

Musano v City of New York

2019 NY Slip Op 30213(U)

January 23, 2019

Supreme Court, New York County

Docket Number: 452429/2014

Judge: Robert R. Reed

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 43

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KATHRYN MUSANO,

Plaintiff,

DECISION AND ORDER

Index No. 452429/2014

- against -

CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE; NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES; NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, DEPARTMENT OF SOCIAL SERVICES, ADULT PROTECTIVE SERVICES; COMMON GROUND COMMUNITY II HDFC; PRINCE GEORGE ASSOCIATES, L.P.; and JAMES SACCO,

Defendants.

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COMMON GROUND COMMUNITY II HDFC; PRINCE GEORGE ASSOCIATES, L.P.; CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE; NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES; and NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, DEPARTMENT OF SOCIAL SERVICES, ADULT PROTECTIVE SERVICES,

Third-Party Index No. 595282/2016

Defendants/Third-Party Plaintiffs,

- against -

CENTER FOR URBAN COMMUNITY SERVICES, INC; and ALLIEDBARTON SECURITY SERVICES, LLC,

Third-Party Defendants.

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ROBERT R. REED, J.:

Motion sequence nos. 001, 002 and 003 are consolidated for disposition herein.

In motion sequence no. 001, third-party defendant AlliedBarton Security Services, LLC (AlliedBarton) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint.

In motion sequence no. 002, third-party defendant Center For Urban Community Services, Inc. (CUCS) moves for summary judgment dismissing the third-party complaint and cross claims asserted against it.

In motion sequence no. 003, defendants/third-party plaintiffs City of New York, the City of New York s/h/a New York City Department of Health and Mental Hygiene, New York City Department of Homeless Services (DHS), New York City Human Resources Administration (HRA), Department of Social Services, and Adult Protective Services (APS) (collectively, City Defendants) and defendants/third-party plaintiffs Common Ground Community II HDFC (Common Ground) and Prince George Associates, L.P. (Prince George) (together, Common Ground Defendants) move for summary judgment dismissing the complaint and the cross-claims asserted against them.

For the reasons set forth below, the motion brought by the City Defendants and the Common Ground Defendants is granted, and the motions brought by AlliedBarton and CUCS are denied as moot.

FACTUAL AND PROCEDURAL BACKGROUND

This action sounding in negligence arises out of an assault that occurred on February 13, 2013 when defendant James Sacco (Sacco) attacked plaintiff Kathryn Musano with a knife at her place of work (NY St Cts Elec Filing [NYSCEF] Doc No. 33, complaint ¶¶ 23-24).

Prince George is the fee owner of the building located at 14 East 28th Street, New York, New York (the Building) (NYSCEF Doc No. 92, aff of Aaron Dobish, ¶ 5). Prince George had contracted with Common Ground to serve as its leasing and managing agent for the Building (*id.*).

Common Ground is a nonprofit organization that provides supportive, affordable permanent and transitional housing to the homeless (NYSCEF Doc No. 69 at 3). Common Ground operated The Prince George Hotel, a 415-unit independent single room occupancy (SRO) facility (the Facility) at the Building (NYSCEF Doc No. 69 at 7; NYSCEF Doc No. 45, Shana Wertheimer [Wertheimer] tr at 14). Sacco was a tenant at the Facility (NYSCEF Doc No. 33, complaint ¶ 8).

CUCS is a nonprofit organization that provides on-site social services to tenants at the Facility pursuant to a memorandum of understanding with Common Ground executed March 12, 2012 (NYSCEF Doc No. 69 at 1 and 19). At the time of the incident, plaintiff was employed by CUCS as a social worker at the Facility (NYSCEF Doc No. 33, complaint ¶¶ 22-23).

AlliedBarton provided “security officer services” at the Facility pursuant to security officer service agreement with Common Ground dated August 16, 2012 (NYSCEF Doc No. 51 at 1). These services included executing post orders, monitoring on-site alarms and surveillance cameras, controlling access to the Facility and conducting patrols (*id.* at 10).

The City Defendants provided funding for supportive, affordable housing at privately-owned facilities for those suffering from mental illness or HIV/AIDS and for the chronically homeless and those with low income (NYSCEF Doc No. 44, Craig O’Connor [O’Connor] tr at 14, 17 and 28). In 2011, the City, acting through DHS, contracted for Common Ground to provide housing and social services to 346 residents for a six-year period (the DHS Contract) (NYSCEF Doc No. 95 at 4 and 81). Social services included on-site case management, such as benefits counseling and financial management, to assist all residents to live independently (*id.* at 83). The DHS Contract also specified that all residents “shall be individuals referred only by the Referral Sources,” later identified as DHS and the HIV/AIDS Services Administration, which was a unit within HRA (*id.* at 90), and that 208 of the 346 units must be “occupied by Department referrals” (*id.* at 82-83).

Plaintiff commenced this action against the Common Ground Defendants and the City Defendants for negligent and inadequate security at the Facility. More particularly, the complaint alleges that defendants “negligently administered, operated and funded the program that improperly classified a tenant named James Sacco as an appropriate tenant for The Prince George Hotel housing program” (NYSCEF Doc No. 33, complaint ¶ 36), and that defendants “negligently retained James Sacco as a tenant, even though he had a known violent history and continued to be an inappropriate tenant” (*id.*, ¶ 38). Although the complaint asserts three claims against Sacco, he has not answered or otherwise appeared in this action. The Common Ground Defendants and the City Defendants answered the complaint and interposed third-party claims against CUCS and AlliedBarton for contribution and indemnification.

THE PARTIES’ CONTENTIONS

The City Defendants move for summary judgment on the ground that plaintiff cannot sustain a negligence claim against them in the absence of a special duty.

The Common Ground Defendants argue that they had no duty to protect plaintiff because the incident was not reasonably foreseeable based on three grounds. First, there were no other incidents of prior, similar criminal activity at the Facility. Second, the Common Ground Defendants had no duty to investigate Sacco’s mental health. Third, despite Sacco’s prior criminal history, Sacco had resided at the Facility relatively peaceably for nine years prior to the incident, which lasted less than one minute. The Common Ground Defendants also argue that they employed adequate security measures at the Facility. Finally, they submit that plaintiff cannot demonstrate that the purported lapses in security proximately caused her injuries.

AlliedBarton argues that plaintiff cannot demonstrate that the inadequate security measures proximately caused her injuries because a fully secured entrance would not have prevented Sacco, a tenant, from entering the Facility. Thus, the incident was not foreseeable.

CUCS argues that the incident was not foreseeable because there have been no prior incidents of violence or threats of violence involving Facility staff or other residents. As such, there was no duty to protect against an unforeseeable and unexpected assault. Additional security measures, such as a panic button inside plaintiff's office, would not have prevented the incident. Finally, plaintiff's complaint about the layout of her office furniture lacks merit because she could have easily taken steps to remedy that condition.

Plaintiff, in opposition, argues that the incident was foreseeable given defendants' knowledge of Sacco's prior violent conduct and history of mental illness. Plaintiff also identifies several lapses in security that she claims were a substantial cause of the incident.

Submitted on the motions are the pleadings, deposition transcripts, the parties' contracts, and Sacco's intake packet and tenant history, among other exhibits.

Plaintiff testified that CUCS maintained three offices at the Building to provide in-house case management services to tenants at the Facility (NYSCEF Doc No. 42, plaintiff 7/2/17 tr at 26-27). CUCS's fourth floor office, where plaintiff worked, was comprised of a common area occupied by four case managers and individual offices for a clinical coordinator and a social worker (*id.* at 56 and 66). The door separating CUCS's office from the hallway off the elevator bank was kept locked "when you're doing documentation only" (*id.* at 60, lines 23-25). At all other times, tenants could enter the CUCS office to meet with staff by walking in or by appointment (*id.* at 61).

Plaintiff explained that CUCS routinely held staff meetings, and a topic at those meetings involved security (*id.* at 38), including reconfiguring their offices to avoid a potential entrapment and the use of panic buttons (*id.* at 38-39). There were two panic buttons in the fourth-floor office – one in the common space and one in the clinical coordinator's office – that plaintiff believed were connected to AlliedBarton's desk in the lobby (*id.* at 43-44). Building access was controlled

as well, with staff and tenants using swipe cards to gain entry (*id.* at 242). Plaintiff testified that she was not aware of any specific conversations between CUCS and AlliedBarton regarding security (*id.* at 53).

Plaintiff testified that some tenants “had mental illness, and that was causing a concern” because “[m]ental illness can be unpredictable” (*id.* at 41, lines 11-12 and 17-18). However, there was nothing in plaintiff’s training to indicate that persons suffering from mental illness had a stronger propensity for violence (*id.* at 42). Plaintiff could not recall when she first met Sacco, but she was aware that he was a second-floor tenant (*id.* at 55). After becoming Sacco’s social worker, she met with him weekly to discuss his goals for independent living (*id.* at 67-68). She stated that Sacco had ongoing issues with his lease concerning the condition of his unit and his inability to pay rent timely (NYSCEF Doc No. 86, plaintiff 5/22/15 tr at 34).

Plaintiff learned of Sacco’s past violent history a month after becoming his social worker, explaining that Sacco had a “violent history of stabbing other people and serving prison time, and I believe that he killed someone” (NYSCEF Doc No. 42, plaintiff 7/2/17 tr at 71, lines 19-21). She never made a formal complaint to CUCS, Common Ground, or the City Defendants that she had never been told of Sacco’s history of violence (NYSCEF Doc No. 86, plaintiff tr 5/22/15 tr at 47).

Plaintiff testified that she observed Sacco exhibiting symptoms of decompensation and paranoid schizophrenia prior to the incident because of his poor physical appearance, erratic behavior and paranoia (*id.* at 55-56), and presumed that Sacco was no longer taking his medication (*id.* at 58). He was also angry at the eviction process and at his sister (*id.* at 59). Plaintiff was concerned for her own safety and stated that she may have mentioned her concerns to others (*id.* at 62), including her supervisor (NYSCEF Doc No. 42, plaintiff tr 7/2/17 at 79). However, she never conveyed her concerns to anyone at Common Ground, AlliedBarton, or the City (*id.* at 75, 241 and 262), and she could not recall anyone from Common Ground taking steps to address them

(*id.* at 77). Furthermore, Housing Court required that APS assist Sacco, but they never evaluated him.

Plaintiff testified that on the day of the incident, Sacco entered her office around 9:15 a.m. (*id.* at 82). At that time, the door leading into CUCS's office was not locked, and Sacco did not have an appointment (*id.* at 82-83). He complained that the smoke detector in his unit was malfunctioning (*id.* at 86). Sacco left plaintiff's office after five minutes to report the problem to Common Ground. Plaintiff testified that she was concerned for her safety during that encounter because Sacco was agitated and dressed strangely (*id.* at 212). However, she did not alert anyone to her concerns at the time (*id.*). Sacco returned to her office 20 minutes later, sat down in the chair next to her desk, and told her that no one in Common Ground's office helped him (*id.* at 91). Sacco then pulled out a five-inch serrated knife from inside his coat and started swinging the knife wildly towards her (*id.* at 98-100 and 102). Plaintiff testified that she jumped out of her chair and placed it between them (*id.* at 100). Although she screamed, no one came to her aid (*id.* at 104). The blade never struck her (*id.* at 102). The entire incident lasted less than one minute (*id.*).

Plaintiff believed that it was unreasonable to admit Sacco into the Facility given his history of mental illness and violence (*id.* at 266; NYSCEF Doc No. 86, plaintiff 5/22/15 tr at 126-127). However, she never asked to be removed as Sacco's social worker (*id.* at 260). She was not aware of Sacco physically threatening anyone at the Facility (*id.* at 269), and Sacco never physically or verbally threatened or made any threatening gestures towards her (*id.* at 274).

O'Connor testified that, at the time of his 2018 deposition, he was the program administrator in charge of the Contract Management Unit within HRA's SRO Unit, where he was responsible for overseeing 118 contracts for 11,000 SRO units (NYSCEF Doc No. 44, O'Connor tr at 9). O'Connor explained that City agencies, such as DHS, contracted with nonprofit organizations to provide supportive, affordable housing and onsite social services (*id.* at 13-14).

The level of support services at each facility varied by contract (*id.* at 15-16), and a SRO operator could enter a subcontract with another provider to furnish those social services (*id.* at 40). Certain contracts also imposed conditions on the composition of a facility's tenant population, with some contracts requiring a facility to take on 60% of an agency's referrals (*id.* at 29-30). In addition, the level of security required at each facility varied by contract (*id.* at 43). The City Defendants' role regarding SRO facilities was to provide funding (*id.* at 23). O'Connor testified that he was familiar with Common Ground as an SRO operator (*id.* at 13), and with the Prince George Hotel (*id.* at 53). He could not recall any communications between Common Ground and his unit concerning inadequate security at the Prince George Hotel (*id.* at 59).

At the time of the incident, Wertheimer worked as Common Ground's building director at the Facility, where she was responsible for overseeing rent collection, building maintained and security (NYSCEF Doc No. 45, Wertheimer tr at 8-9). CUCS provided support services such as case management, entitlement advocacy, HIV/AIDS counseling, and job placement services (*id.* at 48). Wertheimer explained that Common Ground and CUCS interview each prospective tenant before a joint decision on the application is made (*id.* at 26-27), and that many tenants at the Facility had a history of mental illness (*id.* at 29). She believed that Sacco had been homeless before he was placed at the Facility, and that he was not obligated to work with CUCS as a condition of his residency (*id.* at 31).

AlliedBarton provided security at the Facility (*id.* at 77), and security guards were posted inside the lobby to control access to the Facility (*id.* at 118). The guards also patrolled the Facility's hallways and common areas (*id.* at 108-109). They were not required to enter any offices or apartments on their rounds (*id.* at 109). There were surveillance cameras installed on every floor, and panic buttons were placed in each CUCS office (*id.* at 77-78). If a panic button was

pressed, security and Common Ground and CUCS management are notified and staff are trained to respond immediately and to call 911 (*id.* at 70).

Common Ground maintained a master database for each tenant, containing rent information and incident reports (*id.* at 53-54). The security guards were also responsible for recording incidents that occur at the Facility (*id.* at 39), and that information was stored in the master database. Wertheimer could not recall an incident that occurred prior to 2013 where a tenant threatened or assaulted a staff member (*id.* at 83). She also testified that there were no metal detectors installed at the Facility (*id.* at 89), and that tenants were not restricted from using knives for cooking in their kitchenettes (*id.* at 105).

In her affidavit in support, Wertheimer averred that the police removed Sacco from the Facility and that Sacco was barred from entering the Facility after the incident (NYSCEF Doc No. 93, Wertheimer aff, ¶ 23).

Adams testified that he worked for CUCS as a program director at the Facility where his duties included overseeing the social services provided to the Facility's 415 tenants (NYSCEF Doc No. 47, Adams tr at 8-9). He described Sacco as a high-profile client because he suffered from schizophrenia (*id.* at 51). Sacco's funding was provided through an Office of Mental Health contract, but CUCS staff could not force Sacco to accept its services (*id.* at 37 and 39). CUCS and Common Ground also maintained a joint, centralized intake program (*id.* at 33), and the intake forms noted concerns about Sacco's history of violence (*id.* at 42). Adams testified that Sacco had threatened a convenience store clerk in the past (*id.* at 40), but neither CUCS staff nor other tenants had ever filed complaints against him during his tenancy (*id.* at 39-40). Adams could not recall an instance where there was a perceived threat of physical violence from Sacco (*id.* at 58). The day after plaintiff's incident, a case manager told Adams that plaintiff had previously expressed her belief that Sacco was going to kill her (*id.* at 54-55), and Adams maintained that plaintiff never

told her supervisors (*id.*). Likewise, Adams could not recall plaintiff or any CUCS employee complaining about the furniture layout in CUCS's offices (*id.* at 19-20). Sacco was removed to Bellevue Hospital after the incident, where he remained for several weeks (*id.* at 61).

Adams testified that each CUCS office at the Facility was equipped with at least two portable panic buttons connected to a wireless receiver (*id.* at 21-22). There was no written requirement that staff should carry a panic button with them (*id.* at 23), or a protocol describing when a member should press the button (*id.* at 27). Adams testified that CUCS staff conducted periodic testing of the panic buttons to ensure that they were operational (*id.* at 76), and when plaintiff's supervisor pushed the panic button on the day of the incident, the button worked (*id.* at 90). Once a panic button was pushed, it relayed a signal to AlliedBarton's guards (*id.* at 26), who were trained to respond. Unless called, the security guards did not enter CUCS's offices (*id.* at 64). Surveillance cameras were also located outside CUCS's offices.

In an affidavit, Adams described what he observed in the surveillance video taken of the area outside CUCS's office the day of the incident. Adams averred that the entire incident lasted 40 seconds (NYSCEF Doc No. 56, Adams aff, ¶ 7). A CUCS employee who worked on the third floor and two maintenance staff for Common Ground arrived at CUCS's office less than one minute after Sacco had left (*id.*, ¶ 8). Adams personally reviewed CUCS's notes concerning Sacco for the two months preceding the incident and found nothing to suggest that Sacco was decompensating or possessed a violent ideation (*id.*, ¶ 11). Adams also described the events leading up to the incident in a memorandum he drafted shortly after the incident occurred. Adams wrote that plaintiff's first interaction with Sacco took place from 9:34 a.m. to 9:37 a.m. (NYSCEF Doc No. 57 at 1). From 9:38:30 a.m. to 9:39:12 a.m., Sacco met with Common Ground's assistant director of programs, Brian Gruters (Gruters), in an office on the penthouse floor (*id.* at 2). After that meeting, Gruters contacted security to request they "monitor tenant on the cameras due to his

agitation” (*id.*). Sacco returned to CUCS’s office on the fourth floor at 9:40 a.m. and exited the office 40 seconds later.

Wayne Dixon (Dixon) testified that he was a service manager at AlliedBarton (NYSCEF Doc No. 49, Dixon tr at 8), and that he was familiar with the Facility. Access control at the Facility consisted of turnstiles and a security desk staffed with at least one guard 24 hours a day (*id.* at 11-12 and 22). AlliedBarton’s post orders detailed the guards’ daily duties (*id.* at 72). He explained that the guards conducted patrols of the Facility every hour (*id.* at 24), but they would not enter CUCS’s offices or individual apartments unless asked to do so (*id.* at 25-26). In addition, the guards monitored live video images transmitted from public areas such as hallways and stairs (*id.* at 78). Dixon testified that there have been instances of physical violence at the Facility but he could not recall any incident involving a CUCS employee (*id.* at 44). He also could not recall the incident between plaintiff and Sacco (*id.* at 53). A copy of the post orders described additional duties (NYSCEF Doc No. 52 at 2-4).

DISCUSSION

It is well settled that the movant on a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see CPLR 3212*). The “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The “[f]ailure to make [a] prima facie

showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*” (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

A. Timeliness of the Summary Judgment Motions

As a preliminary matter, the published rules for IAS Part 43 state that summary judgment motions must be made within 60 days. However, the preliminary conference order, dated two years prior to the transfer of this matter to the undersigned, states that “[a]ny dispositive motions(s) shall be made on or before 120 days after NOI” (NYSCEF Doc No. 67 at 2). Because there has been no superseding court order shortening the time within which dispositive motions must be made, the motions are timely (*see Freire-Crespo v 345 Park Ave. L.P.*, 122 AD3d 501, 502 [1st Dept 2014]).

B. The Complaint Against the City Defendants

“In order to prevail on a negligence claim, ‘a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom’” (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied* 28 NY3d 956 [2016] [internal citation omitted]). The question of whether a duty exists (*see Rivera v Nelson Realty, LLC*, 7 NY3d 530, 534 [2006]), and the scope of that duty is an issue for the court to determine (*see Waters v New York City Hous. Auth.*, 69 NY2d 225, 229 [1987]), as there can be no liability in the absence of a duty (*see Pasternack*, 27 NY3d at 825; *accord Lauer v City of New York*, 95 NY2d 95, 100 [2000]). “When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose” (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]).

It is not disputed that the City did not own or operate the Facility, and, thus, the City was not acting in a proprietary capacity such that ordinary negligence standards apply (*see Applewhite*, 21 NY3d at 425). Instead, the court finds that the City was acting in a governmental capacity (*see Stora v City of New York*, 117 AD3d 557, 558 [1st Dept 2014] [stating that “[t]he provision of adequate security to prevent attacks by third parties at a homeless shelter is a governmental function”]; *Akinwande v City of New York*, 260 AD2d 586, 587 [2d Dept 1999], *lv dismissed in part, denied in part* 93 NY2d 1030 [1999] [concluding that the defendant municipality’s failure to furnish adequate security at a homeless shelter “implicates a governmental function”]).

A plaintiff seeking to impose liability upon a municipality acting in a governmental capacity must establish the existence of a special duty (*see Applewhite*, 21 NY3d at 426), which has been described as “more than [a duty] owed to the public generally” (*Lauer*, 95 NY2d at 100). A special duty exists where “(1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition” (*Applewhite*, 21 NY3d at 426, citing *Metz v State of New York*, 20 NY3d 175, 180 [2012]). It is the plaintiff’s burden to demonstrate the existence of a special duty (*Turturro v City of New York*, 28 NY3d 469, 482 [2016], citing *Applewhite*, 21 NY3d at 426).

As applied herein, plaintiff has not demonstrated that the first scenario is applicable, and, after viewing the facts in the light most favorable to her (*see Vega*, 18 NY3d at 503), the second and third scenarios are also inapplicable. A plaintiff establishes the existence of a special duty by showing the following:

“(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality’s agents that inaction could lead to harm; (3) some form of direct contact between the municipality’s agents and the injured party; and (4) that party’s justifiable reliance on the municipality’s affirmative undertaking”

(*Cuffy v City of New York*, 69 NY2d 255, 260 [1987], *mot to amend remittitur dismissed* 70 NY2d 667 [1987]).

Although the City Defendants furnished funding for the Facility, there is no evidence that they assumed an affirmative duty to act on plaintiff's behalf, that their inaction would lead to harm to her, that there was direct contact between plaintiff and the City Defendants, or that plaintiff justifiably relied on them to act. As plaintiff did not address this argument, the City Defendants' motion for summary judgment dismissing the complaint against them is granted (*see Clark v City of New York*, 130 AD3d 964, 964 [2d Dept 2015], *lv denied* 26 NY3d 910 [2015]; *Stora*, 117 AD3d at 558; *Akinwande*, 260 AD2d at 587).

C. The Complaint against the Common Ground Defendants

It is well settled that a landowner has a duty of care to maintain its property in a "reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Basso v Miller*, 40 NY2d 233, 241 [1976] [internal quotation marks and citation omitted]). This common-law duty includes taking "minimal precautions to protect tenants from foreseeable harm, including foreseeable criminal conduct by a third person" (*Mason v U.E.S.S. Leasing Corp.*, 96 NY2d 875, 878 [2001], citing *Jacqueline S. v City of New York*, 81 NY2d 288, 293-294 [1993], *rearg denied* 82 NY2d 749 [1993] and *Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548 [1998]; *see also Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 303 [1st Dept 2001] [applying the same duty to managing agents]). However, "foreseeability and duty are not identical concepts" (*Maheshwari v City of New York*, 2 NY3d 288, 294 [2004]). "[F]oreseeability . . . determines the scope of the duty" (*id.*), taking into account the "location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question" (*Jacqueline S.*, 81 NY2d at 295), whereas the scope of the duty rests upon "past experience and the 'likelihood of

conduct on the part of third persons . . . which is likely to endanger the safety of the visitor” (Maheshwari, 2 NY3d at 294 [internal quotation marks and citation omitted]; *Williams v Citibank*, 247 AD2d 49, 51 [1st Dept 1998], *lv denied* 92 NY2d 815 [1998] [stating that a landowner’s duty to take protective measures is informed by “actual or constructive” knowledge of the likelihood of criminal acts on the premises]). Nevertheless, “[a] landlord is not held to a duty to take protective measures unless there is a foreseeable risk of harm resulting from criminal activities of third persons on the premises” (*Camacho v Edelman*, 176 AD2d 453, 454 [1st Dept 1991] [finding that the assault upon the plaintiff was not foreseeable because of “little evidence of criminal activity in the building”]). Moreover, an “owner or possessor is not an insurer of the safety of those who use the premises” (*Williams*, 247 AD2d at 51). Thus, a plaintiff can recover “only on a showing that the landlord’s negligent conduct was a proximate cause of the injury” (*Burgos*, 92 NY2d at 548).

As Sacco was a tenant at the Facility, the line of cases cited by defendants discussing a landlord’s liability for an unauthorized intruder’s criminal acts is inapplicable (*see New v New York State Urban Dev. Corp.*, 110 AD3d 531, 531 [1st Dept 2013] [granting the owner defendants summary judgment because “there was no proof that the assailant who shot plaintiffs was an intruder as opposed to a building resident or guest”]; *Walton v Mercy Coll.*, 93 AD3d 460, 460 [1st Dept 2012] [finding that the assailants were not intruders but invitees of another resident]).

Nonetheless, defendants have demonstrated that the subject incident was not reasonably foreseeable, and that they discharged their duty of providing minimal security measures at the Facility. First, there is no evidence to suggest that Sacco’s attack was foreseeable as he had not engaged in similar, violent acts towards others either residing or working at the Facility (*see Mason*, 96 NY2d at 878 [denying the defendant owners summary judgment because the perpetrator who assaulted the plaintiff had been involved in other criminal acts at the same housing complex]; *Estate of Faughey v New 56-79 IG Assoc., L.P.*, 149 AD3d 418, 418 [1st Dept 2017] [granting the

defendant owners summary judgment because the assailant's "actions were not foreseeable, given the absence of prior violent criminal activity by [the assailant] or other third parties in the building]; *Corporan v Barrier Free Living Inc.*, 133 AD3d 497, 498 [1st Dept 2015] [denying summary judgment to the defendants, the owner and operator of a transitional living facility, where the perpetrator had been involved in two prior physical attacks at that facility]). Sacco resided at the Facility from 2004 through 2013, and the entries in his 53-page tenant history for that period largely concerned the cleanliness of his unit, complaints about or work orders for his smoke detector, and late rent payments, not violent confrontations or incidents involving other tenants or staff.

Second, Common Ground retained AlliedBarton to provide security, including access control, surveillance camera monitoring, and random patrols. Common Ground furnished each CUCS office with two portable panic buttons, and staff members at the Facility carried radios. Plaintiff has not demonstrated how these security measures were deficient.

Plaintiff argues that it was foreseeable Sacco would physically attack plaintiff because of his background. Indeed, she makes much of the fact that Sacco's intake forms read that staff was concerned about Sacco's mental health and history of violence. Notably, Sacco was imprisoned for two years for second degree assault in 1997. However, "[e]ven if a landlord has actual or constructive notice of a tenant's criminal history, 'a landlord is under no duty to safeguard a tenant against attack by another tenant 'since it cannot be said that the landlord had the ability or a reasonable opportunity to control [the assailant]'" (*Gibbs v Diamond*, 256 AD2d 266, 267 [1st Dept 1998], quoting *Wright v New York City Hous. Auth.*, 208 AD2d 327, 331 [1st Dept 1995]). The principle applies equally to those who work at the Facility. Because Sacco had never threatened anyone at the Facility with violence prior to the incident, defendants "had no reason to

anticipate a violent outburst” (see *Waldon v Little Flower Children’s Serv.*, 1 NY3d 612, 614 [2004], *rearg denied* 2 NY3d 794 [2004]).

Moreover, there is no documentary evidence, apart from plaintiff’s belief, that Sacco’s earlier assault with a store clerk involved a knife. In addition, there is no evidence that Sacco’s past instances of decompensation had led to violent confrontations or that it would have led the subject incident. Plaintiff points to a January 29, 2013 entry in Sacco’s tenant history where staff opined that “a very large hole in the wall [in Sacco’s unit] . . . looks like it was hit by great force with a heavy object” (NYSCEF Doc No. 99 at 10) as an indicator that Sacco was violent. This contention, though, is speculative and insufficient to establish that it was reasonably foreseeable he would attack plaintiff. The two complaints of alleged sexual harassment by two other tenants brought against Sacco in 2006 and 2007 also are dissimilar to the violent conduct at issue in this action (see *Piazza v Regeis Care Ctr., L.L.C.*, 47 AD3d 551, 553 [1st Dept 2008] [finding that the defendant nursing home’s awareness of the assailant’s drug history did not place it on notice of his violent tendencies]; *Bonano v XYZ Corp.*, 261 AD2d 280, 280-281 [1st Dept 1999] [stating that the defendant landlord’s awareness of possible harassment of the plaintiff by another tenant did not equate to an awareness of the other tenant’s violent propensities]; *Firpi v New York City Hous. Auth.*, 175 AD2d 858, 859 [2d Dept 1991], *lv denied* 78 NY2d 864 [1991] [concluding that the attack upon plaintiff with a knife was not foreseeable despite the assailant’s “history as a harassing troublemaker”]).

Nor has plaintiff raised a triable issue of fact on proximate cause. “A defendant’s negligence qualifies as a proximate cause where it is ‘a substantial cause of the events which produced the injury’” (*Turturro*, 28 NY3d at 483 [2016] [internal quotation marks and citations omitted]). “[P]roximate cause is generally an issue for the trier of fact, so long as ‘the court has been satisfied that a prima facie case has been established’ and the evidence could support various

reasonable inferences” (*id.* at 483-484 [internal citation omitted]). Thus, “[a] plaintiff . . . need only offer evidence from which proximate cause may be reasonably inferred” (*Burgos*, 92 NY2d at 550). The court finds that it is not reasonable to infer that the lapses in security identified by plaintiff proximately caused her injuries.

Plaintiff submits that the Common Ground Defendants’ policy of providing supportive housing for “hard-to-place tenants (i.e., tenants like James Sacco, who have mental illness and a history of violence) . . . [on] the exact same tenancy terms as the general population” was a substantial cause (NYSCEF Doc No. 112, plaintiff’s affirmation in opposition, ¶ 33). Plaintiff complains that Common Ground and CUCS should not have accepted Sacco’s tenant application given his prior history. A “[p]roximate cause analysis incorporates a ‘test of temporal duration,’ which asks if ‘the occurrence of the injury [was] tied to the claimed negligent act or omission within a reasonable lapse of time’” (*Williams v State of New York*, 18 NY3d 981, 984 [2012], *rearg denied* 19 NY3d 956 [2012] [internal citation omitted]). Here, over nine years had lapsed since the start of Sacco’s tenancy and the incident, and during that time, Sacco did not exhibit any outward manifestations of any violent tendencies or propensities (*see Gill v New York City Hous. Auth.*, 130 AD2d 256, 260 [1st Dept 1987] [stating that “[t]he fact that [the assailant] eventually became dangerous does not mean that he was always dangerous or that his impending dangerousness was reasonably foreseeable by defendant”]). Plaintiff’s conclusory assertion that Sacco was in declining mental health, as evidenced by the poor conditions of his apartment, is not supported.

Likewise, plaintiff’s assertion that it was Common Ground’s responsibility to remove Sacco from the Facility through eviction lacks merit. “A landlord has no duty to prevent one tenant from attacking another tenant unless it has the authority, ability, and opportunity to control the actions of the assailant” (*Britt v New York City Hous. Auth.*, 3 AD3d 514, 514 [2d Dept 2004]

[collecting cases]), and a landlord's "power to evict . . . [is not] 'a reasonable opportunity or effective means' to prevent or remedy . . . [a tenant's] unacceptable conduct" (*Blatt v New York City Hous. Auth.*, 123 AD2d 591, 593 [2d Dept 1986], *lv denied* 69 NY2d 603 [1987] [internal citations omitted]). To the extent that Common Ground had commenced an eviction proceeding against Sacco prior to the incident, the bases for that proceeding concerned the state of Sacco's unit and his nonpayment of rent, and not from any allegedly violent behavior towards others.

Next, plaintiff complains that the lack of internal security measures at the Facility, such as surveillance cameras, a locked door or restricted access to CUCS's office, and additional panic buttons was another substantial cause. However, plaintiff has not shown that it was "a foreseeable consequence of the lapse that . . . [Sacco] will take advantage of the opportunity to conduct an attack while the danger of being observed is minimal" (*Gibbs*, 256 AD2d at 267). Contrary to plaintiff's contention, surveillance cameras were placed in each hallway, and Adams described viewing the surveillance video that showed Sacco entering and leaving CUCS's office. Sacco was one of plaintiff's clients, and restricting Sacco's access to CUCS's office would have defeated Common Ground's and CUCS's mission of providing social services to the Facility's residents. Furthermore, plaintiff has not demonstrated how a panic button in her office, a reconfiguration of the furniture layout in her office, or additional office or training protocols "would have deterred" Sacco from attacking her (*Faughey*, 149 AD3d at 419 [internal quotation marks and citation omitted]).

Lastly, given the brevity of the incident, plaintiff has not demonstrated, short of having "a security officer posted at the precise location where the incident took place," that the incident could have been prevented (*Maheshwari*, 2 NY3d at 295; *see also Waldon*, 1 NY3d at 614 [stating that the defendant could not have intervened to assist the plaintiff "due to the suddenness of the attack"]).

Consequently, the Common Ground Defendants' motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed against them.

D. The Complaint Against Sacco

CPLR 3215 (c) mandates dismissal of the complaint “[i]f the plaintiff fails to take proceedings for entry of judgment within one year of the default,” and the statute authorizes the court to “dismiss the complaint as abandoned, without costs, upon its own initiative or on motion.” Since the transfer of venue of this action from Bronx County to New York County in 2014, plaintiff has not taken any steps for a default judgment against Sacco. Accordingly, the complaint against him is dismissed as abandoned (*see Perricone v City of New York*, 62 NY2d 661, 663 [1984]).

E. Third-Party Complaint against CUCS and AlliedBarton

Because the primary complaint is dismissed, the court need not address the merits of AlliedBarton's and CUCS's motions for summary judgment dismissing the third-party complaint (*see Turchioe v AT&T Communications*, 256 AD2d 245, 246 [1st Dept 1998] [dismissing the third-party actions and cross claims “as a necessary consequence of dismissing the complaint in its entirety]).

Accordingly, it is hereby

ORDERED that the motion of third-party defendant AlliedBarton Security Services, LLC for summary judgment dismissing the third-party complaint (motion sequence no. 001) is denied as moot; and it is further

ORDERED that the motion of third-party defendant Center For Urban Community Services, Inc. for summary judgment dismissing the third-party complaint (motion sequence no. 002) is denied as moot; and it is further

ORDERED that the motion of defendants City of New York, the City of New York, New York City Department of Health and Mental Hygiene, New York City Department of Homeless

Services, New York City Human Resources Administration, Department of Social Services, Adult Protective Services, Common Ground Community II HDPC, and Prince George Associates, L.P. for summary judgment (motion sequence no. 003) is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

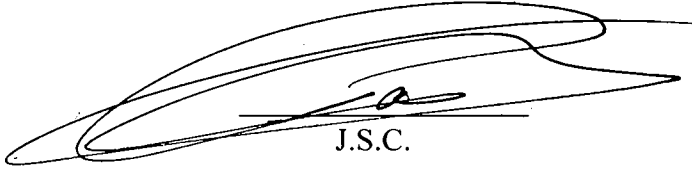
ORDERED that the complaint against defendant James Sacco is dismissed as abandoned; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: January 23, 2019

ENTER:



J.S.C.