SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART PP4

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Juana Suazo,

Plaintiff,

-against-

Linden Plaza Associates, L.P. and
Harlem River Park Houses, Inc.,

Defendants.

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DECISION and ORDER
Index No 308261/09

Recitation of the papers considered in reviewing the underlying motion for summary judgment as required by CPLR § 2219(a):

Notice of Motion and annexed Exhibits and Affidavits.....1
Notice of Cross-Motion and annexed Exhibits and Affidavits.....2
Reply Affirmation.....3

Plaintiff Juana Suazo ("Suazo") resides at 10 Richman Plaza, Apt. 32B, Bronx, New York. She claims that she was attacked, assaulted and battered by two unknown perpetrators in her building on 7/21/09 as a result of the defendants' negligence. The plaintiff's bill of particulars states that her foot was fractured and required surgery as a result of the attack. Despite her use of a wheelchair and cane and bed rest, medication and physical therapy, the plaintiff has difficulty ambulating, reduced range of motion, permanent scarring and intermittent pain and swelling. Ms. Suazo alleges that defendants Linden Plaza Associates, L.P. ("Linden Plaza") and Harlem River Park Houses, Inc. ("Harlem River"), the owners of 10 Richman Plaza, are liable for her injuries because they failed to provide proper and adequate security by permitting unauthorized persons to enter the building; failing to repair the intercom system; failing to provide hallway and elevator video cameras; and failing to enforce the use of their sign-in guest books. The defendants allege lack of actual notice and move for summary judgment pursuant to CPLR 3212.

Plaintiff Suazo cross-moves to strike the defendants' answer and seeks an Order granting partial summary judgment on spoliation grounds pursuant to CPLR 3126. The plaintiff alternatively seeks an adverse inference against the defendants at trial.

DISCUSSION

Summary judgment is a drastic remedy that deprives the litigant of his or her day in court and should only be employed when no doubt exists as to the absence of triable issues of fact. (*Martin v Briggs*, 235 AD2d 192 [1st Dept 1997].)

A landlord has a common-law duty to maintain minimal security measures to protect against foreseeable criminal intrusion upon tenants. (*Jacquelin S. v City of New York*, 81 NY2d 288 [1993]; *Miller v State of New York*, 62 NY2d 506 [1984].) A New York property owner may be liable for injuries inflicted by a trespasser who commits a violent crime against a third person while on the owner's property. (*Buckeridge v Broadie*, 5 AD3d 298 [1st Dept 2004] *citing Jacqueline S. v City of New York*, 81 NY2d 288, *supra*.) Liability is established if the owner knew or should have known of the likelihood of the trespasser to endanger the safety of those lawfully on the premises. (*Buckeridge v Broadie*, 5 AD3d 298, *supra, citing Jacqueline S. v City of New York*, 81 NY2d 288, and *Miller v State of New York*, 62 NY2d 506.)

Building Access

It is undisputed that Richman Plaza, also known as River Park Towers, is a complex comprised of four residential buildings - 10 Richman Avenue, 20 Richman Avenue, 30 Richman Avenue and 40 Richman Avenue. To gain entry into the complex, residents and visitors pass by a staffed security gatehouse and proceed to their building of destination. Entry into the plaintiff's building is gained by walking through an unlocked door and a locked second door leading to the

building lobby. Tenants use a key. Visitors sign a guest book. Tenants and visitors must pass a staffed security desk located in each building lobby to access the elevators or stairs.

Plaintiff's Factual Summary

During her 6/25/10 deposition, plaintiff Suazo testified that on 7/21/09, the day of the incident, she entered her building at approximately 3PM and proceeded through the first unlocked door. The second door's lock was broken. Ms. Suazo walked past the security guard to the elevator. The elevator arrived with two occupants who remained inside. A man with a child, a woman, two female youths and the plaintiff entered the elevator. Ms. Suazo pressed the 32nd floor button to go home. The elevator made various stops. The two original occupants exited first. When the elevator stopped at the 20th floor, the man and child exited but the woman, plaintiff and the two youths remained. The two youths did not permit the elevator door to close. The woman exited the elevator and the plaintiff followed a few seconds later. Before Ms. Suazo left the elevator, the two youths spat on the plaintiff and stomped on her foot. Ms. Suazo proceeded to the exit stairs and began to descend. The youths confronted her - one behind and one in front. The one behind Ms. Suazo pushed her forward and the one in front grabbed her hair and pulled her down the stairs. Ms. Suazo fell to the ground as the youths kicked and punched her, knocked her head against the wall and robbed her of her belongings.

Defendants' Motion for Summary Judgment

Defendants Linden Plaza and Harlem River move for summary judgment. They proffer the affidavit of Perry Mitchell, their Security Director, to establish that they neither knew nor should have known of the propensity or likelihood of the assailants to endanger the plaintiff. The defendants note that the plaintiff's complaint and bill of particulars allege that her assailants were unknown and unauthorized to be in the building. The defendants proffer the deposition testimony

of Jennifer Suazo ("Jennifer"), the plaintiff's daughter, to establish that her mother's assailants were initially unknown but later identified with her daughter's assistance. The plaintiff's Response to Notice for Discovery and Inspection thereafter names the assailants.

During her 6/25/10 deposition, Jennifer Suazo testified that she was speaking by cell phone with her mother, the plaintiff, when the attack commenced. Jennifer instructed her mother to remain on the elevator, go home to Apartment 32B and seek the assistance of "Boomie," her child's father. When the line suddenly disconnected, Jennifer left work and went to her mother's apartment. When Jennifer arrived, Ms. Suazo complained of foot pain. Jennifer called the ambulance and the plaintiff was treated by the paramedics. Afterwards, Jennifer went to the security director's office to review security tapes. The footage revealed six or seven female youths following the plaintiff into the building lobby. Jennifer identified one youth known as "Mama," a building tenant, and recognized a second youth. Jennifer went to Mama's apartment and learned that she was visiting a friend in another building within the complex. When Jennifer arrived at the friend's apartment, she saw Mama and all but one of the youths who were in the lobby and caught on videotape. Destiny, also known as Diamond, an 11-year old, was one of the plaintiff's assailants. Initially, the young women claimed no knowledge of the attack but after Jennifer threatened to call the police, they identified the remaining assailant as a 14-year-old named Latrice who lives at 40 Richman Plaza. Jennifer subsequently went to Latrice's apartment. After Jennifer retrieved some of the plaintiff's belongings from Destiny and Latrice, they were arrested and identified by the plaintiff as her assailants.

By affidavit dated 3/16/11, Mr. Mitchell states that he is employed by RY Management, the complex's managing agent, and has served as River Park Towers' Security Director since 3/24/09. Mr. Mitchell states that he supervises One Step Above Security ("One Step") which provides nine

or ten security officers to work within the complex seven days per week, twenty-four hours per day, in eight hour shifts. One officer is stationed at the command site where video surveillance feeds are located; one is stationed at the guard house which is located at the complex's entrance; four are stationed at the respective entrances of the four apartment buildings; and the remaining officers perform "vertical security inspections" of the rooftops, exteriors and floors by stairs or elevators.

Notice

The defendants argue that they bear no liability for the assault because they neither knew nor should have known of the propensity or likelihood of the assailants to endanger the plaintiff's safety. Mr. Mitchell states that residential complaints and reports filed in his office prior to 6/21/09[1] did not describe criminal or threatening conduct by Latrice Saunders or Destiny McNeil nor mention their propensity to engage in such conduct. Mr. Mitchell states that he received notice on 7/21/09, the date of the plaintiff's assault, that two other female residents were robbed by Latrice and Destiny on 7/20/09. These residents allegedly filed reports with security *after* the plaintiff filed her report.

The Court finds that the defendants have not met their burden. Neither report is annexed to establish the dates, times and content in issue. Just as significantly, Mr. Mitchell acknowledges that he was informed *by his attorney* that the two residents identified their assailants only after they were identified by Jennifer, thus raising a triable fact concerning Mr. Mitchell's credibility and the extent of his actual knowledge.

The defendants posit that there was no reason to deny entry to the assailants because they were authorized guests but no copy of the guest book is submitted for review and the videotape recording their entry into the building has been destroyed. The defendants contend that they are

[1] The plaintiff's complaint states that the incident occurred on 7/21/09.

entitled to summary judgment because the plaintiff identified her assailants and thus were not "unknown" persons as described in her complaint and bill of particulars but this is not dispositive.

Defendants Linden Plaza and Harlem River have not made a prima facie showing of entitlement to judgment as a matter of law through admissible evidence that eliminates all material issues of fact. (*Alvarez v Prospect Hospital*, 68 NY 2d 320 [1986].) The burden of proof has not shifted to the plaintiff. (*Bethlehem Steel Corp v Solow*, 51 NY2d 870 [1980].) The defendants' motion for summary judgment is accordingly denied.

Plaintiff's Cross-Motion

Plaintiff Suazo alleges spoliation of evidence, cross-moves to strike the defendants' answer and seeks an Order granting partial summary judgment on the issue of liability. The plaintiff alternatively seeks an adverse inference against the defendants at trial. Plaintiff Suazo contends that the defendants intentionally failed to produce the video record of the assailants' entry into the building because it would establish that they were neither stopped nor questioned by security nor required to sign the guest book.

Spoliation is the destruction of evidence. The defendants maintain that they did not intentionally destroy the videotape footage but reused it after 30 to 45 days in accordance with their protocol. The defendants contend that they became aware of the plaintiff's intention to commence an action more than 45 days after the incident and argue that the plaintiff's demand for the videotape was unconscionably delayed.

CPLR 3126 provides various penalties for a party's refusal to comply with a discovery order or its willful failure to disclose information. The nature and degree of the penalty is within the Court's discretion. (*Pimental v City of New York*, 246 AD2d 467 [1st Dept 1998].) The drastic remedy of striking an answer is inappropriate absent a clear showing by the moving party that an

adversary's failure to comply is willful, contumacious or in bad faith. (*Christian v City of New York,* 269 AD2d 135 [1st Dept 2000]; *Palmenta v Columbia University*, 266 AD2d 199 [1st Dept 1999]; *Pimental v City of New York*, 246 AD2d 467, *supra.*)

The striking of a pleading warrants substantive evidence and conduct that demonstrates a high degree of culpability (*Russo v BMW of North America*, LLC, 82 AD3d 643, --- 2011 WL 1120087 [1st Dept 2011]) where, for example, a party intentionally destroyed evidence after being notified that the evidence might be required for future litigation. (*Standard Fire Ins. Co. v Federal Pacific Elec., Co.*, 14 AD3d 213 [1st Dept 2004].) In other instances, an adverse inference charge is an appropriate sanction where evidence is destroyed either intentionally or as the result of gross negligence. (*Ahroner v Israel Discount Bank of New York*, 79 AD3d 481 [1st Dept 2010].)

Here, the defendants demonstrate a high degree of culpability by callously disregarding the videotape's value and destroying it despite the likelihood of civil litigation and criminal prosecution. (*Voom HD Holdings, LLC v Echosar Satellite*, 2012 NY Slip Op 00658 [1st Dept 2012] citing *Zubulake v UBS Warburg LLC* (220 FRD 212 [SDNY 2003].) The defendants were aware that their videotape allowed Jennifer Suazo and the plaintiff to identify her assailants and led to their arrest by the New York City Police Department. On October 7, 2009, less than three months after the incident, the plaintiff filed and the defendants were served with a summons and complaint. In January 2010, the plaintiff requested surveillance materials including the videotape in her Combined Demands. In June 2010, the plaintiff made a second demand for the 7/21/09 videotape footage.

This action was commenced less than three months after the plaintiff's egregious assault. The plaintiff's discovery demands were served three months later: This timeline does not constitute an unconscionable delay that excuses the defendants' destruction of evidence.

The defendants' failure to preserve the videotape is indefensible. The Court finds that the defendants committed willful spoliation in failing to preserve crucial footage that identified the alleged assailants, portrayed what occurred when the alleged assailants entered 10 Richman Plaza and captured the action or inaction of the defendants' security guard. The plaintiff's cross-motion for summary judgment is granted.

The defendants shall serve a copy of this Order with notice of entry upon the plaintiff within ten days. This is the Decision and Order of the Court.

Dated: March 19, 2012

So ordered,

Hon. Lizbeth González, AJSC