Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

x

MICHAEL BRATHWAITE,

Plaintiff,

- against -

NEW YORK CITY HOUSING AUTHORITY, THE CITY OF NEW YORK, AMERICAN SECURITY SYSTEMS, INC., SCOTT SECURITY SYSTEMS, INC., DOLUCE REALTY COMPANY,

Defendants.

x

Index Number 17410 2008

Motion Date October 6, 2010

Motion Cal. Number 4

Motion Seq. No. 7

The following papers numbered 1 to 23 read on this motion by defendants American Security Systems, Inc. (American Security Systems), Scott Security Systems, Inc. (Scott Security Systems), and Doluce Realty Company (Doluce Realty) for summary judgment dismissing the complaint against them and for attorney fees and costs against plaintiff Michael Brathwaite (plaintiff); on the cross motion by plaintiff for summary judgment and attorneys fees and costs against American Security Systems, Scott Security Systems, and Doluce Realty and for summary judgment against defendant/third-party plaintiff New York City Housing Authority (NYCHA); and on the cross motion by NYCHA for summary judgment dismissing the complaint against it.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-4
Notices of Cross Motion - Affidavits - Exhibits.....	5-12
Answering Affidavits - Exhibits.....	13-16
Reply Affidavits.....	17-23

Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

This is an action to recover for personal injuries plaintiff allegedly sustained as the result of an assault which took place on August 24, 2007. Plaintiff has alleged that he was injured by two assailants, third-party defendants Glenn Williams and Douglas Williams, while he was in the apartment of his girlfriend, third-party defendant Patsy Williams, whose apartment was in a building owned and maintained by NYCHA.[1] He has also alleged that Glenn Williams was on a "not wanted" list of individuals who were supposed to be prohibited from entering the subject premises and that an inoperative door lock at the front entrance of the building allowed Glenn Williams to enter. Plaintiff has further alleged that defendants American Security Systems, Scott Security Systems, and Doluce Realty were hired by NYCHA to provide security at the premises and that they negligently failed to provide adequate security, while NYCHA negligently maintained the premises, including the front door lock.

In support of the branch of the motion relating to summary judgment for Scott Security Systems and Doluce Realty, they have argued that neither of them had any involvement with the subject premises and that they did not owe a duty to plaintiff. "It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff" (*Pulka v Edelman*, 40 NY2d 781, 782 [1976]; *see Lynfatt v Escobar*, 71 AD3d 743, 744 [2010], *lv denied* 15 NY3d 709 [2010]).

Scott Security Systems and Doluce Realty have relied upon the testimony of Andria Yearwood (Yearwood), an employee of American Security Systems. Yearwood testified that neither Scott Security Systems nor Doluce Realty had any involvement in the affairs of American Security Systems, that Dolcue Realty owned the premises where American Security Systems maintained office space, and that Scott Security Systems was a company from which American Security Systems purchased assets. In light of this testimony, Scott Security Systems and Doluce

[1] The action was dismissed as against defendant The City of New York.

Realty have demonstrated that they had no involvement with the subject premises and that they did not owe a duty to plaintiff (*see Mojica v Gannett Co., Inc.*, 71 AD3d 963, 965 [2010]).

In opposition, plaintiff has failed to point to any evidence in the record to raise a triable issue of fact as to whether Doluce Realty owed him a duty of care. Plaintiff has argued that his counsel contacted counsel for Scott Security Systems and was awaiting evidence regarding the date at which Scott Security Systems sold assets to American Security Systems. These assets consisted of a contract with NYCHA to maintain the intercom system at the subject premises. Plaintiff has argued that, this evidence is necessary in order to determine the date that Scott Security Systems sold its contract with NYCHA to American Security Systems, and thus, whether Scott Security Systems may be liable to plaintiff. However, plaintiff's evidence, submitted in support of his cross motion and in opposition to the motion, contained a copy of correspondence between NYCHA and American Security Systems. This correspondence, regarding the contract between NYCHA and American Security Systems, along with Yearwood's testimony that American Security Systems entered into a contract with NYCHA in April 2006, has demonstrated that American Security Systems was responsible for its duties under the contract with NYCHA for at least a year prior to the incident. Thus, plaintiff has failed to raise a triable issue of fact as to whether Scott Security Systems owed a duty to plaintiff at the time of the incident or in the months prior to the incident. Therefore, Scott Security Systems and Doluce Realty are entitled to summary judgment.

In support of the branch of the motion relating to summary judgment for American Security Systems, American Security Systems has argued that it owed no duty to plaintiff, that plaintiff was not an intended third-party beneficiary to its contract with NYCHA, and that it did not create the alleged condition of the front door lock or have notice of it. "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" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). "Generally, a contractual obligation, standing alone, is insufficient to give rise to tort liability in favor of a noncontracting third party" (*Bienaime v Reyer*, 41 AD3d 400, 403 [2007]). However, there are "three situations 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"(*Espinal v Melville Snow Contrs.*, 98 NY2d at 140 [internal quotes and citations omitted]).

American Security Systems has relied upon, among other things, plaintiff's deposition testimony and the testimony of Yearwood. Plaintiff testified that he was in the apartment of Patsy Williams when Glenn and Douglas Williams assaulted him. He further testified that the front

entrance was the only entrance to the subject premises and that, on occasion, the front door lock was inoperative.

Yearwood testified that, as of January 2007, American Security Systems was responsible for repairing the intercom system at the subject premises only when requested by NYCHA to do so, that it was not responsible for surveillance at the premises, and that it was not responsible for repairing any doors at the premises. However, Yearwood testified that she did not know anything about how the intercom system functioned and that she did not know whether the intercom system was connected to the door locks at the premises. Thus, this evidence is insufficient for American Security Systems to demonstrate that it did not create the alleged condition of the front door lock. American Security Systems has also failed to demonstrate that none of the exceptions set forth in *Espinal v Melville Snow Contrs.*(98 NY2d at 140), applied in the instant case (*see Petry v Hudson Val. Pavement, Inc.*, 78 AD3d 1145, 1147 [2010]). While plaintiff has alleged in his complaint that the inadequacy of the electronic security measures implemented at the subject premises and the failure of the front door lock were proximate causes of his injuries, American Security Systems has failed to satisfy its prima facie burden of demonstrating that no triable issues of fact exist as to whether it exercised reasonable care in the performance of its duties under the contract or whether it may have launched a force or instrument of harm (*see Petry v Hudson Val. Pavement, Inc.*, 78 AD3d at 1147; *Bienaime v Reyer*, 41 AD3d at 403). American Security Systems may not meet its initial burden on this branch of its motion merely by pointing to the gaps in plaintiff's case (*see Pierre-Louis v DeLonghi Am., Inc.*, 66 AD3d 857, 859 [2009]). Therefore, plaintiff's opposition papers need not be considered (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

American Security Systems, Scott Security Systems, and Doluce Realty have also moved for attorney fees and costs against plaintiff in preparing the instant motion. 22 NYCRR 130-1.1 (a) permits costs in the form of reimbursement for expenses reasonably incurred and attorney's fees resulting from frivolous conduct as defined in that section (*see Glenn v Annunziata*, 53 AD3d 565, 566 [2008]; *Breslaw v Breslaw*, 209 AD2d 662, 663 [1994]). Frivolous conduct is defined as conduct that is "completely without merit in law," undertaken "primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another," or which "asserts material factual statements that are false" (22 NYCRR 130-1.1 [c] [1], [2], [3]). In determining if conduct was frivolous "the court shall consider . . . the circumstances under which the conduct took place" (22 NYCRR 130-1.1 [c]). Under the circumstances, American Security Systems, Scott Security Systems, and Doluce Realty have failed to demonstrate that plaintiff's maintenance of an action against them was frivolous conduct within the definition of 22 NYCRR 130-1.1. Thus, they are not entitled to attorney fees and costs against plaintiff.

While plaintiff has cross-moved for summary judgment against Scott Security Systems and Doluce Realty, in light of the above decision, plaintiff is not entitled to summary relief against them on his cross motion.

Plaintiff has also cross-moved for summary judgment against American Security Systems and has argued that American Security Systems had notice of the alleged condition of the front door lock and that the intercom system and front door lock were connected. In support of this branch of his cross motion, plaintiff has relied upon, among other things, his own affidavit and the affidavit of Robert Campbell (Campbell), a licensed locksmith. Campbell stated in his affidavit that he examined the front door lock at the subject premises in January 2010, over two years after the incident occurred. Thus, Campbell's affidavit does not demonstrate the condition of the front door lock and intercom system on the date of the incident and any of his conclusions as to the status of these mechanisms on the date of the incident is speculative (*see e.g. Leslie v Splish Splash at Adventureland*, 1 AD3d 320 [2003]).

Plaintiff stated in his affidavit that when he had visited the premises prior to the date of the incident, on occasion, the front door lock was inoperative, that he could gain entrance to the subject premises merely by pulling on the door, and that this alleged condition had existed for a period of approximately 2 ½ years prior to the incident. While his statements serve to satisfy his initial burden of demonstrating that American Security Systems may have had constructive notice of the alleged condition of the intercom system, and any connection it may have had to the front door lock, in opposition, American Security Systems has pointed to Yearwood's testimony which has raised a triable issue of fact, at least, as to whether American Security Systems had notice of the alleged condition (*see generally Shkolnik v Longo*, 63 AD3d 819, 820 [2009]). Yearwood testified that American Security Systems was not required to conduct inspections of the intercom system for the eight months preceding the incident under the terms of its contract with NYCHA, and that she was unable to locate any evidence that American Security Systems had received any requests for service of the intercom system from NYCHA during the eight-month period prior to the incident. Therefore, plaintiff is not entitled to summary relief on this branch of his cross motion against American Security Systems.

Plaintiff has also cross-moved for attorneys fees and costs against American Security Systems, Scott Security Systems, and Doluce Realty. As discussed above, 22 NYCRR 130-1.1 (a) permits costs and reasonable attorney's fees under certain circumstances. However, plaintiff has failed to demonstrated that American Security Systems, Scott Security Systems, and Doluce Realty have engaged in frivolous conduct, as defined in 22 NYCRR 130-1.1 [c] [1], [2] and [3]. Thus, plaintiff is not entitled to attorneys fees and costs against American Security Systems, Scott Security Systems, and Doluce Realty.

Plaintiff has cross-moved for summary judgment against NYCHA and has argued, among other things, that NYCHA's failure to maintain the front door lock at the subject premises proximately caused his injuries. A landlord is not the insurer of a visitor's safety on his or her premises (*see Dillman v Bohemian Citizens Benevolent Socy. of Astoria*, 227 AD2d 434, 435 [1996]; *Perry v New York City Hous. Auth.*, 222 AD2d 567, 568 [1995]). However, a landlord or landowner has a duty to maintain minimal security measures to protect against the foreseeable criminal acts of third parties (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 518-519 [1980]; *Logan v 530 W. 28th St., L.P.*, 48 AD3d 430 [2008]; *Daly v City of New York*, 227 AD2d 432 [1996], *lv denied* 89 NY2d 803 [1996]). "This duty of care extends to government entities acting in their proprietary capacity as landlords" (*Venetal v City of New York*, 21 AD3d 1087, 1088 [2005]), and is premised upon control over the premises (*see Daly v City of New York*, 227 AD2d at 433). A landlord's duty of care also extends to a guest of a tenant (*see Alvarez v Masaryk Towers Corp.*, 15 AD3d 428 [2005]). "A landlord may discharge its duty of care by providing functioning self-locking doors or other security devices at the entranceway to the building" (*Venetal v City of New York*, 21 AD3d at 1089).

In support of this branch of his cross motion, plaintiff has relied upon, among other things, his own affidavit, a copy of a police report, and copy of a stipulation between Patsy Williams and NYCHA. However, plaintiff has failed to present competent evidence in admissible form to demonstrate that his assailants gained entry to the subject premises on the date of the incident through a negligently maintained entrance (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 551 [1998]; *Alvarez v Masaryk Towers Corp.*, 15 AD3d at 428-429; *see e.g. Snipe v Hennie*, 11 Misc3d 1075[A] [2006]), and he has failed to present evidence that the front door lock was inoperable on the date of the incident. Thus, inasmuch as an issue of fact exists, at least, as to whether NYCHA's alleged negligence was a proximate cause of plaintiff's injuries, plaintiff has failed to satisfy his initial burden on this branch of his cross motion and he is not entitled to summary relief against NYCHA.

NYCHA has cross-moved for summary judgment dismissing the complaint against it and it has argued, among other things, that it did not owe a duty protect plaintiff from the criminal acts of another tenant because they had no reasonable opportunity to control the aggressors. However, NYCHA has failed to demonstrate that Glenn Williams was a tenant at the premises whom they had no authority to control. In fact, the evidence in the record has demonstrated that Glenn Williams may have been on a "not wanted list" prepared by NYCHA and that he was supposed to be excluded from the premises.

Furthermore, NYCHA has submitted a copy of a police report which detailed Glenn Williams' prior shooting of another individual at a building adjacent to the subject premises and it has admitted that Glenn Williams was excluded from the apartment of Patsy Williams because of that prior crime. "There is no requirement that the prior criminal activity be of the same type

as that to which the plaintiff was subjected in order to establish foreseeability of the plaintiff's injury, but the court must consider 'the location, nature and extent of those previous criminal activities and their similarity, proximity or other relationship to the crime in question'" (*Neil v New York City Hous. Auth.*, 48 AD3d 767, 769 [2008], *quoting Jacqueline S. v City of New York*, 81 NY2d 288, 295 [1993]; *see Venetal v City of New York*, 21 AD3d at 1089). In light of the evidence submitted by NYCHA, it has failed to demonstrate that it did not have notice of criminal activity involving Glenn Williams in close proximity to the subject premises and that the incident was not foreseeable based upon that prior crime (*see Neil v New York City Hous. Auth.*, 48 AD3d at 768-769).

NYCHA has also argued that negligent security was not a proximate cause of plaintiff's injury because Glenn Williams was not an intruder. "If a tenant or [the] guest [of a tenant] is assaulted by an intruder, recovery against the landlord requires a showing that the landlord's conduct was a proximate cause of the injury" (*Alvarez v Masaryk Towers Corp.*, 15 AD3d at 428-429). However, NYCHA has failed to eliminate all material issues of fact, as least, as to whether Glenn Williams did or did not gain entrance to the building through a negligently maintained entrance. While NYCHA has also argued that any negligence on its part was not a proximate cause of the incident and that additional security measures would not have prevented the assault, it has failed to point to any evidence in the record to support its contention that Glenn Williams was in possession of a key or was permitted to enter the premises by another tenant. Moreover, based upon the evidence in the record that Glenn Williams was excluded from entering the premises and NYCHA's conflicting argument that he was an individual who had a right to enter the premises, NYCHA has failed to demonstrate whether Glenn Williams was or was not an intruder who gained access through a negligently maintained entrance on the date of the incident, and the opposition papers need not be considered (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

Accordingly, the branch of the motion by American Security Systems for summary judgment is denied. The branch of the motion by Scott Security Systems and Doluce Realty for summary judgment is granted. The branch of the motion by American Security Systems, Scott Security Systems, and Doluce Realty for attorney fees and costs against plaintiff is denied. The branch of plaintiff's cross motion for summary judgment against Scott Security Systems, Doluce Realty and American Security Systems is denied. The branch of plaintiff's cross motion for attorneys fees and costs against American Security Systems, Scott Security Systems, and Doluce Realty is denied. The branch of plaintiff's cross motion for summary judgment against NYCHA is denied. The cross motion by NYCHA for summary judgment is denied.

Dated: January 26, 2011

J.S.C.