

# TORTS, INSURANCE & COMPENSATION LAW SECTION

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## Proximate Cause of Negligent Security Cases: The Predicted Effects of *Burgos* and *Gomez*

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Over the past two decades, the courts of this state have certainly seen an increase in the number of cases arising out of a landlord's alleged failure to provide minimal security precautions to protect tenants from the foreseeable harm of criminal conduct by third parties. The increase in claims has led to confusion, on both sides of the bar, as to just what is required to establish a prima facie case against an allegedly negligent landlord. The sticky issue has almost always been that of proximate cause - a person who sustains personal injuries must show that the landlord's inadequate security measures were a proximate cause of the injuries.<sup>1</sup> Thus, a number of questions would arise: Who was the assailant? How did he gain access to the premises? Would "minimal precautions" have made a difference?

The Court of Appeals was recently given the opportunity "to create a special rule for premises security cases."<sup>2</sup> However, showing both wisdom and restraint, the Court told us that no "special rules" are required and that we need look no further than the previously established rules regarding proximate cause to ascertain the level of proof required to sustain a plaintiff's burden in these matters.<sup>3</sup>

The Court recognized the need to strike a balance between "a tenant's ability to recover for an injury caused by the landlord's negligence" and "a landlord's ability to avoid liability when its conduct did not cause any injury." The Court stated that "[t]here is no need, however, to create a special rule for premises security cases, since the burden regularly placed on plaintiffs to establish proximate cause in negligence cases strikes the desired balance."<sup>4</sup>

What, then, is required? The Court of Appeals has told us that a plaintiff still must establish that the assailant gained access to the premises *through* a negligently maintained entrance.<sup>5</sup> And the Court has further told us that a plaintiff must still show that the assailant was an "intruder" as "even a fully secured entrance would not keep out another tenant, or someone allowed into the building by another tenant."<sup>6</sup>

The defense bar previously interpreted these two requirements as mandating a dismissal of any case where the attacker remained unidentified. Some trial and appellate courts agreed. However, the Court of Appeals expressly rejected this position, stating that it "would place an impossible burden on tenants."<sup>7</sup>

The Court held that a plaintiff can meet his burden on proximate cause by presenting circumstantial evidence from which it may be reasonably inferred that (1) the assailant gained access to the building through a negligently maintained entrance, *and* (2) the assailant was an intruder, as opposed to a tenant or a guest of a tenant.<sup>8</sup>

An examination of the facts of the two cases is warranted, so that we might know, with some certainty, what type of circumstantial evidence will be sufficient to meet these burdens. In *Burgos*,<sup>9</sup> the plaintiff relied upon the following evidence (all circumstantial) in an attempt to defeat the defendant's motion for summary judgment:

- The plaintiff herself did not recognize her assailants.
- The plaintiff lived "in a relatively small building" (five floors and 25 apartments) and was familiar with *all* the building's tenants *and* their families.
- The assailants did not take any steps to conceal their identities, thus showing an apparent lack of concern about being recognized by the plaintiff or others.
- None of the building's entrances had functioning locks on the date of the occurrence.

The Court of Appeals ruled that these items (presumably in their totality) were sufficient to defeat the motion for summary judgment.<sup>10</sup> The assault and robbery in *Burgos* took place as the plaintiff exited from her apartment into the hallway, at which time she was pushed back into her apartment by the assailants. According to the Appellate Division, First Department's decision in the case,<sup>11</sup> the plaintiff in *Burgos* resided on the *fourth floor*. Thus, there was no direct evidence as to the means of entry by the assailants. However, the Court of Appeals presumably felt that the plaintiff made a sufficient showing on this issue by stating in her affidavit that *all* the entrances to the building had broken locks. Thus, if the plaintiff's proof was sufficient to show that the assailants were "intruders," it necessarily followed that they "gained access to the premises *through* a negligently maintained entrance" as, arguably, all the entrances were negligently maintained in *Burgos*.

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In *Gomez*, the court relied upon the following factors:

- The 12-year-old plaintiff actually saw the assailant enter the defendant's building through a back door which was broken.
- The assailant, when he entered the elevator in the defendant's building along with the plaintiff and several other people, did not push a button to select a floor.
- The plaintiff herself did *not* testify that she knew *all* the building residents; rather, she indicated that she knew most of them by sight. However, the plaintiff presented evidence from another building resident and a frequent building visitor to the effect that none of them recognized the assailant.
- The assailant left the building through the broken rear door.
- The assailant again made no attempt to conceal his identity, even though there were people in the area who could have easily identified him.

A common thread in both cases was the assailants' failure to take any steps to conceal their identities. The Court seemed to feel that a tenant, a guest of a tenant or some other individual generally known to the building's residents would take some steps to disguise himself from his neighbors. But this cuts both ways, as the use of a mask or disguise would call attention to the assailant and make the commission of the crime virtually impossible.

The proof in *Gomez* was, arguably, weaker than the evidence in *Burgos*. The plaintiff in *Gomez* resided in a much larger building, with over 150 apartments and several hundred residents. Furthermore, the assailant's failure to push a button when he got into the elevator should have been of no consequence. There were several other people on the elevator besides the assailant, and they all presumably selected a floor. Thus, one could just as easily conclude from the assailant's failure to push a button that he was going to a floor that had already been selected. The conclusion that his failure to push a button was some evidence of his "intruder" status seems a bit of a stretch.

### Summary

The *Burgos* and *Gomez* decisions affirm the plaintiff's burden to prove both that the assailant gained access to the premises *through* a negligently maintained entrance *and* that the assailant was an intruder, with no right of entry to the premises. However, the blanket rule advanced by some defense counsel, that if the assailant has not been identified, the plaintiff's case must fail, has been flatly rejected by the Court of Appeals.<sup>12</sup> Circumstantial evidence can be used by a plaintiff to show that it was more likely than not that the assailants were actually intruders, as opposed to tenants or guests or invitees of tenants. As always, the line between "reasonable inference" and "mere speculation" remains a gray area. It appears that cases where the means of entry cannot be established by admissible evidence may still be dismissed by a motion for

summary judgment. Cases where little or nothing is known about the assailant may face a similar fate. However, the lack of use of a mask or disguise, along with some evidence of the plaintiff's knowledge of all building tenants and the assailant not being included in that group probably will be sufficient to defeat a motion for summary judgment. The effect of such evidence upon a juror's mind at the time of trial seems more tenuous, particularly in cases involving bigger buildings. In a town such as New York City, where people usually do not get to know their neighbors in their large, high-rise apartment buildings, the credibility of such testimony may be suspect.

Overall, the pendulum has apparently swung in favor of the plaintiffs. While the legal principles relied upon by the Court of Appeals in *Burgos* and *Gomez* were already well-established, their application to the facts of those cases shows us that a minimal amount of circumstantial evidence will suffice on the proximate cause issue.

### Endnotes

1. *Miller v. State*, 62 N.Y.2d 506.
2. *Norma Burgos v. Aqueduct Realty Corp.*, No. 168; *Marisa Gomez v. New York City Housing Auth.*, No. 183, (N.Y. Nov. 24, 1998).
3. *Id.*, at p. 6.
4. *Burgos, Gomez*, slip op. at p. 6.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at p. 7.
9. It should be noted at this juncture that the *Burgos* case involved appeal from an order of summary judgment in favor of the defendant, whereas the *Gomez* case involved a post-trial motion to miss by the defendant landlord, after a verdict in favor of the plaintiff.
10. *Burgos, Gomez*, slip op. at p. 8.
11. 245 A.D.2d 221, 666 N.Y.S.2d 640 (1st Dep't 1997).
12. *Burgos, Gomez*, slip op. at p. 6.

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