SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX – IAS PART26

MARCELL JONES,

Plaintiff,

-against-

Index No. 300187/2011

VOLUNTEERS OF AMERICA - GREATER NEW YORK, INC., VOLUNTEERS OF AMERICA, INC., THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, DEVONE MARTIN,

MEMORANDUM DECISION/ORDER

Defendants.

HON. RUBEN FRANCO

This is an action to recover damages for personal injuries allegedly sustained in a physical altercation.

Defendants, Volunteers of America - Greater New York,. Inc., Volunteers of America, Inc., the City of New York, and the New York City Department of Homeless Services, move for summary judgment pursuant to CPLR § 3212.

The facts, as culled from the pleadings, deposition testimony, and exhibits, are as follows: Volunteers of America, Inc. is a non-profit charitable organization providing human services programs across 46 states. Volunteers of America - Greater New York,. Inc., is a subset of Volunteers of America, which focuses its community outreach efforts in the greater New York area. Volunteers of America, among other things, provides housing to previously homeless members of the community. In furtherance of this purpose, Volunteers of America runs a five-story complex that consists of 180 single-occupancy apartment units located at 50 West Mount Eden Avenue, Bronx County ("the Building"). The Building has 24-hour security, with a security officer in the lobby to check people in and out. If there were any problems in the Building, the procedure was that they were to be reported to the security guard in the lobby. The

security guard would prepare an incident report if anyone wished to make an official complaint.

Plaintiff resided in the Building since 1995, and defendant Devone Martin ("Martin") was also a resident of the Building, for at least three years prior to the subject incident. The Building has a lounge in a common area on the second floor. Prior to the incident, plaintiff and Martin never had an altercation.

On December 24, 2010, at approximately 3:00 P.M., plaintiff went to the lounge to play cards. While playing cards, Martin entered the lounge and threatened plaintiff by stating that "... if I (plaintiff) said anything to him, he's going to take my head off." Plaintiff did not respond and Martin left. Plaintiff did not feel he that was in any imminent danger and did not leave the lounge to report the threat to the security guard in the lobby. Martin returned to the lounge a few minutes later, but did not enter, however, from the other side of the door, Martin repeated his threat to plaintiff, who did not respond. Again, plaintiff did not report the incident to the security guard, since Martin did not make an attempt to attack him. Plaintiff did not fear that he was going to get into an altercation with Martin. Several minutes later Martin again returned to the lounge, did not enter, and repeated the threat. Again, plaintiff did nothing and Martin left. A few minutes later Martin again walked by the lounge, going towards his room, but made no threats. Fifteen minutes later plaintiff left the lounge intending to go to the room of a friend approximately 15 feet away. Before plaintiff could get there, he encountered Martin, who was having a verbal altercation with another resident of the Building. Plaintiff walked past them and Martin reached across the other resident, pointed at plaintiff and made another threat. Plaintiff asked Martin why he continued to threaten him, and Martin said nothing, whereupon, he gave the other resident a small push, went around the other resident and nudged plaintiff on his way by. Plaintiff did not feel the need to report the incident to the security guard. Plaintiff went to his

friend's room, and subsequently left and went towards the elevators and again encountered Martin. This time, a physical altercation ensued and plaintiff was injured.

The moving party in a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hospital et.al., 68 NY2d 320, [1986]; Winegard v. New York Univ. Med Center, 64 NY2d 851, [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]; Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, [1957]). Failure of the movant to sustain its burden requires denial of the motion, regardless of the sufficiency of the opposition Winegard v. New York Univ. Med. Center, *supra*, at 853. Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Gaddy v. Eyler, 79 NY2d 955 (1992); Alvarez v. Prospect Hospital, et al., *supra*; Zuckerman v. City of New York, *supra*.

It is beyond cavil that a landlord has a duty to take reasonable security measures to protect his tenants from the intentional criminal acts of others (see Miller v. State, 62 N.Y.2d 506 [1984]). However, absent the authority, ability and opportunity to control the conduct of a third person, a landowner does not have a duty to protect a tenant from the conduct of another tenant (see Britt v. New York City Housing Authority, 3 A.D.3d 514 [2nd Dept. 2004]; Siino v. Reices, 216 A.D.2d 552 [2nd Dept. 1995]). The mere power to evict does not constitute a reasonable opportunity, or effective means to control a third person (see Britt v. New York City Housing Authority, *supra*; Siino v. Reices, *supra*; Gill by Gill v. New York City Housing Authority, 130 A.D.2d 256 [1st Dept. 1987]). The affidavits submitted by plaintiff of James Yusef McLean, alleging that Martin engaged in "threatening and disrespectful behavior," as well as that of Anna

Sairt, alleging that Martin was "constantly disrespectful and threatening towards the entire floor" and "exposed himself to me in the hallway," and of James Braxton, alleging that Martin was "rude, disrespectful, and threatening towards me," are insufficient to establish that Martin had violent propensities (see Bonano v. "XYZ" Corp., 261 A.D.2d 280 [1st Dept. 1999]). No other evidence is submitted to show that the assault was foreseeable *(id.* at 281).

Lastly, plaintiff has failed to show any causal connection between an alleged violation of the regulations that he cites, and the subject incident.

Accordingly, the branch of the motion for summary judgment made on behalf of Volunteers of America - Greater New York,. Inc. and Volunteers of America, Inc., is granted in and plaintiff's Complaint against them is dismissed.

The branch of the motion for summary judgment made on behalf of the City of New York and the New York City Department of Homeless Services, is denied in its entirety for failure to demonstrate a *prima facie* entitlement to such relief. The only basis advanced by these defendants for dismissal of the Complaint against them is contained in their reply papers, which merely states that plaintiff's opposition papers does not mention them and that plaintiff has not submitted admissible evidence against them. However, failure of the movant to sustain its burden requires denial of the motion, regardless of the sufficiency of the opposition Winegard v. New York Univ. Med. Center, *supra*, at 853.

This constitutes the Decision and Order of the court.

Dated: July 20, 2017

Ruben Franco, J.S.C.

HON. RUBÉN FRANCO