SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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EILEEN CULLEN,

Plaintiff,

- v -

HENRY PHIPPS PLAZA EAST, INC. and FJC SECURITY SERVICES, INC.,

Defendants.

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INDEX NO. 158589/2014

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action commenced by plaintiff Eileen Cullen, defendants Henry Phipps Plaza East, Inc. ("Phipps") and FJC Security Services, Inc. ("FJC") move for summary judgment dismissing the complaint. Plaintiff opposes the motion. After a review of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

In her complaint, plaintiff alleged that, on May 17, 2014 she was assaulted while visiting her nephew, Kevin Cullen ("Kevin"), at his apartment at 485 First Avenue in Manhattan ("the building" or "the premises"). The building was owned by Phipps, which contracted with FJC to provide security at the premises. Plaintiff claimed that the attack occurred due to the negligence of the defendants in their ownership, operation, management, repair, maintenance, supervision, security and control of the premises.

The FJC security guards wore uniforms, were unarmed, and their contracted duties included routine patrols of exterior and perimeter common areas; enforcement of pre-established property regulations; interior patrols to remove trespassing persons from the building; enforcement of parking regulations within the confines of the premises; responding to emergencies and resident complaints; interacting with first responders to criminal and/or medical emergencies; and notifying the operations center of any unusual occurrences, emergency situations and/or maintenance issues.

At approximately 5:30 pm on May 17, 2014, plaintiff was unexpectedly attacked in Kevin's apartment by Melissa Castillo ("Castillo"), who had a romantic relationship with Kevin, causing injury to her eye. Castillo had not been invited to the apartment by Kevin or plaintiff.

At her deposition, plaintiff testified that, on the night prior to the attack, she was at Kevin's apartment and overheard Castillo threatening her and Kevin on the phone, which was on speaker. Plaintiff also claimed that, prior to the incident, Kevin twice advised a black male security guard at the front desk that Castillo had threatened him and plaintiff and asked the guard not to allow Castillo into the building. Doc. 82 at 40-44. Specifically, plaintiff maintained that Kevin instructed the security guard "[d]on't buzz her in. We're not gonna buzz her in." Kevin believed that he spoke to a female security guard and could not recall whether it was before or after the attack. Despite plaintiff's testimony that Kevin told the guard not to buzz Castillo in, plaintiff admitted that she did not know whether the guard at the desk had the ability to buzz someone into the building.

In order to enter the building, one had to pass through a set of unlocked doors from the street that led into a vestibule. The doors allowing one to enter the lobby from the vestibule were always locked by an auto-locking mechanism. Arleen Otero, property manager of the premises,

testified at her deposition that one could only pass through the locked doors with a key or be buzzed in by a resident by use of an intercom located in the vestibule. Although Otero said that a security guard was posted at a desk in the lobby 24 hours per day, 7 days per week, the guard's sole responsibility was to monitor the security cameras in the building. The guard did not open the door for individuals who were unable to gain entry by using a key or the intercom, and there was no buzzer at the desk with which the guard could allow people in.

Nothing in the deposition testimony reflected, and plaintiff did not allege, that Castillo gained entry to the building due to a defective security system or that she was allowed in by the lobby security guard. According to Castillo, the guard at the lobby desk did not allow people into the building. That day, she was buzzed into the building after ringing Kevin's apartment from the intercom. After entering the building, Castillo walked past the security guard, took the elevator to Kevin's floor, and knocked on the door. Prior to opening the door, plaintiff and Kevin looked through the peep hole. Although Kevin did not see anyone in the hallway when he did so, plaintiff, Kevin and Castillo testified that Castillo was able to gain entry to the apartment when Kevin opened the door.

Defendants maintain that the lobby guard was to watch the security monitors located at the desk and do occasional patrols through the common areas and hallways to ensure that nobody was loitering or intruding in the building. Plaintiff represented that the security guard did not check IDs or sign visitors in.

Defendants now move for summary judgment, arguing that neither of them owed a duty to plaintiff and therefore are not liable for her injuries as a matter of law.

Summary judgment is a drastic remedy that should not be granted where there are doubts regarding triable issues of fact (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). To

prevail on a motion for summary judgment, the moving party must make a prima facie showing of its entitlement to judgment as a matter of law by demonstrating no issues of material fact remain (*See Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). To successfully establish a prima facie case of negligence, a plaintiff must demonstrate the defendant owed a duty, breached that duty, and that the breach proximately caused the plaintiff's injury (*See Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301 [1st Dept 2001]). When evaluating motions for summary judgment, the court must view the facts in a light most favorable to the non-moving party (*See Jennack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]). Once the moving party has demonstrated its prima facie entitlement to judgment, the burden shifts to the non-moving party to demonstrate by admissible evidence remaining material issues of fact requiring a trial (*See Jacobson v New York City Health v Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Before a party may be found negligent, it must owe a duty to the injured party. (*See Espinal v Melville Snow Contractors Inc.*, 98 NY2d 136, 137 [2002] ["Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party"]). Since there is no contractual obligation owed by Phipps to plaintiff, negligence may only be found if the defendant breached a common law duty to plaintiff.

A landowner is not an insurer of safety (*Wayburn*, 282 AD2d 301 at 303). It is well established that "[l]andlords have a common law duty to take minimal security precautions to protect tenants from foreseeable harm, including a third party's foreseeable criminal conduct." (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 548 [1998] [citation omitted]; *see also*

Carasquilo v Macobs Vill. Associates, 99 AD3d 455, 456 [1st Dept 2012] ["duty to take minimal security precautions to protect plaintiff from the criminal acts of third-party intruders and as to whether any such failure was the proximate cause of the attack upon plaintiff]; *Pappaldaro v New York Health & Racquet Club*, 279 AD2d 134, 141 [1st Dept 2000] ["a landowner is under a duty to maintain its property in a reasonably safe condition…and the burden of avoiding the risk common law negligence extends to third parties"]; *Wayburn*, 282 AD2d 301 at 303 ["A landlord has a common-law duty to take minimal security precautions to protect tenants and members of the public from the foreseeable criminal acts of third parties"]).

While a heightened duty to provide security may be imposed on a landlord if there is a history of crime on the premises, the lowest minimal security duty required of a landlord is a functioning locking entrance door (*See Jacqueline S. v City of New York*, 81 NY2d 288, 295 [1993] [the most rudimentary security a residential building must supply is locks for the entrances]; *M.D. v Pasadena Realty Co.*, 300 AD2d 235, 237 [1st Dept 2002] ["landlord's compliance with its duty to take minimal security precautions to protect tenants living in the building has been established" due to little evidence of criminal activity and the fact that the electric door lock was functioning on the day of the assault]; *Batista v City of New York*, 108 AD3d 484 [1st Dept 2013] [landlord was not responsible for plaintiff's injury by third party unless it failed to provide "even the most rudimentary security" such as an entry door lock]).

Here, the motion papers do not indicate that there was a history of criminal activity at the premises. Phipps installed an intercom system, locking doors and hired security guards to monitor the building. Thus, Phipps fulfilled its common law duty to provide minimal security precautions at the premises (*See James v Jamie Towers Housing Co., Inc.*, 99 NY2d 639, 641 [2003] ["by providing locking doors, an intercom service and 24-hour security, [the building

owner] discharged its common-law duty to take minimal security precautions against reasonably foreseeable criminal acts by third parties"]; *Anchumdia v Tahl Propp Equities, LLC*, 123 AD3d 505, 505 [2014] [defendants "satisfied their duty to provide minimal security precautions by providing locking doors, video cameras monitoring the front entrance and the lobby, and an unarmed security guard who monitored the entire building"]).

There is no evidence that the security precautions at the front entrance were deficient in any way. Plaintiff and Kevin testified at their depositions that the lock on the door to the lobby was functioning on the day of the incident and that a security guard was always at the front desk. There is no indication that Castillo entered the building through a negligently maintained entrance or alternative entrance (*See Mason v UESS Leasing Corp.*, 274 AD2d 79, 80 [1st Dept 2000] ["in premises security cases…the necessary causal link between a landlord's culpable failure to provide adequate security and a tenant's injuries resulting from a criminal attack in the building can be established only if the assailant gained access to the premises through a negligently maintained entrance"]). To be successful, the plaintiff must provide evidence "that the assailant was more likely than not an intruder" (*Laniox v. City of New York*, 170 AD3d 519, 520 [1st Dept 2019]), rather than a tenant or an invitee. Castillo's unrefuted deposition testimony indicates that she was buzzed in by a resident, in accordance with the building's security protocols.

Additionally, Phipps did not proximately cause plaintiff's injuries. "No duty may be imposed on a defendant to prevent a third party from causing harm to another unless the intervening act which caused the harm was a normal, foreseeable consequence of the situation created by defendant's negligence." (*Engle v Eichler*, 290 AD2d 477, 479 [2nd Dept 2002]). As noted previously, there is no indication the security measures in place at the time of the incident

were insufficient in any way. Castillo had visited the building on multiple prior occasions and there was no history of violence between she and Kevin about which defendants were aware (*See Flynn v Esplanade Gardens, Inc.*, 76 AD3d 490 [1st Dept 2010] [landlord not negligent for a targeted attack on a resident of its building by a visitor where neither it nor its hired security staff had reason to anticipate such an occurrence]). While plaintiff maintains that the security guard should have checked IDs or had a sign in procedure at the front desk, a landowner is required to provide reasonable security measures, rather than "optimal [or] the most advanced security system available." (*Florman v City of New York*, 293 AD2d 120, 124 [1st Dept 2002]). Therefore, the complaint must be dismissed as against Phipps.

Similarly, FJC has established its prima facie entitlement to summary judgment as a matter of law. Prior to the alleged incident, on May 1, 2014, FJC contracted with Phipps to provide security guard services at the premises ("the agreement"). The agreement required FJC to provide "security service as specified in this [a]greement for the protection of all residents, agents, employees, guests and the real property now or hereafter owned, leased or possessed by [Phipps]." Doc. 76 at par. (A)(1). The agreement further provided, inter alia, that:

> IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY OR TO ANY OTHER PERSON OR ENTITY WITH RESPECT TO ANY SUBJECT MATTER OF THIS AGREEMENT, UNDER ANY EQUITY, COMMON LAW, TORT, CONTRACT, ESTOPPEL, NEGLIGENCE, STRICT LIABILITY OR OTHER THEORY, FOR ANY . . . INCIDENTAL, SPECIAL, CONSEQUENTIAL OR INDIRECT DAMAGES . . .

Doc. 76 at par. (A)(4)(c).

Additionally, paragraph (A)(5) of the agreement provided that "the conduct of the [g]uard[s] [are] to be guided by a set of [s]tandard [r]ules and such other written instructions

applicable to the services as may be issued by [Phipps] from time to time through its authorized representatives." Doc. 76 at par. (A)(5).

Plaintiff maintains that the agreement clearly imposed a contractual duty on FJC to protect plaintiff or, in the alternative, that if FJC did not owe such a contractual duty, then it assumed such a duty by assuring plaintiff and Kevin that Castillo would not be permitted into the building.

Initially, plaintiff was not an intended third-party beneficiary of the agreement between Phipps and FJC which, as noted above, contains a clause (Doc. 76 at par. [A][5]) specifically providing that it is not for the benefit of any third parties (*See Santiago v Kmart Corp.*, 158 AD3d 596 [1st Dept 2018] [citations omitted]).

Even if the agreement did not contain the provision limiting liability to third parties, FJC would not owe any duty to plaintiff. As noted above, in *Espinal v Melville Snow Contrs.,* the Court of Appeals held that "a finding of negligence must be based on a breach of a duty" and that "a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party." (98 NY2d 136 at 138 [2002] [citations omitted]). "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." (*Id.* [citation omitted]).

The Court of Appeals noted three exceptions to this rule:

> "in which a party who enters into a contract to render services may be said to have assumed a duty of care – and thus be potentially liable in tort – to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely."

(Id. at 140 [citations, internal quotation marks and alterations omitted]).

Here, none of these exceptions apply. Castillo testified that she was buzzed into the building and that the guard at the desk did not let her in. Additionally, Otero represented that the guard did not have the capability of buzzing people into the building. Thus, the guard cannot be deemed to have launched a force or instrument of harm.

Nor has plaintiff demonstrated that her alleged detrimental reliance on the guard gave rise to a duty owed to her by FJC. Initially, such reliance is not pleaded in the complaint or the bill of particulars (*See Espinal*, 98 NY2d at 141). Further, despite plaintiff's testimony that Kevin directed the guard not to allow Castillo into the building, she neither testified at her deposition that she relied on the guard's actions nor submitted an affirmation in opposition to defendants' motion to this effect (*See Santiago v Kmart Corp*., 158 AD3d at 596 citing *Espinal v Melville Snow Contrs*., 98 NY2d at 140). It is only in the affirmation of plaintiff's counsel that the issue of such reliance is specifically argued. Although plaintiff claims that the guard told her and Kevin that he knew who Castillo was and that he would not allow her into the building (Doc. 82 at 40-44), the guard's hearsay statements fail to raise a material issue of fact given that it is undisputed that an individual could only enter the building with a key or by being buzzed in and, thus, any inaction by the guard would not have placed plaintiff in a worse position than if there had been no security at all (*See Murshed v New York Hotel Trades Council & Hotel Association of New York City Health Center, Inc*., 71 AD3d 578, 579 [1st Dept 2010]).

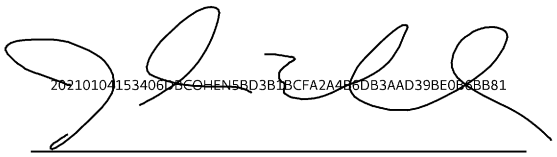
Finally, since the conduct of the guards was to be guided by instructions provided by Phipps (Doc. 76 at par. [A][5]), it is evident that FJC did not entirely displace Phipps' duty to maintain the premises safely. Therefore, plaintiff has failed to raise a triable issue of material fact and FJC is entitled to summary judgment dismissing the complaint.

The remaining contentions of the parties are either without merit or need not be addressed given the findings above.

Therefore, it is hereby:

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



1/4/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE