APL-2021-00179

New York County Clerk's Index No. 158442/2012
Appellate Division, First Department Case No. 2020-01722

Court of Appeals

STATE OF NEW YORK

In the Matter of TAYSHANA MURPHY
by its Administratrix, TEPHANIE HOLSTON,

Plaintiff-Appellant,

against

THE NEW YORK STATE HOUSING AUTHORITY,

Defendant-Respondent,

(Caption Continued on the Reverse)

BRIEF FOR *AMICI CURIAE* THE DEFENSE ASSOCIATION OF NEW YORK, INC. AND THE DRI CENTER FOR LAW AND PUBLIC POLICY IN SUPPORT OF DEFENDANT-RESPONDENT

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Date Completed:November 17, 2022

and

TYSHAWN BROCKINGTON, ROBERT CARTAGENA,
and CLC COMMUNICATIONS INC.,

Defendants.

THE NEW YORK CITY HOUSING AUTHORITY,

Third-Party Plaintiff,

against

TERIQUE COLLINS,

Third-Party Defendant.

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Corporate Disclosure Statement for DANY

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

Corporate Disclosure Statement for the DRI Center for Law and Public Policy

The DRI Center for Law and Public Policy is the public policy advocacy voice of DRI, Inc., a not-for-profit corporation that has no parent companies, subsidiaries or affiliates.

Preliminary Statement

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. (hereinafter "DANY") and the DRI Center for Law and Public Policy (hereinafter "the Center") as amici curiae in relation to the appeal which is before this Court in the above-referenced action.

DANY'S Mission Statement

DANY is a specialty bar association created to promote continuing legal education, diversity and justice for all in the civil justice system.

DRI'S Statement of Interest

The DRI Center for Law and Public Policy is the public policy and advocacy voice of DRI, an international membership organization composed of more than 14,000 attorneys, corporations, and in-house counsel involved in the defense of parties in civil litigation. The Center's mission includes promoting appreciation of the role of defense lawyers in the civil justice system, addressing substantive and procedural issues germane to defense lawyers and their clients, improving the civil justice system, and preserving the civil jury. To help foster these objectives, DRI and the Center participate as amicus curiae in carefully selected appeals presenting questions that are of national importance to civil

defense attorneys, their clients, and the conduct of civil litigation. This is just such a case.

DRI'S Mission Statement

DRI is committed to: enhancing the skills, effectiveness, and professionalism of defense lawyers; anticipating and addressing issues germane to defense lawyers and the civil justice system; promoting appreciation of the role of the defense lawyer; improving the civil justice system and preserving the civil jury; and seeking out and embracing the innumerable benefits and contributions a diverse membership provides.

DANY and DRI Respectfully Request an Affirmance

As this Court is aware, the unfortunate underlying incident was part and parcel of an ongoing violent altercation between two groups of people which culminated in the intentional and vicious murder of plaintiff's decedent at an apartment building operated by defendant-respondent. The perpetrators were tried and convicted of murder.

DANY and DRI respectfully submit that to hold an owner liable for an unforeseeable and targeted attack by assailants with murderous intent would expose landlords in this State to insurer-type liability as virtually no lock, security camera, or other minimum safety device would have prevented these

assailants from committing the heinous murder which gives rise to the instant action. To require a property owner to prevent injuries to the victims of targeted attacks would require a standard greater than the minimum currently required of a reasonable property owner. Negligence cannot be presumed from the mere happening of an accident, and owners must act reasonably and are not guarantors of safety of what happens on their property. See, Basso v. Miller, 40 N.Y.2d 233 (1976). The deleterious ramifications on property owners and municipalities in New York State if this Court finds they are liable for the unforeseeable and intentional criminal acts of trespassers over whom they do not control will increase the likelihood of unlimited or insurer-like liability (see Pasternack v. Lab. Corp. of Am. Holdings, 27 N.Y.3d 817, 825 (2016)), resulting in higher premiums, and eventually higher rents and taxes.

DANY and DRI further respectfully submit that, for the foregoing reasons, as well as the further arguments which are set forth in this brief, there should be an affirmance.

Statement of Facts

The targeted attack on Plaintiff's Decedent.

In the early morning hours of September 11, 2011, Robert Cartagena and Tyshawn Brockington entered 3170 Broadway, a building in the General Grant Houses, a housing development owned and operated by the New York City Housing Authority ("NYCHA"). (R. 107, 116, 858, 1206-07)(References are to the Record on Appeal). The two entered the building through an exit door that was not functioning properly, but in full view of multiple cameras that were monitored 24 hours a day, seven days a week by the Video Interactive Patrol Enhance Response ("VIPER") unit of the 26th Precinct, a unit dedicated to closed circuit monitoring of the Grant Houses. (R. 746-50, 857-58, 1206-07) Cartagena and Brockington were following six young people, five males and one female, who had run into the building moments before. (R. 213-14, 853-54) Neither Cartagena nor Brockington accosted or attacked the people congregated outside the building's entrance. (R. 810, 819, 997, 1118, 1531)

The six young people who ran into the building ahead of Cartagena and Brockington were Tayshana Murphy, plaintiff's decedent (aka Chicken) (R. 290), Robert Nelson (aka Poopa) (R. 793), Taylonn Murphy (Tayshana's younger brother, aka Bam) (R. 292), Eric Pierce (aka Bullet) (R. 786), Paul

Washington (aka Paulie) (R. 786-787), and Steven Reynoso. (R 953-954) Tayshana was wearing a bright red hoodie. (R. 214, 299) Nelson, Eric, and Steven testified at Cartagena's trial for Tayshana's murder. (R. 781-1004, 1048-1217, 1453-1702) They testified that after running into the lobby through the side door, the group came back to the doors and started taunting Cartagena and Brockington. (R. 950, 955-56, 1087, 1093, 1530) When Cartagena and Brockington kept coming, however, they all left the lobby.

A surveillance video of the lobby captured the sequence of events which took place over less than 90 seconds. Playlist_2012-8-22_2052 (the time stamp is about two and a half hours fast (R. 753)):

> 6:38:12 Tephanie Holston, Tayshana's mother, identifies the exit or "side" door which is propped open on the right side of the frame (R. 213)
>
> 6:38:15 Nelson identifies Tayshana, himself, Taylonn, Eric, Paul, and Steven running into the lobby through the "side" door. (R. 853-54)
>
> 6:38:21 "side" door closes without bouncing.
>
> 6:38:22 Steven, wearing the Hollister sweatsuit (R. 1481) and Paul reenter the frame and begin peering out through glass window panels.
>
> 6:38:28 Eric enters the frame pointing, saying he saw them. (R. 854)
>
> 6:38:30 Steven presses the button next to the "side" door before pushing the door open. (R. 2004)

6:38:34 Tephanie testifies the intercom door is located behind the pillar at the right side of the frame. (R. 214) A woman enters through the locked "intercom" door.

6:38:37 Nelson testified they were taunting Cartagena and Brockington (R. 855) Eric and Steven confirm that they were taunting Cartagena and Brockington. (R. 1093, 1530)

6:38:40 Tayshana reenters the frame then flees again with the other boys – Tephanie identifies her daughter in the frame. (R. 214) Eric testified they headed up the staircase. (R. 1094)

6:38:46 "side" door bounces upon closing indicating a malfunction. (R. 1975-76)

6:39:20 Two young men enter through the "side" door and head toward the stairs. Nelson identifies Brockington and Cartagena as the two men entering the lobby. (R. 858) Eric confirms, testifying that Brockington is on the left and Cartagena on the right. (R. 1206-07)

6:39:22 "side" door bounces again upon closing indicating a malfunction. (R. 1975-76)

Nelson testified that he and Taylonn took an elevator to the 15th floor where Tayshana and Taylonn lived with their family. (R. 784-86, 859) The woman that rode up with them got off on the ninth floor, and Nelson testified that when the elevator stopped, he heard gunshots. (R. 968-70) Eric and Steven testified that they ran up one of the stairwells with Tayshana, stopping on the fourth floor to get an elevator. (R. 1087, 1541) As they waited, Tayshana was watching the stairwell they had run up while Eric and Steven went to the other stairwell. (R. 1087, 1541-44) Eric testified that he heard Tayshana say "I'm not

with them," after which someone said "I don't give a fuck," followed by gunshots. (R 1088, 1096-97) He ran down the stairwell he was in and ran to his own building. (R. 1089) Steven testified that he heard Tayshana say "I didn't have nothing to do with it. I didn't have nothing to do with it." and then heard gunshots. (R. 1544) He ran upstairs to the 12th floor. (R. 1545) Tayshana was shot three times and died on the floor of the fourth-floor hallway. (R. 569, 616-17)

Earlier that evening, more than 10 Grant residents had chased Cartagena and his girlfriend Brittany Santiago and fought with Cartagena. (R. 1269-74) Brittany testified that even though she didn't see Tayshana throw anything or punch anyone, Tayshana was part of the crowd chasing them. (R. 1270, 1274-75) Nelson testified he saw Bryan and Isaiah (with Tayshana bring up the rear) chasing Cartagena and a female on the Manhattanville side of 125th Street near the seafood market. (R. 802-03) Eric testified that he was with Tayshana and they were among the group chasing, taunting, and fighting with Cartagena. (R. 1144, 1148, 1151, 1154) Steven testified that the group from Grant actually beat up Cartagena. (R. 1643-54)

Brittany testified that after the chase and fight Cartagena and Brockington met and exchanged stories of being attacked that night by people from Grant. (R.

1275-76) Cartagena then called Terique Collins (aka Streets). (R. 1276) After the call, she, Cartagena, and Brockington then walked over to Terique's apartment in 1420 Amsterdam Avenue where Terique handed Brockington a gun, the same 9mm semi-automatic handgun Brittany had carried across town after Cartagena and Terique purchased it that spring. (R. 1251-52, 1278-79)

Brittany testified that the four of them then left 1420 and walked to her apartment in 1305 Amsterdam. (R. 1281-1283) At her apartment, Cartagena and Brockington talked for a few minutes, then all three men left. Cartagena said, he "will be right back," and that "we are going to go smoke somebody." (R. 1283-84)

After Tayshana's death, Cartagena and Brockington fled to South Carolina where they were taken into custody by U.S. Marshals on September 21, 2011. (R. 1025-27) After a jury trial, Cartagena was convicted of second-degree murder and felony murder among other charges on April 1, 2014. (R. 1912-15) Tyshawn Brockington was also convicted of second-degree murder. (R. 1954)

Procedural History.

A notice of claim on behalf of Tayshana's estate was served on NYCHA on or about December 7, 2011. (R. 77-8) By summons and complaint filed November 30, 2012, Tephanie Holston, as adminstratrix of the Estate of

Tayshana Murphy, commenced an action to recover damages caused by the alleged negligence of NYCHA and the intentional acts of Cartagena, Brockington, and Terique Collins. (R. 104-11) In her bill of particulars, plaintiff alleged wrongful death damages and damages for Tayshana's conscious pain and suffering. (R. 165-74)

By notice of motion dated January 25, 2019, NYCHA moved for summary judgment dismissing plaintiff's claims against NYCHA. (R. 56-9) In support of its motion, NYCHA submitted, inter alia, portions of the Criminal Trial transcript of People v. Robert Cartagena, the deposition transcript of Tephanie Holston, and an affidavit of J. Lawrence Cunningham, a security management consultant. (R. 192-30, 239-1918, 1931-1938) NYCHA argued that it was not liable for the intentional, targeted attack by two men over whom it could not exercise control, that it reasonably maintained the premises, and that it had no notice of any unsafe condition.

In opposition to NYCHA's summary judgment motion, plaintiff submitted her affidavit reciting that the "side" door was an exit only door that never worked. (R. 1969-71) She submitted the deposition transcript of Robert Loomis as evidence that part of the repair work was never done and that NYCHA records were suspect. (R. 1252, 1987-2005) She also submitted the affirmation of Barry

Gasthaler, a licensed locksmith, who reviewed the surveillance video showing the boys activities in the lobby and offered his opinion that the bouncing exit door was proof that the electromagnetic door lock was not operating properly. (R. 1974-77) Gasthaler, however, failed to explain the door closing without bouncing when the group first entered the exit door that had been propped open (6:38:21) or Steven's pressing the button to open the exit door when he came back to go out the exit door (6:38:30). (R. 2004) Plaintiff contended that Tayshana was not the victim of a targeted attack because Cartagena and Brockington were not targeting Tayshana as opposed to the group of youths who attacked them or all the people in Grant Houses. (R. 30-2, 1948-49)

In reply, NYCHA argued that plaintiff failed to offer any evidence that the murderous attack on Tayshana was anything but an attack targeting the six youths who ran after disrespecting them. (R. 2025-27) NYCHA also argued that plaintiff's attack on the records submitted to show regular inspections of the doors did not negate that documentary evidence. (R. 2029-31) NYCHA additionally argued that since the last inspection of the door was sometime before 1:30 p.m. on September 10 and the incident took place around 4:00 a.m. the next morning, there was no evidence that NYCHA failed to repair the door

within a reasonable time after it had notice of the failure of the door. (R. 2028-29)

The Supreme Court's Decision.

The trial court dismissed plaintiff's complaint after oral argument, finding that Tayshana Murphy was the victim of a targeted attack which severed any causal link between NYCHA's alleged negligence and her death. (R. 45-51, 53) The court also found that NYCHA met its burden of showing it had no notice of the allegedly defective door and that plaintiff failed to offer admissible evidence to rebut that showing. (R 51-4)

Notice of entry of the order of dismissal is dated September 6, 2019. (R. 9) Plaintiff's notice of appeal is also dated September 6, 2019. (R. 2-7)

The Appellate Division, First Department's Order.

On appeal, the Appellate Division affirmed, by order dated April 13, 2021. Estate of Murphy v. NYCHA, 193 A.D.3d 503 (1st Dep't 2021). The First Department reasoned that because an owner is only required to take "minimal security precautions to protect tenants from foreseeable criminal acts of third parties," where minimal security precautions like a locked exit door would not have stopped Cartagena and Brockington from entering the building by other

means, the "assailants' murderous intent" was "the only proximate cause" of Tayshana's death. Id., 193 A.D.3d at 507, 509.

By order dated November 18, 2021, this Court granted plaintiff leave to appeal. Estate of Murphy v. NYCHA, 37 N.Y.3d 913 (2021).

Legal Argument

A Targeted Attack Is An Intervening Act That Severs Causation As A Matter Of Law

For well over 100 years this Court has held that the mere happening of an incident will not support an inference of negligence. See, Eaton v. New York Cent. & H.R.R.R. Co., 195 N.Y. 267 (1909). Here, there is no debate that the decedent's tragic death was the result of a targeted attack, carried out by assailants with what can unquestionably be described as *murderous intent*. Despite the undisputed fact that assailants over whom the NYCHA exercised no control perpetrated this unforeseeable, intentional act, Plaintiff seeks to hold the NYCHA - and every landowner in this State - as insurers of safety. The Appellate Division, First Department correctly upheld this State's precedent in dismissing Plaintiff's complaint because the clear targeted attack was an unforeseeable superseding intervening cause. Any argument that a functioning door lock or violation of the Administrative Code or Multiple Dwelling Law would have deterred the assailants hell-bent on committing this heinous assault is wholly without merit. To hold otherwise would impose a duty of care upon landowners that could not be satisfied as the mere happening of an assault on their property will result in liability, and this Court should affirm.

"In order to set forth a *prima facie* case of negligence, a plaintiff's evidence must establish (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury." Merino v. New York City Tr. Auth., 218 A.D.2d 451, 457 (1st Dep't 1996), aff'd, 89 N.Y.2d 824 (1996). "In the absence of duty, there is no breach and without a breach there is no liability." Pulka v. Edelman, 40 N.Y.2d 781 (1976). "The definition and scope of an alleged tortfeasor's duty owed to a plaintiff is a question of law." Pasternack v. Lab. Corp. of Am. Holdings, 27 N.Y.3d 817, 825 (2016); Sanchez v. State of New York, 99 N.Y.2d 247, 252 (2002); Di Ponzio v. Riordan, 89 N.Y.2d 578, 583 (1997). And courts "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability." Palka v. Servicemaster Mgt. Services Corp., 83 N.Y.2d 579, 586 (1994). Of note, "[e]vidence of negligence is not enough by itself to establish liability. It must also be proved that the negligence was the cause of the event which produced the harm . . ." Sheehan v. City of New York, 40 N.Y.2d 496, 501 (1976).

While it is well established that a property owner has a duty to keep 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 N.Y.2d 233, 241 (1976)), it is equally important to remember that a landowner is not the insurer of the safety of its tenants or visitors to the building, (see, Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 519 (1980)). Rather than act as an insurer, a landowner owes a duty to exercise reasonable care in maintaining its property in a reasonably safe condition. Galindo v. Town of Clarkstown, 2 N.Y.3d 633, 636 (2004). To that end, "[l]andlords have a 'common-law duty to take minimal precautions to protect tenants from foreseeable harm,' including a third party's foreseeable criminal conduct." Burgos v. Aqueduct Realty Corp., 92 N.Y.2d 544, 548 (1998), citing Jacqueline S. by Ludovina S. v. City of New York, 81 N.Y.2d 288 (1993). "While this legal obligation does not require a landlord to become an insurer of a tenant's safety, it imposes a minimum level of care on landlords and managing agents who know or have reason to know that there is a likelihood that third parties may endanger the safety of those lawfully on the premises." Wayburn v. Madison Land Ltd. Partnership, 282 A.D.2d 301, 303 (1st Dep't 2001); Mason v. U.E.S.S. Leasing Corp., 96 N.Y.2d 875, 878 (2001) ("A

landlord has a duty to minimize the foreseeable danger from criminal acts when past experience alerts it to the likelihood of criminal conduct on the part of third persons").

A property owner defendant may establish that a danger was not foreseeable by tendering evidence that there was no prior criminal activity at the premises likely to endanger the safety of plaintiff, and thus, plaintiff's alleged attacker's conduct was not foreseeable. Stevens & Thompson Paper Co. Inc. v. Middle Falls Fire Dept., Inc., 188 A.D.3d 1504, 1508 (3d Dep't 2020); Ramos v. Washington 2302 Plaza Assoc., L.P., 136 A.D.3d 517 (1st Dep't 2016), lv to appeal denied, 27 N.Y.3d 907 (2016). Alternatively, a property owner may demonstrate entitlement to summary judgment where there is evidence that the criminal act perpetrated against the plaintiff was targeted and premeditated. Estate of Faughey v. New 56-79 IG Assoc., L.P., 149 A.D.3d 418, 418-419 (1st Dep't 2017). And where it is "unlikely that any reasonable security measures would have deterred" the criminal perpetrator, summary judgment for the landlord is warranted. Id.; Martinez v. City of New York, 153 A.D.3d 803, 805 (2d Dep't 2017) ("Recovery against a landlord for an assault committed by a third party requires a showing that the landlord's negligent failure to provide adequate security was a proximate cause of the injury."). In targeted attack

cases, courts have found that where the criminal act of a third party is so extraordinary in nature or so attenuates the defendant property owner's negligence from the ultimate injury, the criminal act is a superseding cause that serves to relieve defendant of liability irrespective of the defendant's negligence. Kush v. City of Buffalo, 59 N.Y.2d 26, 33 (1983); Boltax v. Joy Day Camp, 67 N.Y.2d 617, 619 (1986).

In Ishmail v. ATM Three, LLC, 77 A.D.3d 790, 791 (2d Dep't 2010), following a broken engagement, defendant Balgram Singh began stalking his ex-fiancée, Holika Mangroo. Singh "harassed her at work and at home, threatened her with a gun, and set [her brother] Salima's car on fire." Ultimately, Singh started a fire at the apartment's front door, preventing the occupants, including the decedent Salima, from escaping until the fire department arrived. Salima succumbed to smoke inhalation. Unlike its later decision in Scurry v. New York City Hous. Auth., 193 A.D.3d 1 (2d Dep't 2021) where it imposed insurer-type liability on the owner, the Second Department in Ishmail found that "[a] determination that the [landlord and property manager] had notice of Singh's prior criminal activity would be based solely on speculation and would be contrary to evidence in the record establishing that they had no such notice." Id. at 792.

Ishmail followed a long history of precedents from the First Department in which the plaintiff's negligent security claims were dismissed because they were the result of an unforeseeable targeted attack. See, Cynthia B. v. 3156 Hull Ave. Equities, Inc., 38 A.D.3d 360 (1st Dep't 2007) (rapist targeted infant plaintiff); Flores v. Dearborne Mgt., Inc., 24 A.D.3d 101 (1st Dep't 2005) ("murders were a result of a planned hostage taking and armed robbery, incident to the intended murder of the specific target in his apartment"); Cerda v. 2962 Decatur Ave. Owners Corp., 306 A.D.2d 169 (1st Dep't 2003); Harris v. New York City Hous. Auth., 211 A.D.2d 616, 617 (2d Dep't 1995)(prior attempt on decedent's life by same perpetrator); Tarter v. Schildkraut, 151 A.D.2d 414, 416 (1st Dep't 1989) (The plaintiff's ex-lover's acts were truly extraordinary and unforeseeable and served to break the causal connection between any negligence on the part of the defendants and the plaintiff's injuries where he had actively stalked her and was intent on harming plaintiff). Indeed, the plaintiffs in Cerda and Rivera were victims of a preconceived criminal conspiracy to murder such that the First Department found that "it [is] most unlikely that any reasonable security measures would have deterred the criminal participants." Cerda, 306 A.D.2d at 169; see, also, Buckeridge v. Broadie, 5 A.D.3d 298, 300 (1st Dep't 2004)("Plaintiff's injury was the result of an intervening, intentional criminal act

of sophisticated armed robbers disguised as agency workers, who targeted defendant and his home in advance").

Plaintiffs turn to Scurry and demand that the NYCHA and all owners in this State be held responsible for the unforeseeable, intentional acts of assailants over whom the owners could not exercise control. Such a duty runs contrary to over 100 years of precedent. In Rivera v. New York City Hous. Auth., 239 A.D.2d 114 (1st Dep't 1997), plaintiff was injured when two assailants entered her apartment and stabbed her multiple times. The First Department observed that the causal connection between any alleged negligent security claims "is further undermined by the clear evidence that this attack was motivated by a preconceived criminal conspiracy to murder plaintiff's stepbrother, who lived with her in the apartment." Id. at 115.

In Scurry, after ending her relationship with Walter D. Boney, the decedent and her four sons moved into a NYCHA apartment at the Cypress Hill Houses. In late 2006 and early 2007, "Boney acted in an increasingly volatile manner, committing acts of stalking, leaving angry voice mails, and making multiple threats that he would kill the decedent and himself. On two occasions, Boney appeared unexpectedly at the decedent's apartment and banged on the hallway door. In the summer of 2007, Boney made harassing phone calls to the

decedent's place of employment, once attacked and choked the decedent at her workplace, and harassed the decedent's new boyfriend." Id. 193 A.D.3d at 3. On October 24, 2007, when the decedent left her apartment to go to work, Boney confronted her in the hallway, restrained, choked and then doused her with a flammable liquid. Id. at 4. "Boney ignited the flammable liquid setting himself, the decedent, Scurry, and the hallway on fire. The decedent died at the scene, Boney died several days later, and an injured Scurry was hospitalized." Id. According to the "second supplemental bill of particulars, the street-level front door of the decedent's apartment building was not equipped with a working door lock." Id. at 3-4. Scurry submitted testimony that the door locks had been broken for several months that allowed anyone to enter the building.

The trial court denied the owner's summary-judgment motion. On appeal, the Second Department weighed foreseeability against proximate cause. It also compared its analysis to that of the First Department. The court found that "[w]here the criminal act is targeted, the First Department deems the causal nexus between the plaintiff's injury and the landowner's duty of care to be severed as a matter of law." Id. at 7. It compared several cases in which the victim was targeted versus cases in which the plaintiff was victimized at random. In "random" criminal matters resulting in injuries, however, Scurry held that the

First Department found "the causal nexus between the plaintiff's injury and the landowner's duty of care as potentially raising a triable issue of fact." Id. The Appellate Division reasoned, "[t]he rationale behind the First Department's distinction between targeted and random crimes is that, in actions involving premeditated attacks upon known victims, 'it is unlikely that any reasonable security measures would have deterred' the criminal attack." Id. [internal citations omitted].

The Second Department believed that the First Department's mechanical focus on the perpetrator's intent was problematic because there may always be more than one proximate cause of an injury. By eliminating the distinction between "random" and "targeted" attacks, the Second Department reasoned, "[a]ll of these actions [c]ould be examined sui generis, recognizing the unique facts of individualized matters, rather than simplistically or arbitrarily channeling them into either 'targeted' or 'random' criminal boxes that do not accommodate the factual nuances that may vary from case to case." Id. at p. 10. And because there was a triable issue of fact regarding whether an operable door lock would have deterred Boney's attack, the Second Department affirmed the trial court's denial of summary judgment. Id.

In Estate of Murphy, following the earlier offsite altercation between members of the rival gangs, several people including the decedent, Nelson, Pierce, Reynoso, Taylonn and Washington congregated in the park in front of the building's entrance. Nelson observed Cartagena and Brockington walking towards the building and advised that the group should go inside. (R. 807-08, 1086, 1521, 1525-29) While the decedent, Nelson, Pierce, Reynoso, Taylonn and Washington ran into the building, other Grant residents remained outside. (R. 806, 809, 810, 1080, 1087, 1529, 1531) Making good on their promise to "smoke" one of the members of the opposing gang, Cartagena and Brockington entered the building through the exit-only side door and shot the decedent. (R. 1087, 1088, 1096, 1283-84, 1544)

The Appellate Division, First Department unanimously affirmed the trial court's decision that granted summary judgment to NYCHA in Estate of Murphy. In so doing, the First Department found that the record demonstrated that Murphy's killers were (1) bent on revenge, and (2) intent on gaining access to the building. The "brazen manner in which they entered the building, in plain sight of several other people and surveillance cameras, without attempting to shield their faces," demonstrated that they would have gained entrance to the building by following another resident in or forcing someone to let them in. Id.

Thus, the unlocked door was not a proximate cause of the decedent's death. In its decision, the First Department acknowledged Scurry:

> [t]he Second Department recently characterized our precedent in the area of negligent security cases where there was a targeted victim as drawing a "sharp distinction between targeted and random attacks in determining issues of foreseeability and proximate cause" (Scurry v. New York City Hous. Auth., 193 A.D.3d 1, 9 (2d Dep't 2021)). It called this approach problematic, since "the binary dichotomy between those two categories of crime . . . mechanically focus[es] on the perpetrator's intent, [and] fails to account for the myriad of facts that may be present in a given case. Indeed, there may be more than one proximate cause of an occurrence or injury." The Scurry Court goes on to state that a court's focus in such cases should be on the various contributing factors to the crime, including whether a faulty lock presented the assailants with an opportunity to attack the decedent, in a manner that might not otherwise have been possible.

The First Department disagreed with Scurry's implication that it did not consider the reasonableness of the property owner's security measures once there was a finding that the victim was targeted. Indeed, relying on its prior precedents, the First Department wrote, "the supporting cases confirm that this Court has not abandoned the notion that more than the simple fact that a victim was targeted is necessary to shield a property owner from liability." Id.

The First Department's reasoning in Estate of Murphy correctly follows its precedent and the duty of reasonable care imposed by this Court. Unlike the insurer-type liability advanced by Plaintiff and Scurry, this Court should affirm Estate of Murphy. Indeed, where the defendant property owner proffers undisputed evidence that the plaintiff was a victim of a targeted attack, the owner's alleged failure to provide minimal security measures, is not a proximate cause of the injury as a matter of law. The targeted attack defense does not undermine or obviate the duty owed by a building owner to its tenants. Rather, it recognizes that property owners owe a duty to take minimal precautions given the *foreseeability of the criminal conduct* that caused the injury and that property owners are not insurers. Maheshwari v. City of New York, 2 N.Y.3d 288, 294 (2004) ("Although landlords and permittees have a common-law duty to minimize foreseeable dangers on their property, including the criminal acts of third parties, they are not the insurers of a visitor's safety."). Indeed, not even law enforcement is required to provide protection where, as here, the plaintiff is a target of a criminal attack. Riss v. City of New York, 22 N.Y.2d 579 (1968). Volitional, intentional criminal conduct, such as the conduct involved in both Scurry and Estate of Murphy is unforeseeable as a matter of law.

In Nallan, this Court examined a presumed targeted attack where plaintiff was shot while standing in the defendants' building's lobby. Nallan, 50 N.Y.2d at 513. While plaintiff had heard of two thinly veiled threats against him, a police investigation led Nallan to believe that he was not in any serious danger. Id. The building's lobby attendant, who was usually present, had left his post to take care of his janitorial duties before plaintiff arrived. Id. Plaintiff's assailant was never apprehended. Id. at 514. In reinstating plaintiff's claims, this Court found that given the 107 crimes in the building, including seven crimes against persons, the question of whether Nallan's injury was foreseeable should have gone to the jury. Id. at 519-520. With respect to legal or proximate cause, this Court found that "the fact that the 'instrumentality' which produced the injury was the criminal conduct of a third person would not preclude a finding of 'proximate cause' if the intervening agency was itself a foreseeable hazard." Id. at 520-521. Plaintiff's expert testified that the presence of a lobby attendant, even if he was unarmed and untrained, would have deterred criminal activity. Thus, it was a question for the jury as to whether the absence of the lobby attendant was a proximate cause of Nallan's injury. Id. at 521.

While at it might superficially appear that this Court in Nallan examined and decided that even in a targeted attack case, a jury should still decide whether

the property owner provided a reasonable level of security given the foreseeability of the crime, there are key differences between Nallan and the cases at bar. At the outset, the perpetrator's identity and motivation in Nallan remained unknown. Indeed, plaintiff in Nallan believed that any threat that existed for his union activities had subsided. Given the ambient crime in the building, along with the expert's testimony that a lobby attendant's presence served as a deterrent, there was no reason to treat Nallan as anything other than a negligent security case in which there was notice.

In contrast, the facts in all of the targeted attack cases lay bare the inevitably of injury to the plaintiff. Plaintiff and the Second Department's decision in Scurry seek to tear down the distinction between random and unforeseeably intentional and targeted attacks. In doing so, property owners will be exposed to the vagaries of a jury to decide whether, in a case such as this, the door locks were working, and whether this would have prevented the intentional and unforeseeable crime. While this Court has historically held that property owners owe a duty to provide minimal security measures, it has also maintained for over 100 years that property owners are not insurers. Following the First Department would maintain this Court's precedent that property owners are not guarantors of safety as the "murderous intent" of the wrongdoers in Estate of

Murphy and other cases involving targeted attacks severs the causal link between an allegedly malfunctioning door and the tragic events in this case.

To hold otherwise would unreasonably heighten the duty owed by property owners and render them liable for intentional attacks. Exposing property owners to the duty of care set forth in Scurry would result in landlords having to ensure far more than minimum safety measures and require that they become involved in the associations, affiliations, and relationships of their tenants to have an inkling of the specific danger faced by the specific tenant so as to design a reasonable means of security. This State has never imposed such a duty on property owners, and it is respectfully submitted it should refrain from imposing a heightened duty of care for targeted attacks committed with "murderous intent" and affirm the First Department's holding.

Conclusion

For the foregoing reasons, the order appealed from should be affirmed.

Dated: Garden City, New York
November 16, 2022

Respectfully submitted,

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Court of Appeals

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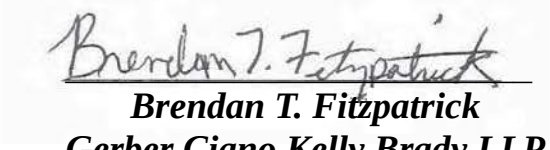

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