At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of October, 2019.

PRESENT:

HON. DAWN M. JIMENEZ-SALTA,
Justice.

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LAILA SARA, as Administrator of the Goods, Chattels and Credits to the Estate of AHMAD SARA, deceased,

Plaintiff,

- against-

Index No. 507197/2017
Motion Seq. 3

KALLIOPI NOTIAS, STAVROS G. NOTIAS,

Defendants.

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KALLIOPI NOTIAS and STAVROS G. NOTIAS,

Third-Party Plaintiffs,

-against-

HUSSEIN SARA and SAMIR SARA,

Third-Party Defendants.

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The following papers numbered 1 to 9 read herein: Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4-8
Reply Affidavits (Affirmations)	9

Upon the foregoing papers, defendants Kalliopi Notias and Stavros G. Notias (Notias Defendants) move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the complaint and any counterclaims asserted against them.

Background

Ahmad's Death

The decedent, Ahmad Sara (Ahmad), was a twenty-three-year-old, non-verbal male with active autistic disorder, an intellectual disability and anxiety disorder. Ahmad resided with his mother, Najah Sara,[1] and his brothers, Hussein and Samir Sara, in Unit 6 on the second floor of the 4-story, 20-unit, walk-up apartment building located at 6823 Ridge Boulevard in Brooklyn (Building). The Building, which was built in 1917, has been owned by the Notias Defendants since 1988.

According to the affidavit testimony of Ahmad's brother, Hussein, "Ahmad had to have someone with him 24 hours a day and could not be left alone." Hussein further attested that Ahmad "liked to wander" so he installed an extra lock on the inside of the apartment, which required a key to open the apartment door. Hussein also attested that "[d]espite our precautions, on many occasions Ahmad would escape the apartment and run out to the local deli for candy, or up to the roof, where he would run in circles clapping and humming."

On May 4, 2015, at approximately 10:50 a.m., Ahmad died when he fell from the roof of the Building, and was found naked, lying face up on the sidewalk in front of the Building.

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[1] Najah Sara post-deceased her son, Ahmad, on September 11, 2015.

According to the police report, detectives determined that the incident did not involve a crime because Ahmad "appears to have voluntarily jumped from roof of [the] location."

The Instant Action

On January 27, 2017, Laila Sara, Ahmad's sister and Administrator of his Estate (Laila), commenced this action against the Notias Defendants by filing a summons and a verified complaint. Laila subsequently filed a supplemental summons and an amended complaint asserting a single cause of action against the Notias Defendants for negligence. The amended complaint alleges, in part, that:

> "the door to the roof of the Subject Premises was not properly equipped or secured with any alarm or other warning device, or that any such device was not properly installed or working to notify tenants, occupants and others that the door to the roof was opened or to deter persons, including Decedent, from accessing and traversing the roof of the Subject Premises
>
> "Defendants herein, their agents, servants, employees, contractors and/or licensees, breached one or more of the duties owed to the plaintiff in failing to properly equip, secure and/or maintain alarms at the door to the roof of the Subject Premises" (amended complaint at ¶¶ 31-32).

On or about July 31, 2017, the Notias Defendants answered the amended complaint, denied the material allegations therein and asserted affirmative defenses.

The Notias Defendants subsequently filed a third-party summons and complaint against Ahmad's brothers, Hussein and Samir Sara, asserting a single claim for contribution. The third-party complaint alleges that Hussein and Samir Sara "negligently cared for and watched the decedent . . ." (third-party complaint at ¶¶ 9-10). Hussein and Samir Sara

answered the third-party complaint, denied the material allegations therein and asserted affirmative defenses.

Thereafter, discovery ensued. On January 14, 2019, Laila filed a note of issue and certificate of readiness indicating that discovery had been completed.

The Notias Defendants' Summary Judgment Motion

The Notias Defendants now move for summary judgment dismissing the amended complaint on the ground that they did not owe any duty to Laila or to Ahmad, the decedent. Specifically, the Notias Defendants argue that they "had absolutely no duty to have a working alarm on the roof door . . . and defendants were mandated by applicable law to keep the roof door open from the inside so that people could access the roof in an emergency." The Notias Defendants further argue that:

> "the sole proximate cause of this accident was the Sara family tenants[']] failure to have an alarm on the apartment door to notify them that the decedent had gotten out of the apartment and the blatant failure to lock the extra locks that were put on the door prior to the incident to prevent the decedent from getting out on his own."

The Notias Defendants submit an expert affidavit from Robert L. Grunes, a professional engineer, who explains that "the Tenement House Law of 1901 . . . requires that: 'no bulkhead door shall at any time be locked with a key . . . but may be fastened on the inside by movable bolts or hooks.'" Grunes opines that "[t]he bulkhead, roof door and roof complied with the relevant governing provisions of the edition of the NYC Building Code contemporaneous with the subject incident via the effective 'grandfather clause.'" Grunes

further explains that "there is no current Building Code requirement that a roof bulk head door have an audible alarm to deter persons from entering onto the roof or purportedly to notify tenants that someone has gone onto the roof." Lastly, Grunes questions whether Ahmad actually fell from the roof (as the police concluded) as opposed to the fourth floor fire escape, given the trajectory of the fall and the location where Ahmad's body was found.

Laila's Opposition

Laila, in opposition, argues that the Notias Defendants failed to make a prima facie showing of their right to summary judgment. Laila contends that:

> "the landlords had years of actual notice that the roof door security was faulty because the roof door could be pushed open without the security alarm sounding, that Ahmad Sara was mentally challenged . . . and ignored the complaints of the decedent's mother and brother Hussein, and did not appreciate [the] danger, that the easily accessible and unsecured roof was an attractive hazard to him."

Laila argues it was the "landlords' own responsibility to maintain their property in a safe and habitable condition . . ." and "[a] landlord's duty to its tenants is not limited to the parameters of the building code." Laila also asserts that "[a] landlord is liable for personal injuries caused in whole or part by unsafe conditions where it has actual or constructive notice of the defect, even if the appurtenances were provided gratuitously." Laila submits an affidavit from Hussein Sara, who attests that:

> "I believe that had Ahmad been required to both turn the knob and push the push-bar, as designed, he could not have accessed the roof and would never have fallen. At the least, had the alarm gone off when Ahmad pushed open the roof door, I would have been able to reach him in time and retrieve my brother before his fatal fall."

The Notias Defendants' Reply

The Notias Defendants, in reply, assert that the Sara family's "failure to undertake the simple task of locking the extra locks they put on the door or to install an alarm on the apartment door . . . is tantamount to gross negligence or willful disregard of [Ahmad's] life and safety and *was the sole proximate cause* of this accident" (emphasis added). The Notias Defendants further argue that Laila's claim against them is speculative because there is no definitive proof that Ahmad fell from the Building's roof rather than from a fire escape. Additionally, the Notias Defendants assert that "no liability could be imposed . . . for [Ahmad's] random act of suicide."

Discussion

Summary judgment is a drastic remedy and should be granted only when it is clear that no triable issues of fact exist (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The moving party bears the burden of prima facie showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material issue of fact (*see* CPLR 3212 [b]; *Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). Making a prima facie showing then shifts the burden to the opposing party to produce sufficient evidentiary proof to establish the existence of material factual issues (*see Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Accordingly, issue-finding rather than issue-determination is the key in deciding a summary judgment motion (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404,

[1957], *rearg denied* 3 NY2d 941 [1957]). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not resolve such issues" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]).

"Embedded in the law of this State is the proposition that a duty of reasonable care owed by the tortfeasor to the plaintiff is elemental to any recovery in negligence" (*Eiseman v State*, 70 NY2d 175, 187 [1987]). An owner of real property owes a duty to maintain the property in a reasonably safe condition and must warn of any dangerous or defective condition of which it has actual or constructive notice; however, a property owner has no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous (*Fishelson v Kramer Properties, LLC*, 133 AD3d 706, 707 [2015]). A condition is not "inherently dangerous" if it was "readily observable by reasonable use of one's senses" (*Casey v Clemente*, 31 AD3d 361, 362 [2006]). Thus, to impose premises liability, there must be evidence that a "dangerous condition existed and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" (*Davis v Rochdale Vil., Inc.*, 63 AD3d 870, 870-871 [2009], citing *Gordon v American Mus. of Nat. Hist.*, 67 NY2d 836 [1986] and *Moody v Woolworth Co.*, 288 AD2d 446 [2001]).

"A landlord is not an insurer of tenant safety" (*Banner v New York City Hous. Auth.*, 94 AD3d 666, 667 [2012]). However, "'[a] landowner must act as a reasonable [person] in maintaining his 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'" (*Romano v Omega Moulding Co. Ltd.*, 57 AD3d 873, 874 [2008], quoting *Peralta v Henriquez*, 100 NY2d 139, 144 [2003] and *Basso v Miller*, 40 NY2d 233, 241 [1976]; *see also Cupo v Karfunkel*, 1 AD3d 48, 51 [2003]).

Importantly, "there is no duty on the part of a landlord to prevent access to the roof" (*Parra v 648 Grand St. Hous. Dev. Fund Corp.*, 40 Misc 3d 1224 [A], *7 [Sup Ct Kings County 2013]). To the contrary, pursuant to Multiple Dwelling Law § 104 (1), "a landlord is prohibited from securing a roof door such that it cannot be opened from the inside" (*id.*; *see also Banner*, 94 AD3d at 667 [holding that "defendant was required to keep the door to the roof unlocked for fire safety purposes" citing Multiple Dwelling Law § 104]).

Here, Laila does not dispute that there is no regulation or statute that required the Notias Defendants, as the owners of the Building, to install a special lock or alarm on the door to the roof of the Building. In support of their motion, the Notias Defendants tendered the affidavit of a professional engineer, who opined that the door to the roof of the Building as constructed and maintained conformed with all applicable building codes. Indeed, the Notias Defendants were statutorily required to keep the door to the roof unlocked for fire safety purposes, pursuant to Multiple Dwelling Law § 104.

Laila's claim that if the alarm had sounded the Sara family would have heard the alarm and retrieved Ahmad from the roof before he fell is rejected as pure speculation (*see Santiago v Quattrociocchi*, 91 AD3d 747, 748 [2012] ["The affidavit of the plaintiffs' expert

submitted in opposition to the motion was speculative and insufficient to raise a triable issue of fact")]. Contrary to Laila's contention, there is no evidence connecting any alleged failure to maintain the alarm on the roof door to Ahmad's fall from the roof of the Building. Furthermore, the absence of a working alarm on the door to the roof of the Building does not constitute an inherently dangerous condition warranting premises liability. Accordingly, it is

ORDERED that the Noticia Defendants' summary judgment motion is granted, and the amended complaint is hereby dismissed.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Hon. Dawn Jimenez-Salta

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