance Video Footage

Surveillance video taken from 3170 Broadway at the time of the incident shows that as Cartagena and Brockington approached the building, Murphy and her companions ran inside.[1] Other people can be seen hanging out in front of the building. These people, who had no connection to the earlier altercation, did not run away. (R. 1964-1968, Playlist_2012_08-22_2051-1 at 6:38:12-22).

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

The surveillance video also shows that as Murphy and her companions were running into the building, a young woman holding a set of keys calmly walks towards the entrance door, and then into the lobby, seemingly oblivious to the drama going on around her. (R. 1964-1968, Playlist_2012_08-22_2051-1 at 6:38:11-22, Playlist_2012_08-22_2052 at 6:38:11-38). The surveillance video further shows Cartagena and Brockington completely ignore the people standing outside the building, and instead focus their attention exclusively on Murphy and her companions. (R. 1964-1968, Playlist_2012_08-22_2053 at 6:39:07-11; Playlist_2012_08-22_2054 at 6:38:05-11).

After Cartagena and Brockington attempted to enter the building through the locked front entrance door through which the young woman with the keys had entered a few seconds earlier, they then walked over to the unlocked side door and entered the building. (R. 1964-1988, Playlist_2012_08-22_2052 at 6:39:16-24, Playlist_2012_08-22_2054 at 6:39:5-16).

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

Around November 30, 2012, the plaintiff 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. Lawrence Cunningham, who 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). 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 the locks to the 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 of any door malfunctions between September 10, 2011 at1:30 p.m., when Caretaker Pugh would have left for 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 Murphy was not the victim of a targeted attack. However, he failed to refute any of the eyewitness testimony which established that Murphy 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 Supreme Court's July 17, 2019 Order

In an order dated July 17, 2019, the Supreme Court granted NYCHA's motion, holding 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 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.
>
> 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).

The First Department's Decision

In an order dated April 13, 2021, the First Department affirmed the Supreme Court's order, holding:

> The record establishes that Murphy's killers were intent on gaining access to the building. Cartagena and Brockington arranged to meet Collins, who had a gun, and testimony and text messages revealed that they were bent on revenge. This is further evidenced by the brazen manner in which they entered the building, in plain sight of several other people and surveillance cameras, without attempting to shield their faces. Moreover, considering that at least one other person, by all appearances oblivious to the brouhaha between the two groups, entered the building at the same time, it does not take a leap of the imagination to surmise that Cartagena and Brockington would have gained access to the building by following another person in or forcing such a person to let them in. This negates the unlocked door as a proximate cause of the harm that befell Murphy, and makes her assailants' murderous intent the only proximate cause.
>
> *Estate of Murphy v. New York City Hous. Auth*., 193 A.D.3d at 509.

Argument

Point I:

The First Department Properly Held that NYCHA Cannot be Held Liable as a Matter of Law Because the Unrefuted Evidence Shows that Murphy was the Victim of a Targeted, Premeditated Attack, Making it Highly Unlikely that Minimal Safety Precautions Would Have Prevented the Attack

In affirming the dismissal of the plaintiff's complaint against NYCHA, the First Department relied on the well-settled and longstanding case law which holds that a landlord cannot be held liable for an intentional, premeditated attack on its premises which "demonstrates [the perpetrators'] willingness to succeed regardless any minimal safety precautions placed in their way." *Estate of Murphy v. New York City Hous. Auth*., 193 A.D.3d at 508, *citing Roldan v New York City Hous*. *Auth*., 171 A.D.3d 418, 419 (1st Dep't 2019) (no liability where, among other things, the plaintiff admitted that he 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); *Buckeridge v. Broadie*, 5 A.D.3d 298 (1st Dept. 2004) (a defendant homeowner could not be held liable where the plaintiff's injury was the result of an intervening, intentional criminal act of sophisticated armed robbers disguised as environmental protection agency workers, who targeted the defendant and his home in advance); *Cerda v. 2962 Decatur Ave. Owners Corp*., 306 A.D.2d 169, 169 (1st Dep't 2003) (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); *see also Faughey v New 56-79 IG Assoc., L.P.*, 149 A.D.3d 418, 418-419 (1st Dep't 2017) (the defendants' alleged negligence was not a proximate cause of decedent's death because the decedent was the victim of a targeted, premeditated attack, making it unlikely that any reasonable security measures would have deterred assailant); *Flynn v. Esplanade Gardens, Inc*., 76 A.D.3d 490, 492 (1st Dep't 2010)(a specifically targeted criminal assault perpetrated upon the plaintiff by the companion of a frequent visitor the plaintiff knew constituted an unforeseeable, intervening force that severed any causal nexus between the building owner's alleged negligence and the plaintiff's injuries, since it was most unlikely that reasonable security measures would have prevented an attack of this kind); *Flores v. Dearborne Management, Inc*., 24 A.D.3d 101, 102 (1st Dep't 2005)(holding that the defendant was not liable for a murder which was a result of a planned attack by the perpetrators to execute a particular resident of a particular apartment and leave with any money that they found in the apartment because "such intentional conduct was, as a matter of law, the sole proximate cause of the

decedent's death."); *Harris v. New York City Hous. Auth*., 211 A.D.2d 616, 616-617 (2d 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).

The unrefuted evidence in this case demonstrates that the animosity between the rival gangs precipitated Cartagena and Brockington's shooting of Murphy; that the shooting took time and planning; and that Murphy was specifically targeted because of her participation in the altercation with Cartagena and her close affiliation with the Three Stacks gang. (R. 784-785, 790-792, 804-805, 1057-1058, 1101-1102, 1234, 1269-1270, 1274, 1277-1279, 1283-1284, 1461-1463, 1466-1467).

After being chased and taunted by Murphy and the Three Stacks gang, Cartagena was physically assaulted by several members of the same gang. He then met up with Brockington, who complained that he too had almost been "jumped" that evening by gang members from the Grant Houses. The two men entered into a conspiracy to "smoke" the individuals from the Grant Houses who participated in the earlier altercation with Cartagena. (R. 1277-1279, 1283-1284). As part of their plan, Cartagena and Brockington met with Collins to obtain a handgun. (R. 1277-

1279, 1283-1284). Thereafter, Cartagena and Brockington walked over to Murphy's residence at 3170 Broadway to exact their revenge. (R. 807-808, 1086, 1521, 1525-1529).

As Cartagena and Brockington approached Murphy's building, she and her companions ran inside the building. (R. 809, 1087, 1529, 1531, 1964-1968, Playlist_2012_08-22_2051-1 at 6:38:12-22). There were other individuals hanging outside of the building who had nothing to do with the earlier altercation. These individuals did not run away, but remained outside of the building, apparently unconcerned with Cartagena and Brockington's imminent approach. (R. 809-810, 1087, 1529, 1531, 1936, 1964-1968, Playlist_2012_08-22_2051-1 at 6:38:12-22).

At the same time Murphy and her companions were running into the building, a young woman holding a set of keys in her hand calmly walks to the entrance door. She does not appear aware or concerned that Cartagena and Brockington are approaching the building. (R. 1964-1968, Playlist_2012_08-22_2051-1 at 6:38:12-22, Playlist_2012_08-22_2052 at 6:38:11-38).

When Cartagena and Brockington arrive at the entrance to the building, they do not make any attempt to conceal their identities despite the presence of security cameras, as well as people hanging out in front of building. (R. 810, 1964-1968, Playlist_2012_08-22_2053 at 6:39:07-11; Playlist_2012_08-22_2054 at 6:38:05-11). Cartagena and Brockington did not pay any attention to the people in front of

the building, but rather, focused their attention entirely on Murphy and her companions. (R. 1964-1968, Playlist_2012_08-22_2053 at 6:39:07-11; Playlist_2012_08-22_2054 at 6:38:05-11).

The foregoing demonstrates Cartagena and Brockington's determination to gain access to Murphy's building so they could exact revenge on her and her companions for the earlier altercation with Cartagena. Thus, they would not have been deterred by a locked door. This is especially true given the presence of people outside the front of the building, as well as the young woman who entered the building shortly before the incident. As the First Department noted:

> It does not take a leap of the imagination to surmise that Cartagena and Brockington would have gained access to the building by following another person in or forcing such a person to let them in. This negates the unlocked door as a proximate cause of the harm that befell Murphy, and makes her assailants' murderous intent the only proximate cause.
>
> *Estate of Murphy v. New York City Hous. Auth*., 193 A.D.3d at 509.

Under these circumstances, NYCHA cannot, and should not, be held liable as a matter of law.

Point II:

This Court Should Reject the Faulty Reasoning of the *Scurry* Court in Favor of the Well-Settled and Longstanding Case Law Relied Upon by the First Department in This Case

The plaintiff argues that this Court should ignore the well-settled and longstanding case law relied upon by the First Department in this case, and instead adopt the flawed rationale of the Second Department in *Scurry v. New York City Hous. Auth*., 193 A.D.3d at 8-10.

The *Scurry* Court misapprehends and oversimplifies First Department decisions in targeted victim cases. The *Scurry* Court incorrectly asserts that the First Department "mechanically focus[es] on the perpetrator's intent" and "fails to account for the myriad of facts that may be present in a given case." *Scurry v. New York City Hous. Auth*., 193 A.D.3d at 8. However, as the First Department explains in this case:

> We disagree with the *Scurry* Court's implication that under this Court's jurisprudence the fact that a victim was targeted obviates the need for any inquiry into the security measures in place at the subject premises. Indeed, we are aware of no case in the First Department that suggests that a landowner would avoid liability even if minimal precautions would have actually prevented a determined assailant from gaining access. In reality, however, that is hardly ever the case. In *Buckeridge v Broadie* (5 A.D.3d 298, 300, 774 N.Y.S.2d 132), cited in *Roldan*, the assailants were "sophisticated" and disguised themselves to gain entry. In *Cerda v 2962 Decatur Ave. Owners Corp*. (306 A.D.2d 169, 170, 761 N.Y.S.2d 220

> [1st Dep't 2003]), also relied on by *Roldan*, the plaintiff was assaulted by a "team of assassins." *Roldan* itself does not discuss the circumstances by which the plaintiff was targeted or the level of planning by the assailant, but the supporting cases confirm that this Court has not abandoned the notion that more than the simple fact that a victim was targeted is necessary to shield a property owner from liability. Rather, the cases confirm that, given the minimal steps a landowner is required to take to secure premises, it has no duty to outwit or outthink those who are determined to overcome those steps.
>
> *Estate of Murphy v. New York City Hous. Auth*., 193 A.D.3d at 508-509.

The *Scurry* Court erroneously suggests that the targeted victim defense as applied by the First Department overlooks that there may be more than one proximate cause of an event. 193 A.D.3d at 8. The *Scurry* Court further states that a landlord cannot escape liability if it played a concurrent contributory role in the attack. *Id*. at 9. However, the *Scurry* Court confuses proximate cause, with merely furnishing the occasion or condition for the event, which is not actionable. *See, e.g.*, *McLean v. Ripoli*, 157 A.D.3d 604, 605 (2d Dep't 2018)(a tow truck driver's alleged negligence in hitching a vehicle that had broken down on the highway to the back of his tow truck, did nothing more than furnish the condition or give rise to the occasion by which plaintiff's injury was made possible); *Roman v. Cabrera*, 113 A.D.3d 541, 542 (1st Dep't 2014)(a driver that pulled over to the shoulder of the highway to change a flat tire could not be liable because he merely furnished

the condition or occasion for the occurrence of the event, but was not one of its causes).

In *Price by Price v. New York City Hous. Auth*., 92 N.Y.2d 553 (1998), this Court affirmed the First Department's order affirming a judgment dismissing a personal injury action against NYCHA by a tenant who was assaulted in her apartment building, which did not have front door lock. Notably, in *Price*, the First Department held that the jury's finding that NYCHA was negligent, but that such negligence did not proximately cause the plaintiff's injuries was supported by the evidence. 92 N.Y.2d at 557. This Court held, among other things, that the trial court properly instructed the jury on proximate cause. *Id*. This Court further held that the trial court did not abuse is discretion in admitting the testimony of NYCHA's security expert that the minimal security afforded by a front door lock and intercom would not have deterred the assailant considering serial nature of his past crimes, his conduct and verbal behavior, and his use of knife during attacks. *Id*. at 558. This Court also held that the trial court properly admitted the testimony of a prior victim of the assailant that he was able to enter her building even though the entrance door was locked at the time. *Id.* at 558-559.

Clearly, the *Price* decision is instructive in that it illustrates that it is not a new or novel principle that a landlord cannot be liable for an assault, even where an assailant gained access to a building through a malfunctioning entrance door,

where the evidence shows minimal security measures would not have stopped the assailant. Nevertheless, the *Scurry* Court would hold a landlord liable, even where minimal security measures would not have deterred the assailant, based on its misguided and novel concept of "concurrent contributory" liability. Clearly it is the *Scurry* Court, and not the First Department, that misapprehends the standard for establishing proximate cause in a negligent security case.

Indeed, the *Scurry* Court proposes that a much more onerous burden be imposed on property owners than that imposed by this or any other court. The *Scurry* Court suggests that there are three limited circumstances where a property owner can establish freedom from liability for an assault on its premises: where the assault was committed by an individual lawfully present at the premises; where the security measures at the building were reasonable, adequate, and in working order at the time of the assault; or where the assault reflected such a degree of preplanning, coordination, and sophistication that no level of building security would have prevented the crime. *Scurry v. New York City Hous. Auth*., 193 A.D.3d at 10 (internal citations omitted).

The *Scurry* Court, however, ignores that a property owner need not affirmatively prove that an assailant was lawfully present at the premises in order to establish its freedom from fault. Rather, a property owner can establish its freedom from fault by submitting evidence that the identity of assailant remains

unknown, and it remains unknown whether the assailant was an intruder, as opposed to another tenant or guest lawfully on the premises. *See Laniox v. City of New York*, 170 A.D.3d 519, 520 (1st Dep't 2019), *aff'd* 34 N.Y.3d 994 (2019). Moreover, a property owner cannot be liable for an assault committed by an assailant who was not "lawfully" on the premises, but who gained access to the subject building through a ruse (*see Buckeridge v Broadie*, 5 A.D.3d at 300), or by simply following a tenant into the building. *See Raghu v. 24 Realty Co.*, 7 A.D.3d 455, 456 (1st Dep't 2004).

The *Scurry* Court further ignores that a property owner need not establish that lock to the building's entrance door was operable at the time of the assault in order to avoid liability. Even in cases where the entrance door lock was broken at the time of the assault, no liability can attach where the property owner did not create or have any notice of the broken door lock. *See Roldan v. New York City Hous. Auth.*, 171 A.D.3d at 419; *Ramirez v. BB & BB Mgt. Corp*., 115 A.D.3d 555, 555 (1st Dep't 2014).

Most relevant to this case, the *Scurry* Court ignores that a property owner only has a duty to provide minimal security. *See Mason v. U.E.S.S. Leasing Corp*., 96 N.Y.2d 875, 878 (2001); *Burgos v. Aqueduct Realty Corp*., 92 N.Y.2d 544, 548 (1998). Thus, the proper standard is that the assault reflected such a degree of preplanning, coordination, and sophistication that "minimal" safety precautions

security would not have prevented the crime. *See Price*, 92 N.Y.2d at 557-558. The Second Department's requirement that a defendant establish that "no level" of building security would have prevented the crime ignores well-established law that a property owner is not an insurer of its tenants' safety (*see Nallan v. Helmsley-Spear, Inc*., 50 NY2d 507, 519 [1980]), and would, in effect, impose strict liability upon property owners.

For the foregoing reasons, the faulty rationale employed by the Second Department in *Scurry* should be rejected, and the First Department's well-reasoned decision in this case should be affirmed in all respects.

Point III:

There is no Merit to the Plaintiff's Argument that this was a "Random" Assault

There is absolutely no merit to the plaintiff's argument that Murphy was the victim of a random attack, and was not specifically targeted by Cartagena and Brockington. The plaintiff incorrectly relies on the prosecutor's opening statements in Cartagena's criminal trial to support her argument that Cartagena and Brockington could have shot any one of the thousands of residents of the Grant Houses. However, the prosecutor's hyperbolic opening statements do not in any way refute the eyewitness testimony which shows the following: Murphy and members the Three Stacks gang chased Cartagena several hours before the murder to stop him from getting away; several members of the gang assaulted and threw

bottles at Cartagena while he was being chased; that all the parties involved knew one another; and that Cartagena and Brockington entered into a criminal conspiracy to "smoke" those individuals from the Grant Houses who were present at the earlier altercation with Cartagena. (R. 784-7888, 790-792, 804-805, 1057-1058, 1101-1102, 1149, 1269-1270, 1272, 1274, 1285, 1322, 1461-1463, 1479).

The plaintiff's contention that Murphy's shooting was a random act is further undermined the surveillance video which shows that as Cartagena and Brockington approached 3170 Broadway, Murphy and her companions ran into the building,[2] but the other people who were either hanging out in front or entering the building, and who had no connection to the earlier altercation, did not run away and were unconcerned with Cartagena and Brockington's presence. *See* Playlist_2012_08-22_2051 at 6:38:12-22; Playlist_2012_08-22_2051-1 at 6:38:12-22. Cartagena and Brockington completely ignored these people, and instead focused their attention exclusively on Murphy 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 Murphy and her companions were keenly aware that they were being targeted by Cartagena and Brockington by

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

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 continued to follow them. *See* Playlist_2012_08-22_2052 at 6:38:22-53.

That Murphy said to Cartagena and Brockington "I'm not with them," and "I had nothing to do with it" does not, as the plaintiff suggests, show that she was a random victim, but rather, provides additional confirmation that she was aware that she was being specifically targeted. (R. 1088, 1096, 1544). If, as the plaintiff suggests, Murphy 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 Murphy 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).

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. *Rivera*, 239 A.D.3d at 114-115. The perpetrators 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, the First Department 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*. That the plaintiff was not the initial intended victim did not warrant a different result.

The facts of case more strongly favor dismissal than *Rivera*. In that case, the plaintiff was not the main target of her assailants' premeditated conspiracy to murder her step-brother, yet the First Department held that there was no liability.

239 A.D.2d at 115. Here, the undisputed evidence shows that Murphy was part of a group that Cartagena and Brockington specifically targeted, and was not a random victim of opportunity. As noted above, all the parties involved were well acquainted with one another. Cartagena and his girlfriend Santiago had lived at both the Grant Houses and Manhattanville Houses. (R. 1102, 1285). Santiago knew Murphy and her brother, and recognized Murphy as one of the participants in the earlier altercation. (R. 1269-1274, 1285, 1322). Members of the Three Stacks knew Cartagena and Brockington. (R. 788-790, 1057, 1102, 1479). Notably, Cartagena celebrated the murder on his Facebook page a short time thereafter, which not only demonstrates a complete lack of remorse, but further underscores that Murphy was a specifically targeted victim. (R. 1799).

There no evidence in the 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. The testimony of Cartagena's girlfriend Brittany Santiago, establishes that after Cartagena and Santiago were chased by Murphy and members of the Three Stacks gang, at which time Cartagena was assaulted by several members of the group, Cartagena and Brockington plotted their revenge on those involved, including Murphy. As part of their plan, Cartagena and Brockington met with an associate to obtain a handgun. (R. 1276-1284). As the trial court noted, Cartagena and Brockington's mission for revenge

"took time and planning." (R. 48-49). Notably, That Cartagena and Brockington were convicted of premeditated murder, and not manslaughter, further undermines any notion that this attack was the result of brief rage, or a random act. (R. 1912-1913).

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.

Point IV:

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

Because the First Department did not reach the issue of whether NYCHA had constructive notice that the lock to the side door of the building was inoperable at the time of this incident, it is not properly before this Court. In any event, the plaintiff's argument that NYCHA failed to establish lack of such notice is belied by the evidence in the record.

As noted above, 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 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.

That the lock to the side door through which Cartagena and Brockington entered the building may not have been 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 just after 4:00 a.m. on September 11, 2011, more than 14 hours after NYCHA's maintenance 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 speculates 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, she ignores 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 further speculates 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," 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. 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 the work was performed 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 attempts to create an issue of fact where none exists by conflating the two the work orders. However, 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 only with 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 cannot state, without engaging in speculation, what prevented the lock to the side door from operating properly at the time of the shooting, as neither she nor her expert ever personally inspected the subject door. The plaintiff and her expert do not present any admissible evidence as to what

actually caused the lock to the side door to malfunction at the time of the shooting, nor does she, nor do they 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 the unrefuted evidence that vandalism of the doors was a constant problem at the building. (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). 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 although 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 was ever performed. Of course, this contention is not based on personal knowledge, but rather, 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 attacks on the reliability of NYCHA's maintenance records are unavailing. Notwithstanding any minor discrepancies on the April 5, 2011 work order, it is clear that NYCHA completed the work described on that order given the front entrance door to the subject building was locking properly at the time of the incident. *See* Playlist_2012_08-22_2053 at 6:39:07-11; Playlist_2012_08-22_2054 at 6:38:05-11.

Finally, the plaintiff's argument regarding NYCHA's inability to locate certain maintenance records is without merit. The plaintiff failed to demonstrate these records, including Caretaker Daily Checklists for March and April 2011, are even relevant. In any event, 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).

In sum, should this Court reach the issue of constructive notice, it is respectfully submitted that affirmance of the First Department's decision on the alternative ground that the evidence shows that the entrance and exit doors were working properly on the day before the alleged incident, and 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. *See Roldan v. New York City Hous. Auth.*, 171 A.D.3d at 418-419.

Point V:

There is no Basis to Reject the Opinion of NYCHA's Security Expert, Lawrence Cunningham

The plaintiff contends that the First Department improperly considered opinion of NYCHA's security expert, Lawrence Cunningham. However, the First Department does not reference Cunningham's opinion anywhere in its decision. It appears that the First Department relied exclusively on the witness testimony and surveillance video taken at the time of the incident. *See Estate of Murphy v. New York City Hous. Auth*., 193 A.D.3d 503.

Moreover, it is well-settled that an expert's opinion may be based "upon facts and material in evidence, real or testimonial." *Wagman v. Bradshaw*, 292 A.D.2d 84, 87 (2d Dep't 2002). Here, Cunningham's opinion was properly based on the same admissible evidence relied upon by the First Department, that is, the eyewitness testimony presented at Cartagena's criminal trial, and the surveillance video. (R. 1931-1938). Accordingly, to the extent that the First Department considered Cunningham's opinion, it was entirely proper for that court to do so.

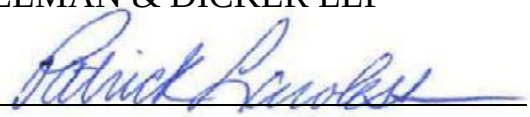
Conclusion

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

Dated: August 29, 2022
New York, New York

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER LLP

By: 
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Certificate of Compliance

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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Dated: August 29, 2022

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