SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

CHRISTINA LEE WARTHEN,

Plaintiff,

INDEX NO. 157921/12

MOTION SEQ. NO. 001

-against-

SULLIVAN PROPERTIES, L.P. and,
MANHATTAN SKYLINE MANAGEMENT,

Defendants.

SULLIVAN PROPERTIES, L.P. and
MANHATTAN SKYLINE MANGEMENT,

THIRD-PARTY INDEX NO. 590140/13

Third-Party Plaintiffs

-against -

ROBERT SHORTHALL,

Third-Party Defendant.

The following papers were read on this motion by the third-party defendant for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ■ Yes ☐ No

In this personal injury action, the third-party defendant Robert Shorthall (Shorthall) moves, pursuant to CPLR 3212(a), for summary judgment dismissing the third-party complaint. Defendants/third-party plaintiffs Sullivan Properties, L.P., and Manhattan Skyline Management

(collectively, the landlord) are in opposition to Shorthall's motion.

BACKGROUND

Christina Lee Warthen (plaintiff) testified at her deposition that, on June 13, 2012, at approximately 3:00 a.m., she was awakened by Shorthall banging on and rattling the safety gate outside her living room window, while standing on the fire escape affixed outside that window, apparently trying to enter the apartment. Plaintiff, who recognized Shorthall as her upstairs neighbor, grabbed her cell phone and left her apartment so as to get outside and call the police. When plaintiff started to go down the building staircase she slipped and fell down the stairs between the third and fourth floors, and sustained an injury. Subsequently, plaintiff instituted a lawsuit against the landlord. The landlord then instituted a third-party action against Shorthall. The third-party complaint alleges that plaintiff's injury was caused by Shorthall's actions and not by any negligence on behalf of the landlord. Shorthall testified at his deposition that during the subject incident, he was drunk, thought that his wife had locked him out, and mistakenly thought that he was trying to enter his own apartment (affirmation in opposition, exhibit C, pp. 14-22).

In support of his motion, Shorthall submits that the landlord cannot establish that plaintiff's injuries of falling down the stairs were a foreseeable and probable result of him banging on her window. In support of this claim Shorthall relies upon, *inter alia*, *Palsgraf v Long Is. R.R.* (248 NY 339, 344 [1928]) and *Di Ponzio v Riordan* (89 NY2d 578, 583 [1997])., proffering that one cannot be liable for an unforseeable injury. Thus, Shorthall proffers that he cannot be held accountable for plaintiff's injuries as her fall was not a foreseeable consequence of his actions. Additionally, Shorthall proffers that the landlord's Bill of Particulars are devoid of any theory or explanation for the subject incident, and as such there are no triable issues of fact as to what Shorthall did or did not do. In opposition, landlord maintains that Shorthall's motion should be denied as he has failed to meet his *prima facie* burden for summary judgment and

there are triable issues of fact outstanding.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Svc. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-86 [1st Dept 2006], quoting *Winegrad*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof of inadmissible form of sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980], *DeRosa v City of NY*, 30 AD3d 323, 325 [1st Dept 2006]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for

summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978], *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

DISCUSSION

It is established that, where varying inferences may be drawn from the evidence, foreseeability is generally a question for the jury (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 329 [1991]; *Kriz v Schum*, 75 NY2d 25, 34 [1989]). It is also established that a "plaintiff need not establish that the precise manner in which the accident occurred was foreseeable. Rather, it is sufficient that she demonstrate that the risk of some injury from the defendant's conduct was foreseeable" (*Boderick v R.Y. Mgt. Co., Inc.*, 71 AD3d 144, 148 [1st Dept 2009] [citation omitted]).

Here, a jury could certainly infer that Shorthall's behavior would cause plaintiff to leave her apartment in a condition of some apprehension, and a jury could certainly conclude that it was foreseeable that she might come to some harm upon leaving her apartment, having been suddenly awakened at 3:00 a.m. by a man banging on and rattling the safety gate outside her window (*see Taieb v Hilton Hotels Corp.*, 131 AD2d 257, 262 [1st Dept 1987] ["It is entirely foreseeable that persons in a burning building may be injured by fire, smoke, or in the attempt to escape the building"]).

CONCLUSION

Accordingly, it is hereby

ORDERED that third-party defendant Robert Shorthall's motion for summary judgment is denied and plaintiff is directed to serve a copy of this Order with Notice of entry upon all parties.

Dated: 12/2/14

PAUL WOOTEN J.S.C.

Check one: [ ] **FINAL DISPOSITION** [X] **NON-FINAL DISPOSITION**
Check if appropriate: [ ] **DO NOT POST** [ ] **REFERENCE**