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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
DOCKET NO. 1784CV02486-B

NOTICE SENT (5)
07.05.22
(KAT)

JASON FIELD, as personal representative, and GLORIA AMANDA GIBBS, as personal representative,

Plaintiffs

vs.

HIGHBRIDGE CONCIERGE, INC., BAYBERRY MANAGEMENT, LLC, and COURT SQUARE PRESS BUILDING CONDOMINIUM TRUST,

Defendants

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT (Papers 38 and 41)

This civil action arises from the vicious killing on May 5, 2017, of Dr. Richard Field and Dr. Lina Bolanos by the convicted murderer Bampumim Teixeira (Teixeira). The murders occurred in the victims' home, a penthouse unit on the eleventh floor of the Macallen Building (Building) in South Boston. At the time of the murders, defendant Bayberry Management, LLC (Bayberry) managed the Building, and defendant Highbridge Concierge, Inc. (Highbridge) provided concierge services for the Building. Defendant Court Square Press Building Condominium Trust (the Trust) is the condominium association for the Building and its sister building, the Court Square Press, also in South Boston.

Plaintiff personal representatives of the victims' respective estates allege Teixeira was able to enter the Building, invade their loved ones' home, and commit the murders because of the negligence of Bayberry, Highbridge, and the Trust. The matter is before the court on summary judgment motions brought by Highbridge and the Trust (Paper 38), and Bayberry (Paper 41),

based on their respective theories of lack of duty as a matter of law. Following hearing on April 27, 2022, and thorough review of the pleadings and applicable authority, the motions are **ALLOWED** in part, and **DENIED** in part.

For the reasons explained below, judgment is ALLOWED and shall enter in favor of the respective Defendants on the common law negligence claims, Counts VI, IX and XII. Summary judgment is DENIED on Counts IV, V, VII, VIII, X, and XI, the wrongful death claims.[1]

Undisputed Background Facts

The Macallen Building

The Building is an 11-story, 144-unit condominium complex located at 141 Dorchester Avenue, South Boston, Massachusetts, near the Broadway MBTA stop. Consolidated Statement of Material Facts in Support of Defendants' Motions for Summary Judgment (Facts) 1, 3, 5. The Building features a three-level parking garage, accessed by vehicles via a garage door that is opened through the use of a personally programed transponder. Facts 4. The top floor of the Building consists of two penthouse units, Penthouse A and Penthouse B. Facts 31; Joint Appendix Ex. 1 at 12. Drs. Field and Bolanos lived in Penthouse A, which Dr. Field bought in 2013 for $1,945,000. Facts 16, 31.

In 2017, the Building required a fob to open the lobby's entry doors. Joint Appendix Ex. 1 at 245. In the absence of a fob, a person could be buzzed in by a concierge at the concierge desk, which was immediately to the right of the entry doors upon entering the main lobby. Joint Appendix Ex. 1 at 245, Ex. 28 at 12. The concierge desk was equipped with a computer screen on which the feeds of the building's 14 closed-circuit television (CCTV) cameras were viewable.

[1] Counts I-III, previously pleaded against Palladion Services, LLC the former concierge service for the Building, were dismissed pursuant to stipulation on May 22, 2020. Docket, Paper 24.

Facts 51. Camera locations included the entrance to the garage, the lobby, the driveway, and various angles of Dorchester Avenue. Joint Appendix Ex. 14 at 42. Only one of the Building's cameras was located inside the garage, and it was pointed towards the two vehicle garage doors. Joint Appendix Ex. 14 at 42-43; Ex. 24.

Further into the lobby beyond the concierge desk on the left are two elevators. Joint Appendix Ex. 28 at 1, Ex. 21 at 86. During the morning beginning at 6:00 a.m. and until 4:00 p.m., Elevator 1, the service elevator, could be accessed from the main lobby, as well as via its rear door, which opens into level P-1 of the Building's garage. Joint Appendix Ex. 21 at 86-89, Ex. 28 at 53-55, Ex. 14 at 34-35. In 2017, anyone could enter the service elevator from P-1 between those hours, but a fob was required to send the service elevator to a residential floor. Joint Appendix Ex. 21 at 88-89, Ex. 28 at 54-55. A fob could be used to access all residential floors but for Floor 11; only residents on Floor 11 where Dr. Field and Dr. Bolanos lived could use a fob to send an elevator to Floor 11. Joint Appendix Ex. 1 at 126. However, a person without a fob could gain access to any floor, including Floor 11, by: waiting inside the elevator for it to be summoned by someone else on a residential floor; exiting the elevator on that floor; and then using one of two internal, unlocked stairwells to access other floors. Highbridge was aware of these circumstances. Joint Appendix Ex. 21 at 90, Ex. 28 at 24-25, Ex. 1 at 52, and Ex. 30 at 51.

Elevator 1 was locked on the P-1 side after 4:00 p.m. until 6:00 a.m. the next morning, as well as whenever the vehicle garage doors were malfunctioning and left in the open position. Joint Appendix Ex. 1 at 65-69, 250, Ex. 14 at 34. This management of Elevator 1 was established to limit access to the Building from the garage. Joint Appendix Ex. 1 at 72-75, 250.

Building Management and Concierge Services

In 2012, the Trust hired Bayberry, a property management firm, to manage the Building and its sister building, the Court Square Press Building. Facts 11, 30. Bayberry maintains an office at the premises. Facts 12. Section 4 of the Court Square Press Building Condominium Management Agreement (Management Agreement) provides:

> **Powers and Duties of Manager.** The Manager shall be authorized and required to perform all services necessary for the management of the Property, including but not limited to:
>
> ...
>
> **(E) Utilities, Repairs and Maintenance.** [Provide for utilities to be supplied to the Condominium and cause the common areas and facilities of the Condominium to be maintained and repaired in accordance with the standards established by the Trustees pursuant to the By-Laws at the expense of the Trust. The same shall include entering into contracts in the name of the Trust (and monitoring the proper performance under such contracts) for . . . *security services.*

Joint Appendix 51 (bold in original, italics supplied). Christopher Mullen, the president and sole owner of Bayberry, testified he had satisfied the obligation to enter into a security contract by entering into concierge agreements, which involved "certain security aspects" and provided security services "[i]n some way." He also acknowledged that "the 24/7 concierge was a safety and security measure." Joint Appendix Ex. 1 at 28, 34.

From April, 2007 through February, 2017, Palladion Services, LLC (Palladion) provided concierge services at the Building and Court Square Press Building. Facts 33. In or about October 2015, Palladion hired Teixeira as a concierge employee. Facts 34. While working as a concierge at the Building, Teixeira gained knowledge of where the CCTV cameras and stairwells were positioned, as well as how the elevators and the garage operated. Facts 35. In April 2016, following a confrontation with a resident, Teixeira quit his job at the Building. Facts 36.

In February 2017, the Trust terminated its concierge services contract with Palladion, and hired Highbridge. Facts 37, 39. Prior to the murders, Highbridge was unaware that Teixeira had previously worked at the Macallen Building, or that he had been involved in an altercation with a building resident. Facts 67. Highbridge was also unaware of Teixeira's criminal history or background. Id.

The Concierge Services Agreement (CSA) under which Highbridge operated included a "Statement of Work" that referenced and incorporated into the Agreement a Concierge Service Manual. Facts 39. The Manual provides that: "The concierge position exists to assist in the common functionality of the building. The services of the concierge include: **access control,** vendor management, package and delivery acceptance and retrieval, emergency response, policy enforcement, and resident services. . . . Highbridge . . . **is not an insurer of the building's security, safety or general exposures.**" Joint Appendix Ex. 14 at 6 (emphasis supplied). The Manual further provides that a concierge's general responsibilities include: "[m]ak[ing] daily rounds of building facilities (if required by your position)"; [c]ontrol[ing] access to the residential section of the building and other common areas"; and "[m]onitor[ing] CCTV when possible, and attempt[ing] to resolve problems." Joint Appendix Ex. 14 at 33-34. Neither the CSA nor the Manual obligated Highbridge to ensure that any particular CCTV camera feed was displayed on the CCTV monitor at the concierge desk. Facts 52.

Highbridge's duties also included unlocking Elevator 1 at 6:00 a.m. in the morning and locking it at 4:00 p.m. Joint Appendix Ex. 14 at 34-35. Lastly, the Manual provides: "In your position as concierge you may either become aware of, or be notified of, criminal activity. Just remember, when in doubt, report it." Joint Appendix Ex. 14 at 8.

Pursuant to the CSA and the Manual, Highbridge also employed "Runners," shared between the Building and the Court Square Press Building, who assisted the concierge staff at the buildings' front desks during day and evening shifts. Facts 53. Among other duties, Runners were responsible for conducting driveway checks every hour, and for conducting building tours between 5:00 p.m. and 7:00 p.m. Facts 54. See also Joint Appendix Ex. 14 at 38.

Macallen Building Garage Security Issues

Over the years, the Building experienced a variety of security issues with the garage.

In December 2012, a car in the garage had its convertible top cut open, in an apparently failed attempt to get into the car. Joint Appendix Ex. 45. The perpetrator entered the garage when one of the garage's two doors was opened for contractors working at the Building. Joint Appendix Ex. 1 at 43-45. Mullen sent an email to the concierge desk and Palladion, informing them of the incident and directing the concierge to "please use extra caution from this point moving forward about any suspicious persons entering either building." Joint Appendix Ex. 45.

In October 2014, another vehicle break-in took place in the Building garage. Joint Appendix Ex. 46. The perpetrator entered the garage by piggybacking behind a resident who used a fob to open a pedestrian door leading from the P-2 level of the garage. Joint Appendix Ex. 1 at 56-60. Following this incident, Mullen sent an email to all residents in which he wrote:

> [A] vehicle in the Macallen garage was broken into on Friday October 24th, at approximately 5 PM. . . . Although nothing was stolen from the vehicle, a window was broken.
>
> Residents should be aware that there have been multiple car break ins throughout South Boston recently. The recent incident in the garage is the second attempted theft in the Macallen garage over the past two years. It is believed the suspect in this case 'piggybacked' a resident with key access to the building.
>
> It is important that all residents be vigilant in preventing unauthorized access to the garage or building. Please,

> Do not let anyone in (even if they say they are here as a "guest") without the presence of the Concierge.
>
> Do not leave access doors ajar.
>
> If you find a garage door open (or other door being left open) immediately notify the Concierge.
>
> If you see someone looking or acting in a suspicious manner, immediately notify the Concierge and/or contact the South Boston police 911.

Joint Appendix Ex. 46.

In February 2015, winter weather conditions were causing the garage doors to get stuck. Joint Appendix Ex. 1 at 66. Mullen sent an email to all residents with the subject "Garage doors & Security precautions" in which he wrote:

> To avoid costly damage to the doors, I have notified staff to keep the doors open until we have consistent weather improvement. Security is very important to all, so the P-1 level [elevator] doors inside and out will be disabled other than when a delivery and or move is being performed.
>
> Over the past few months there have been Teenagers "hanging out" under the Broadway Bridge on Foundry St. and have damaged cars one being a residents [sic]. The Police are aware of this and have told me they are doing extra passes, but the colder temps have kept them from showing up. If you do see them (usually 4 or 6 of them) in the future, please simply put a call into Boston Police ... and let the Concierge on duty know, as well.

Joint Appendix Ex. 48.

On February 23, 2017, soon after Highbridge took over for Palladion, the Trust's Board of Trustees held a monthly meeting attended by Mullen. Joint Appendix 52 at 1. Patrick Knight, the president and owner of Highbridge, also attended a portion of the meeting. Joint Appendix Ex. 21 at 149, 151-152, Ex. 52 at page 5. The minutes reflect certain "changes made" by Highbridge, including an "increased focus on garage security (especially in cold weather when the doors act up)." Joint Appendix Ex. 52 at page 5 (emphasis removed). At the meeting, the

Board discussed the need for a "security upgrade" and items to be priced/researched in connection with this upgrade by Bayberry. Joint Appendix Ex. 52 at pages 5-6.

Dr. Field's Complaint to Bayberry About Floor 11 Access

Pursuant to the Management Agreement, Bayberry was tasked with "[a]ttend[ing] to the reasonable complaints of Unit Owners, with respect to the operation of the common areas and facilities of the Condominium" and providing monthly reports of such complaints and their dispositions to the Trust. Joint Appendix Ex. 51 at § 4(L). In August 2016, nine months before the murders, Dr. Field and Mullen engaged in an email exchange, which reflects the following back and forth between the two:

> Dr. Field: "I remember the other thing I wanted to talk about. its [sic] the stair case [sic] nearest my door. We have had several neighbours [sic] walk in and knock on my door as well as a few that came up to see if they could see the roof. There is no handle on the door so they can walk right in. I understood the top floor was supposed to be secured. Can you put the one way handles on the door the same as on the roof?"
>
> Mullen: "In regards to people knocking on your door, I am shocked that people would do that[.] The egressed stairwells are unlocked, but the elevator access is not. During inspection I do know the building inspector from the city of Boston asked that the doors not be locked in anyway [sic]."
>
> Dr. Field: "We were sort of shocked of [sic] too by the knocks on the doors which prompted me to check where they got in.[] Can we get clarification from somewhere on the door locks. It would seem reasonable that the hallway must be able to access the stairway in event of a fire but not the other way round. If so[,] then the doors to the roof could not have passed inspection."
>
> Mullen: "Richard by the way did you catch [the] names of these people? It's pretty clear and understood that the 11th floor is locked off from others."
>
> Dr. Field: "I did but I don't want to make an issue of the individuals I wanted to make sure the top floor was secure. I understand the fire dept would have an issue with fob access but it confuses me as to why they would take issue with one way access to stairwells. These seems [sic] a common mode of security in other buildings."
>
> Mullen: "As you can imagine building code is interpreted several different ways is a conflict (sic) between the fire department in the building department although they do work simultaneously to agree on use and occupancy. It would be the way the code is written in interpreted the day of inspection that is the only sensible reason. It get hundreds of pages of updated code or [sic] year to adjust my Massachusetts state code book.

Joint Appendix Ex. 47.

Mullen does not recall inquiring further about what was permissible under the building code or looking into whether it would be possible to outfit the Floor 11 doors with electromagnetic sensors that release access to the doors in the event of an alarm. Joint Appendix Ex. 1 at 136, 139, 140. Mullen acknowledges there were "cage doors" in one stairwell between the P-3 level and the residential floors equipped with an electromagnetic release that would automatically unlock in the event of a fire alarm. Joint Appendix Ex. 1 at 118-120. After these murders, locks were installed on Floor 11 stairwell doors. Joint Appendix Ex. 32 at 34-37.

The Murders of Dr. Richard Field and Dr. Lina Bolanos

On May 5, 2017, at or about 2:40 p.m., Teixeira walked past the lobby doors of the Building for approximately six (6) seconds, where he was observed by Highbridge Runner Corey Raji. Facts 57. A few minutes later, Teixeira was standing within several feet of the garage door, as Runner Raji pulled his vehicle into the garage. Joint Appendix Ex. 25 at 57-59, Ex. 55.[2] At or about 3:50 p.m., Teixeira gained entry into the Building's garage behind a different vehicle entering the garage. Facts 59. Teixeira was captured by a CCTV camera facing the garage door for approximately fifteen (15) seconds before he entered. Facts 60. At the moment Teixeira entered the garage, neither the concierge on duty at the Concierge Desk, Zuruf Tongo, nor Runner Raji, who was now sitting next to Tongo, observed Teixeira on the CCTV monitor. Facts 62. In those seconds, Tongo was waving goodbye to individuals leaving the front lobby doors, and Raji was looking at his personal cell phone beneath the concierge desk. Facts 62. It

[2] Raji testified in his deposition that he did not remember seeing anyone near the garage. Joint Appendix Ex. 25 at 59. However, at Teixeira's criminal trial, Raji testified he saw Teixeira "at the back of the building by the garage entrance" when "I was putting my car into the parking spot." Joint Appendix Ex. 54 at 8-109.

is unknown which camera feeds were viewable on the CCTV monitor at the moment Teixeira entered the garage. Facts 63.

According to Teixeira's statement to Boston Police Detectives the day after the murders, once he made his way into the garage, he summoned Elevator 1, entered it, and waited for it to be called to a residential floor. From there, he made his way to Floor 11 via the stairwell. Joint Appendix Ex. 53 at 49-51, 66-67, 71-73.[3]

A little before 5:00 p.m., Dr. Bolanos entered the building through the main entrance and stopped at the concierge desk to pick up packages and her mail before making her way to Floor 11. Joint Appendix Ex. 33 at 73-74. More than an hour later, Dr. Field entered the lobby via the garage entrance, and made his way to Floor 11. Joint Appendix Ex. 33 at 74-75.

According to Raji, around 7:00 p.m. he conducted his building tour, starting on Floor 11 and checked the floor's trash room, which was only a few feet from the door to Penthouse A. Raji testified that he did not see any packages or keys strewn on the floor of the hallway outside Penthouse A. Joint Appendix Ex. 25 at 80-86.

At 7:05, 7:09, 7:41 and 7:45 p.m., various calls were placed to 911 by Dr. Field's cellphone. Joint Appendix Ex. 69. The call at 7:41 lasted approximately 3 minutes, and according to the plaintiffs, Dr. Bolanos could be heard faintly begging for help. Joint Appendix Exs. 69, 70. Thereafter, at 7:46 p.m., Dr. Field's cellphone sent texts to a friend pleading for help. Joint Appendix Ex. 41.

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[3] Defendants have moved to strike Exhibit 53 from the summary judgment record, contending Teixeira's statement to police is inadmissible. Paper 51. That motion is **DENIED at this time, without prejudice to any rulings by the trial judge**. Portions of the statement in Exhibit 53 will likely be admissible as statements against penal interest. Zinck v. Gateway Country Store, Inc., 72 Mass. App. Ct. 571, 574-575 (2008); Mass. Guide to Evidence (2022), Section 804(b)(3), pages 355-357, and cases cited. Moreover, even if Exhibit 53 were stricken in its entirety, the other circumstantial Record evidence described here permits a reasonable inference for purposes of summary judgment that Teixeira accessed Floor 11 in the manner described.

At 8:24 p.m., unable to reach either Dr. Field or Dr. Bolanos on their cellphones, the friend called the concierge desk and asked Tongo to go up to Penthouse A to check on Dr. Field and Dr. Bolanos. Joint Appendix Ex. 31 at 44-45, 47-48, Ex. 33. at 70-72. Tongo did not go up to Penthouse A, but instead called the cellphones of Dr. Field and Dr. Bolanos. He received no answer. Joint Appendix Ex. 33 at 81-82. At 8:33 p.m., Tongo, called 911. Joint Appendix Ex. 33 at 87.

Boston Police immediately arrived at the building and made their way to Floor 11. Joint Appendix Ex. 33 at 89-90. Officers testified that there were packages and a set of keys strewn along the hallway near the door to Penthouse A. Joint Appendix Ex. 34 at 41-43, Ex. 19 at 54-55. Using the keys in the hallway, the police accessed Penthouse A. Joint Appendix Ex. 34 at 43-45, Ex. 19 at 54. Dr. Field and Dr. Bolanos were found dead inside; Teixeira was found alive inside and taken into custody after a struggle.

Discussion[4]

Plaintiffs bring claims for wrongful death, conscious pain and suffering, and negligence against Highbridge (Counts IV-VI), Bayberry (Counts VII-IX), and the Trust (Counts X-XII). As explained below, although the Defendants are entitled to summary judgment on the negligence claims, the wrongful death counts and conscious pain and suffering counts survive.

[4] There is no dispute about the standard of review. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Helfman v. Northeastern Univ., 485 Mass. 308, 314 (2020), quoting Godfrey v. Globe Newspaper Co., 457 Mass. 113, 118-119 (2010). The moving party bears the burden of demonstrating the absence of a triable issue of fact on every relevant issue. Scholz v. Delp, 473 Mass. 242, 249 (2015). Record evidence and all reasonable inferences drawn therefrom are construed in favor of the party opposing the motion. Borden Chem., Inc. v. Jahn Foundry Corp., 64 Mass. App. Ct. 638, 645 (2005). However, "[b]are assertions made in the nonmoving party's opposition will not defeat a motion for summary judgment." Barron Chiropractic & Rehab., P.C. v. Norfolk & Dedham Grp., 469 Mass. 800, 804 (2014). The court considers admissible record evidence as presented by any pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, but does not weigh evidence, assess credibility, or find its own facts. O'Connor v. Redstone, 452 Mass. 537, 550-551 (2008).

Negligence and Conscious Pain and Suffering Claims

Highbridge argues that the plaintiffs' common law claims for conscious pain and suffering and negligence must be dismissed, because the Wrongful Death Statute, G. L. c. 229, § 2, provides the exclusive cause of action for the recovery of damages. Although only Highbridge makes this argument, it applies to all three Defendants.

I agree the three negligence counts should be dismissed, because G. L. c. 229 provides the exclusive (and comprehensive) remedy for damages relating to wrongful death. Hallett v. Wrentham, 398 Mass. 550, 555 (1986)("The wrongful death statute provides for a single action brought by the decedent's executor or administrator. The executor or administrator presents all claims by the designated beneficiaries for damages flowing from the wrongful death."). The wrongful death counts allege both that the defendants' negligence resulted in the murders of Dr. Bolanos and Dr. Field, Complaint, para. 53, and that the same negligence resulted in Dr. Bolanos' and Dr. Field's kidnapping and mental and physical terrorization. Complaint, para. 56. Both forms of harm seek to recover for what I am persuaded was the unitary event of Teixeira's violent home invasion, which event included the forms of conscious pain and suffering to the victims alleged in the Complaint, in addition to their death.

The parties are correct that Section 6 of G.L. c. 229 permits the recovery of a victim's conscious pain and suffering damages in an action for wrongful death, so those claims survive as a statutory matter, if other elements are ruled met. Opposition to Highbridge's Motion, Paper 39, at 25. All forms of suffering by the victims are distinct from the suffering of their statutory next of kin, for the consortium-like loss of loved ones. The suffering of next of kin is addressed by a separate provision of the statute. G.L. c. 229 section 2 (1973); Laramie v. Philip Morris USA,

Inc., 488 Mass. 399, 406, and note 7 (2021)("compensatory damages are based on the 'fair monetary value of the decedent to the persons entitled to receive the damages recovered'").[5]

The Motions are therefore ALLOWED on Counts VI, IX, and XII, as unnecessarily duplicative of the wrongful death claims.

Wrongful Death Claims

As stated, the Wrongful Death Statute permits a claim for negligence that causes the death of a person. To prove negligence, a plaintiff must establish that: the defendant owed the plaintiff a duty of reasonable care; the defendant breached that duty; harm resulted; and there was a causal relation between the breach and the harm. Jupin v. Kask, 447 Mass. 141, 146 (2006). The existence of a duty is a question of law for the court which may be decided on summary judgment. Id. All three Defendants argue they are entitled to summary judgment because they owed no duty to Dr. Bolanos and Dr. Field. I conclude otherwise.[6]

Duty of Care

A tort duty of care can arise in one of three ways. First, it can arise from "existing social values and customs." Mullins v. Pine Manor Coll., 389 Mass. 47, 51 (1983)(internal quotations omitted). "[T]he courts will find a duty where, in general, reasonable persons would recognize it

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[5] The potential availability of statutory punitive damages under section 2 is beyond dispute, if gross negligence and/or recklessness is properly pleaded in a wrongful death case, and proven at trial. Laramie, 488 Mass. at 406.

[6] Defendants have moved to strike Exhibits 23, 35, 36 and 28 from the summary judgment Record. Paper 51. These Exhibits are expert reports proffering opinions about, among other things, a proposed basis for duty. Defendants are quite correct that legal conclusions are not the stuff of expert witness testimony. Nor is duty a question of fact for an expert at this stage of the case. Because I rule Plaintiffs establish duty on other bases, I do not rely on any of the reports for these Rulings. The Motion to Strike is **DENIED without prejudice** to consideration by a subsequent motion or trial judge of substantive Daubert/Lanigan challenges to any proffered expert opinions or portions thereof.

and agree that it exists." Luoni v. Berube, 431 Mass. 729, 735 (2000), quoting W.L. Prosser & W.P. Keeton, Torts § 53, at 358–359 (5th ed. 1984). Jupin, 447 Mass. at 146-147.

The second way a duty can arise is through voluntary assumption. Mullins, 389 Mass. at 52 ("It is an established principle that a duty voluntarily assumed must be performed with due care."); Holloway v. Madison Trinity Ltd. Partnership, 95 Mass. App. Ct. 628, 632 (2019). "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." Mullins, 389 Mass. at 53, quoting Restatement (Second) of Torts § 323 (1965).

Lastly, a duty can arise pursuant to contract. LeBlanc v. Logan Hilton Joint Venture, 463 Mass. 316, 328 (2012)("It is settled that a claim in tort may arise from a contractual relationship, . . . and may be available to persons who are not parties to the contract . . . who are foreseeably exposed to danger and injured as a result of . . . negligent failure to carry out that obligation.") (internal quotations, and citations, omitted). Whether a duty arises under any of these circumstances largely depends on the reasonable recognizability or foreseeability by the defendant of the alleged harm to the plaintiff. Jupin, 447 Mass. at 147; Heath-Latson v. Styller, 487 Mass. 581, 584 (2021)("Fundamentally, the existence of a duty of care depends upon the foreseeability of a risk of harm that the defendant has an ability to prevent."); LeBlanc, 463 Mass. at 328; Whittaker v. Saraceno, 418 Mass. 196, 198 (1994)(commercial landlord may well have a duty of care to guard against foreseeable criminal acts of third parties); Foley v. Boston Housing Auth., 407 Mass. 640, 644 (1990)(no duty in employer-employee relationship).

Generally, no duty exists to protect others from criminal activities of third persons. Jupin, 447 Mass. at 148. However, such a duty may arise if the putative defendant "realizes or should realize that [their act or omission] involves an unreasonable risk of harm to another through" criminal conduct. Id., quoting Restatement (Second) of Torts § 302B (1965). Stated differently, third-party criminal conduct will be viewed as foreseeable if the defendant recognized or should have recognized that their conduct likely created a situation that afforded an opportunity to a third person to commit a crime. Id., quoting Restatement (Second) of Torts § 448 (1965).

"[T]he standard of foreseeability turns on an examination of all the circumstances." Mullins, 389 Mass. at 56. A plaintiff may establish foreseeability with evidence of prior similar criminal acts by a third party, but evidence of such acts is not required; prior criminal conduct is but one factor to consider in the analysis. Id. See also Whittaker, 418 Mass. at 199 ("The previous occurrence of similar criminal acts on or near a defendant's premises is a circumstance to consider, but the foreseeability question is not conclusively answered in favor of a defendant landlord if there has been no prior similar criminal act.").

With these general principles in mind, the court analyzes the potential duty of each Defendant.

The Trust

Ownership of a condominium unit is a hybrid form of real estate interest; the owner has both exclusive ownership and possession of his unit and an undivided interest, shared with the other unit owners, in the common areas. Noble v. Murphy, 34 Mass. App. Ct. 452, 455–456 (1993). Such ownership "affords an opportunity to combine the legal benefits of fee simple ownership with the economic advantages of joint acquisition and operation of various amenities

including recreational facilities, contracted caretaking, and **security safeguards.**" Id. (emphasis added). Busalacchi v. McCabe, 71 Mass. App. Ct. 493, 499 (2008)("Though it borrows from both individual and common forms of ownership, condominium ownership differs from both.").

Pursuant to the condominium statute, the maintenance of such "amenities" in common areas is the responsibility of the condominium association. See G. L.c. 183A, § 10(k)(requiring that "[t]he organization of unit owners ... designate a person or entity ... [to] oversee the maintenance and repair of the common areas of the condominium."); Feinstein v. Beers, 60 Mass. App. Ct. 908, 909 (2004)(rescript)("condominium association controls the common areas"). For many condominium associations, as is the case here, the responsibility to oversee the common areas is met through the employment of a professional property management firm.

The parties have not cited, and the court has not found, a Massachusetts appellate decision addressing the duty of care, if any, owed by a condominium association to protect unit owners against the criminal acts of third parties carried out through common areas. To the limited extent our own appellate courts have addressed duty in the condominium context, they have distinguished between criminal incidents implicating a public or common area of the building, and those implicating private areas over which a unit owner had control, because condominium associations do not assume exclusive responsibility for privately-owned units. Feinstein, 60 Mass. App. Ct. at 908-909 (leaving unit balcony door partially open was an obvious danger, relieving trust of duty to warn; trust did not create situation that caused the danger); Hawkins v. Jamaicaway Place Condo. Tr., 409 Mass. 1005, 1005 (1991)(rescript) (individual unit owner's failure to install security bars on his windows at his own expense supported summary judgment for the trust).[7]

[7] See also, O'Brien v. Christensen, 422 Mass. 281, 283, 286-287 (1996)(trust responsible for the proper maintenance and repair of the common elements pursuant to condominium master deed).

The Supreme Courts of California and Arizona have each addressed the duty of care of condominium associations, and concluded that they should be held to the same standard of care for common areas as a landlord. Like a landlord, a condominium association bears a duty to exercise due care for the residents' safety in those areas under the association's control, i.e., the common areas. Martinez v. Woodmar IV Condominiums Homeowners Ass'n, Inc., 941 P.2d 218, 189 Ariz. 206, 209 (1997)(shooting in parking lot before condominium security guard came on duty; noting that "a new type of possessor . . . the condominium association . . . [l]ike a landlord who maintains control and liability for conditions in common areas, . . . controls all aspects of maintenance and security for the common areas and, most likely, forbids individual unit owners from taking on these chores"); Frances T. v. Village Green Owners Assn., 723 P.2d 573, 42 Cal. 3d 490, 499-503 (1986)(no exterior lighting in common area controlled by association outside unit; rape and robbery of unit owner inside unit; association held to same standard as landlord to exercise due care; "not necessary [for foreseeability] . . . that the prior crimes be identical to the ones perpetrated against the plaintiff")(emphasis in original).

I am persuaded by the reasoning of these decisions. In each case, the defendants raised the arguments raised here. But the existence of opportunistic crime, including violent crime, accessed through public areas is a foreseeable fact of everyday life for most citizens, and condominium complexes are no exception. I accordingly believe that recognizing this duty is consistent with current Massachusetts law, as well as the teaching of Mullins regarding "existing social values and customs." 389 Mass. at 51. Heath-Latson, 487 Mass. at 584-585 ("There are exceptions to this [no duty] rule."); Whittaker, 418 Mass. at 198-199 ("All of the circumstances are examined in defining the scope of a duty of care based on the reasonable foreseeability of harm."); Or v. Edwards, 62 Mass. App. Ct. 475, 484-485 (2004)(duty of residential landlord).

In Massachusetts, our Supreme Judicial Court has explained: "A landlord 'is not a guarantor of the safety of persons in a building's common area. A landlord is not free, however, to ignore reasonably foreseeable risks of harm to tenants, and others lawfully on the premises, that could result from unlawful intrusions into common areas of the leased premises.'" Griffiths v. Campbell, 425 Mass. 31, 34 (1997), quoting Whittaker, 418 Mass. at 197; Or, 62 Mass. App. Ct. at 484 ("landlord of residential property ... was under a duty – higher than that of a commercial landlord – to protect tenants from reasonably foreseeable risks of harm, including foreseeable risks of criminal acts")(citation and footnote omitted). Thus, whether the Trust owed a duty to Dr. Bolanos and Dr. Field turns on whether Teixeira's intrusion into the building in the manner he accomplished it,[8] and the harm that resulted, was foreseeable. **I conclude for summary judgment purposes on this Record that it was.** Jupin, 447 Mass. at 147-148, n. 7 ("[I]insofar as foreseeability bears on the existence of a duty, it is not appropriate to leave such an issue to the jury. . . . [T]he issue of foreseeability insofar as it affects the causal relationship between the defendant's breach of a duty and the victim's injuries is for the jury to decide.").

There is evidence that the Trust undertook to ensure the security of the Building's common areas, by: entering into contracts with Bayberry and Highbridge, both of which were entrusted with certain security responsibilities;[9] monitoring security issues and overseeing the maintenance of the building's security features (e.g., CCTV cameras, key fobs, and garage door transponders); and conducting condominium meetings on these topics.[10] By way of just one example, at their February 23, 2017 meeting, the Board of Trustees discussed the need for a security system upgrade (e.g., replacing the exterior cameras at Macallen). All these efforts

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[8] I do not agree with the Trust' argument that the Record evidence on this point is unduly speculative. Paper 42, at page 17 and n. 6.

[9] Bayberry's and Highbridge's security responsibilities are discussed below.

[10] As noted above, the Trust's duty with regard to common areas is established by statute.

would make little sense unless the Trust foresaw that uninvited and unauthorized intruders could gain access through the common areas of the Building to commit criminal acts, and understood the unit owners were relying on the Trust and its agents to attempt to protect them against such acts.

There is also evidence that the type of criminal intrusion that occurred here was reasonably foreseeable to the Trust. The Trust, primarily through Bayberry, was well aware that unlawful intrusion into the garage was possible when the garage doors were opened, that such intrusions had resulted in criminal activity in the past, and that once an intruder accessed the garage, he could access residential floors by waiting for a resident to call Elevator 1. Additionally, the Trust possessed very specific notice from Dr. Field that he was concerned about the lack of a locking mechanism on the stairwell doors. Dr. Field expressed his belief that the absence of a lock could permit unlawful intruders to access Floor 11, and cause harm to residents or their property. Defendants characterize this exchange as merely reflecting Dr. Field's concern that certain neighbors already lawfully within the residential portions of the Building were entering Floor 11. Trust and Bayberry Reply, Paper 44, at 7. However, Dr. Field's specific language may reasonably be interpreted otherwise. Joint Appendix 47 ("I don't want to make an issue of the individuals [who were his neighbors] I want[] to make sure the top floor [is] secure.").

For purposes of the summary judgment Record before me, I conclude that it was reasonably foreseeable to the Trust that an intruder could enter the garage, access Floor 11 as described and acknowledged possible, and then harm residents. The fact that no other armed home invasion or murder had occurred at the premises before May 5, 2017 cannot detract at this

stage of the case from all of the other circumstantial evidentiary factors pointing to a duty based on foreseeability, whether that duty is found in common law or contract.

The Trust's motion for summary judgment on Counts X and XI (wrongful death against the Trust) is DENIED.

Bayberry

Through its Management Agreement with the Trust, Bayberry assumed the Trust's duty to protect the condominium's common areas from intruders. Section 4 of these parties' Agreement specifically provides:

> The Manager shall be authorized *and required* to perform all services necessary for the management of the Property, including: but not limited to:
>
> ...
>
> **(E) Utilities, Repairs and maintenance.** []Provide for utilities to be supplied to the Condominium and cause the common areas and facilities of the Condominium to be maintained and repaired in accordance with the standards established by the Trustees pursuant to the By-Laws at the expense of the Trust. The same shall include entering into contracts in the name of the Trust (and monitoring the proper performance under such contracts) for . . . *security services*.

Joint Appendix 51 (bold in original, italics supplied).

This duty by Bayberry to protect the common areas from intruders pursuant to the Management Agreement is supported by: Mullen's testimony that he satisfied the obligation to enter into a security contract by entering into concierge agreements, which involved "certain security aspects," and provided security services "[i]n some way," and that "the 24/7 concierge was a safety and security measure," Joint Appendix Ex. 1 at 28 and 34; the emails between Dr. Field and Mullen regarding Floor 11 access, which indicate both that Dr. Field relied upon Bayberry, as agent of the Trust, to protect residents from intruders gaining access to common areas, and that Floor 11 was intended to be subject to additional security protections; the emails indicating Bayberry took charge when security issues in the building arose, particularly with

regard to the garage; and the Board of Trustees meeting minutes indicating Bayberry's participation in the Trust's efforts to upgrade the building's security system.

To the extent Bayberry argues the murders were unforeseeable, and therefore there was no duty, I rule otherwise for the same reasons discussed above in connection with the Trust.

Bayberry's motion for summary judgment on Counts VII and VIII (wrongful death) is accordingly DENIED.

Highbridge

I rule that, for purposes of summary judgment, Highbridge also assumed a duty to protect the common areas from intruders.

This duty begins with the plain meaning of "access control," contained in the CSA at 6, and the methods by which that control was to be maintained. The Concierge Service Manual incorporated into the CSA required Highbridge to: "[m]ake daily rounds of building facilities"; [c]ontrol access to the residential section of the building and other common areas"; and "[m]onitor CCTV when possible." Joint Appendix Ex. 14 at 33-34. Additionally, the Manual anticipated that a concierge could need to address criminal activity in common areas, stating: "In your position as concierge you may either become aware of, or be notified of, criminal activity. Just remember, when in doubt, report it." Id., at 8. Highbridge's duties also included unlocking Elevator 1 at 6:00 a.m. in the morning and locking it again at 4:00 p.m. Id., at 34-35. These functions related to building security because they were, at least in part, intended to prevent intruders from entering the Building through its common areas.

Highbridge understandably relies on the language of the Manual where it expressly states that "[Highbridge] is not an insurer of the building's security, safety or general exposures," Joint Appendix Ex. 14 at 6. I have considered this language in my reading of the entire contract. I am

unable to rule that this language defeats Plaintiffs' theory of contractual duty, for several reasons. First, Plaintiffs are not claiming Highbridge was their "insurer." Second, this disclaimer cannot negate the undisputed Record facts that Highbridge undertook certain functions under the Manual whose clear purpose was to prevent intruders from accessing the Building's common areas. And third, once these security-related functions were contractually undertaken by Highbridge, it had a duty to perform the functions with reasonable care, that is, in a non-negligent fashion.

The summary judgment Record contains several examples of performance by Highbridge personnel in key areas that a reasonable jury could determine to have been negligent: the failure of Raji to address Teixeira's loitering near the garage door when Raji drove his own car into the garage; the failure of Tongo and Raji to observe on the monitor that Teixeira was "piggybacking in" to the garage behind a different car; and the unexplained failure of Raji to notice packages and keys strewn about the 11th floor in front of the unit during his alleged building tour. The undisputed fact that Highbridge was not a security firm with employed security guards does not change this Record.

In his deposition, Mullen stated that, in his view, "the 24/7 concierge was a security and safety feature," and that he considered Highbridge's daily rounds of the building and monitoring of CCTV to be a security function. Joint Appendix Ex. 1 at 34, 177-178. The February 23, 2017 Board of Trustees meeting minutes indicate Highbridge had put an "increased focus on garage security (especially in cold weather when the doors act up)." Joint Appendix Ex. 52 at 5 (emphasis removed). While these facts may well be viewed by a reasonable jury to constitute an effort by the Trust to shift responsibility to its new concierge Highbridge, such Record evidence further supports the claim for summary judgment purposes that Highbridge assumed a duty

pursuant to the CSA to prevent foreseeable intruders from entering the common areas, and could lead a reasonable jury to determine Highbridge beached that duty.

Although I agree with Highbridge about the historical duty of a landowner to a guest, and respect that precedent, I believe it is distinguishable here as both a matter of fact and of law. Cf. Lev v. Beverly Enterprises-Massachusetts, 457 Mass. 234, 243 (2010); Luoni, 431 Mass. at 731-732; Velazquez v. Riverplace Apartments Limited Partnership, 79 Mass. App. Ct. 1103, (2011)(Rule 1:28 opinion)(definition of reasonable foreseeability based on policy and pragmatic judgment). For the reasons discussed above I am unpersuaded that our appellate courts will not impose a duty in this area of condominium living, in the context of this Record.

To the extent Highbridge contends Plaintiffs cannot establish Highbridge could reasonably have foreseen that its alleged acts or omissions would result in murder, I disagree. It was reasonably foreseeable that the negligent performance of Highbridge's access control obligations could result in an intruder gaining access to the Building, and committing a violent attack on a resident.[11] Surely one of the core reasons for "access control" to condominium buildings, whether through a concierge service or other means, is the prevention of criminal conduct against residents or their property.

Highbridge's motion for summary judgment on Counts IV and V (wrongful death) is accordingly DENIED.

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[11] For the same reason, I am not persuaded for purposes of summary judgment by Highbridge's arguments that Plaintiffs cannot establish proximate cause because the murders were a superseding-intervening event. Paper 38, at pages 16-19. Causation is a question of fact for the jury. Jupin, 447 Mass. at 147-148, n. 7 Fund v. Hotel Lenox of Boston, 418 Mass. 191 (1994)(court assumed, for summary judgment purposes, that hotel owed duty to guest, and ruled that stabbing murder by an intruder was reasonably foreseeable, given that security system could have been found to fail standard of reasonableness; summary judgment for defendant vacated); Ledet v. Mills Van Lines, Inc., 97 Mass. App. Ct. 667, 672, review denied, 486 Mass. 1104 (2020)("The concept of foreseeability defines both the limits of a duty of care and the limits of proximate causation."); Delaney v. Reynolds, 63 Mass. App. Ct. 239, 242 (2005)("Where the intervening occurrence was foreseeable by a defendant, the causal chain of events remains intact and the original negligence remains a proximate cause of a plaintiff's injury.").

Conclusion

For the reasons stated, the defendants' motions for summary judgment (Papers 38 and 41) are **ALLOWED as to Counts VI, IX, and XII, but otherwise DENIED**. The case shall go forward to trial by jury as scheduled against all three Defendants on all elements of the claims for the wrongful deaths of Dr. Field and Dr. Bolanos.

SO ORDERED.

Dated: July 5, 2022

Christine M. Roach