Zelaye v 2108 Amsterdam LLC.
2020 NY Slip Op 35720(U)
August 3, 2020
Supreme Court, New York County
Docket Number: Index No. 156516/2017
Judge: Robert David Kalish

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** **PART** **IAS MOTION 29EFM**

Justice

----------X

EDISON GARCIA ZELAYE,

Plaintiff,

- v -

2108 AMSTERDAM LLC.,

Defendant.

----------X

INDEX NO. 156516/2017

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER.

Motion by Defendant 2108 Amsterdam LLC ("Defendant") for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the Complaint by Plaintiff Edison Garcia Zelaye ("Plaintiff") with prejudice is granted.

BACKGROUND

Plaintiff alleges that on May 11, 2017, he was caused to sustain serious injuries in a fire[1] at 2108 Amsterdam Avenue, New York, NY 10032, ("premises") which was owned and managed by Defendant, when he was visiting Angell Matamoros ("Matamoros") in Apartment 5N. (*See* Complaint; *see also* Plaintiff EBT at 21:15-25; 22:21-23:06.) Matamoros was renting one of the rooms in the apartment from the apartment's record tenants Joseph Lawrence and Karimah Lawrence ("the Lawrences"). Plaintiff alleges that his injuries were caused by Defendant's negligence "in that [Defendant] failed to exercise due care and caution; in failing to maintain [the premises] in a reasonably safe and proper condition; in that they caused created, allowed and permitted [the premises] to be, become and remain in a dangerous, defective and hazardous condition when they knew, or through the exercise of reasonable care, should have known of the existence of said condition; . . . in that [Defendant] failed to have Apartment 5N at the aforementioned premises equipped with operational smoke detecting devices in conformity with the New York State and New York City statutes and regulations[.]" (Complaint ¶ 11.) In the Bill of Particulars, Plaintiff asserts that Defendant had actual and constructive notice of alleged "unsafe condition." (Bill of Particulars ¶¶ 5-7.)

Defendant moves for summary judgment dismissing the Complaint arguing that it complied with the Administrative Code by providing a working smoke detector to the Lawrences

[1] The Complaint does not allege the cause of the fire.

at the time they took possession. In opposition, Plaintiff argues that Defendant failed to maintain its property in reasonably safe condition and, based on Defendant's superintendent Mario Villanueva's affidavit, it was put on notice regarding the high risk of fire in Apartment 5N. In its reply, Defendant argues that Villanueva's affidavit is inadmissible, Defendant satisfied its duty when it complied with the Administrative Code, and, even assuming it breached a duty, there is no showing that any negligence by Defendant was a proximate cause of Plaintiff's injuries.

I. Deposition of Plaintiff Edison Garcia Zelaye

Plaintiff stated that on the evening of May 10, 2017, he arrived at the premises at 8 PM to visit Angel Matamoros ("Matamoros") and his girlfriend Anaceli Rodriguez ("Rodriguez")—Rodriguez did not live in Apartment 5N. Matamoros was renting a room in Apartment 5N from the record tenants of the apartment, who were renting the other room at the apartment to someone else who was not present at the night of the incident. (Plaintiff EBT at 21:01-23:14; 20:23-26:23.) At the time of the incident, there was no electricity in the apartment. (*Id.* at 27:18-29:23.) According to Plaintiff, the kitchen and living room were each lit by one pencil-sized candle at the time of the incident. (*Id.* at 33:07-12; 51:02-05.)

On the night of the incident, Plaintiff, Matamoros, and Rodriguez were in Matamoros's room, which faced the street and outside of which there was a fire escape. (*Id.* 30:3-17.) There was only a "little candle" in the room to light up the statues of saints. (*Id.* at 28:22-25.) There were no candles in the room to see around. (*Id.* at 29:02-07.) They were drinking—with Plaintiff consuming six beers—eating, listening to music, and watching television which was powered by an extension cord that went out the window into the apartment below. (*Id.* at 26:24-29:23.)

Around midnight, when the door to Matamoros's room was shut "Plaintiff saw smoke coming in underneath the door." (*Id.* at 31:18-22; 51:20-25.) Plaintiff smelled the smoke immediately. (*Id.* at 31:23-32:03.) Rodriguez opened the door and Plaintiff, Matamoros, and Rodriguez all saw flames. (*Id.* at 32:4-13.) They did not close the door. (Id. at 32:14-16.)

Plaintiff believed that "[t]he fire was coming from the kitchen." (*Id.* at 32:23-33:12; 51:02-19.) Plaintiff and Matamoros tried to put out the fire by throwing water on it from a bucket that was in Matamoros's room to wash his hands. (*Id.* at 32:18-22; 33:13-25; 44:11-17.) Plaintiff then left the room to continue to try to put out the fire. Matamoros and Rodriguez did not accompany him. Plaintiff stated that he went that way instead of taking the fire escape down from the room or remaining in the room—which is what Matamoros and Rodriguez had done—in case the other person living in the apartment had come back to the apartment and was stuck amidst the fire and needed help. Plaintiff was then allegedly burned while trying to put out the fire and returned to Matamoros's room and remained there, allegedly burned, until the firefighters arrived. (*Id.* at 32:14-35:5; 35:19-36:08; 39:05-40:07; 41:16-21; 46:10-48:12; 49:09-14.)

Plaintiff stated that before the fire, he "had seen smoke detectors in the apartment . . . but [did] not believe they worked." (*Id.* at 36:19-22.) He did not believe that they worked because when he was in the apartment previously, he observed the other person living in the apartment burn food while cooking and noted that the smoke detector did not sound. (*Id.* at 36:22-39:4.) He

did not believe that Matamoros and his roommate had purposefully disconnected the smoke detector. (*Id.* at 38:22-39:04.)

II. Affidavit of Mario Villanueva (Defendant's Superintendent)

Mario Villanueva ("Villanueva") was the superintendent with Defendant 2108 Amsterdam at the time of subject incident and lived in a basement apartment in subject building. Villaneuva submitted an affidavit in the instant motion enclosed as part of Plaintiff's opposition papers; however, he was not the superintendent and was not employed by Defendant when he submitted his affidavit in the instant motion as Villanueva stopped working as the superintendent of Defendant in January of 2018. He stated in his affidavit that, "[a]s soon as I started working at the 2108 Amsterdam Avenue building, it became apparent to me that the [record] tenant in Apt. 5N, Karimah Lawrence, was mentally ill and addicted to drugs." (Villanueva Aff at 3.)

According to Villanueva, Karimah Lawrence "lived in one room with her husband. There was another bedroom that Mrs. Lawrence rented to different people every few weeks. The third bedroom was rented by . . . Matamorros who had been the superintendent at the building for six or seven years and had been fired right before [Villanueva] was hired." (*Id.*)

Villanueva stated that the other tenants would repeatedly complain to me that there was a "steady stream of undesirable people coming and going out of the apartment, many of whom she let squat there for extended periods of time, who were smoking crack." He added that, "[f]rom the time I was hired until May of 2017, I repeatedly and continuously relayed the tenants' and my complaints about Mrs. Lawrence to both Mr. Roberts and the property manager for the building, Issaka Maguizo. I told both of them on numerous occasions that Mrs. Lawrence was letting squatters stay in the apartment who were smoking crack, that they had removed the smoke detector and that they were going to burn the building down." (*Id.*)

Villanueva further stated that "[a]bout a month before the fire, the electricity to Mrs. Lawrence's apartment was turned off and several tenants approached me to let me know that in addition to being full of individuals smoking crack, the apartment was now also full of burning candles and that they were more worried than ever that there was going to be fire. Once again, I told both Mr. Maguizo and [Mr. Evans aka Khomari] who seemed totally unconcerned and told me not to worry about it." According to Villanueva, he nevertheless was worried about it, and so were the other tenants, "who continued to complain to me and I continued to advise Mr. Maguizo and [Khomari], right up until the time of the fire, that there was a dangerous situation in Apartment 5N and that unless it was corrected there was going to be a fire." (*Id.*)

III. Deposition of Issaka Maiguzo (Defendant's Building Manager)

Issaka Maguizo ("Maguizo") was Defendant's building manager at the time of the incident. (Maiguzo EBT at 6:10-16:14.) Maguizo personally managed six buildings, one of which was subject premises owned by Defendant. (*Id.* at 15:16-16:8; 24:8-12.) As part of his position at subject premises, he performed random check-ups on smoke detectors and window guards around the building, repaired any broken lights, cleaned the basement, and handled tenants' complaints. (*Id.* at 39:12-23; 44:03-07.) He stated that while he kept records of tenant

complaints for some of the other buildings that he managed, he did not keep records of complaints for Defendant. (*Id.* at 16:24-20:16.) With regard to smoke and carbon monoxide detectors in the subject premises, Maguizo stated that there was supposed to be a battery powered carbon monoxide and smoke alarm unit in each apartment and in the common hallway outside the apartments. (*Id.* at 32:14-25; 33:25-34:7.) Maguizo further stated that, as directed by the management company, Evan Robert Management, he had checked all the smoke detectors in the building, with the exception of one unit on the first floor, in February 2015 to make sure they were working properly after a complaint was made. (*Id.* at 23:10-29:05.)

IV. Deposition & Affidavit of Robert Khomari (Defendant's Managing Agent)

Robert Khomari ("Khomari") was Defendant's managing agent at the time of the incident. *(*Khomari EBT, NYSCEF Doc No 44, at 24:14-25:15; 34:13-36:23.) As part of this role, he kept records of the leases and rent roll of the tenants of the premises. (*Id.* at 38:05-08.) Khomari was also a member of the LLC that owned Defendant's building. (*Id.* at 50:10-14.)

According to Khomari, at the time of the incident, based on the lease and rental roll, the only people known to be tenants at Apartment 5N were Joseph Lawrence and Karimah Lawrence ("the Lawrences"). (*Id.* at 51:02-52:11.) The Lawrences had last signed a lease renewal in 2014. (*Id.* at 54:02-54:11.)

The unsigned lease renewal documents were forwarded to a company called Fountain House that was paying the rent of Apartment 5N. (Plaintiff's Affirm in Opp, Ex C [Renewal Lease Form], NYSCEF Doc No 61; Ex E [Khomari Aff and rent checks from Fountain House], NYSCEF Doc No 63.) Khomari stated that Fountain House supervised "mentally ill people." (*Id.* at 77:10-15; 79:20-89:25.)

Khomari stated that prior to the incident, property manager Issaka Maguizo, who reported to him, as well as tenants told him about the "high traffic" in Apartment 5N. (*Id.* at 57:4-19) He also stated that at some point prior to the fire he became aware that there was a problem with "squatters" in the apartment. (*Id.* at 64:15-20). He stated that as a result of these complaints and at some point before the incident, Defendant had started an eviction proceeding against the Lawrences. (*Id.* at 55:3-56:10.)

Khomari stated in an affidavit that Defendant was "not asked [to] perform any repairs within apartment 5N between the time that [they] purchased the building on May 4, 2015 and the subject May 11, 2017 fire." (Khomari Aff ¶ 7, NYSCEF Doc No 48.)

V. Affidavit of Henry Ocasio (Defendant's Real Estate Salesperson)

Henry Ocasio ("Ocasio") was the broker who rented Apartment 5N to the Lawrences in July 2012. (Ocasio Aff ¶¶ 2, 3.) He stated that he witnessed the signing of the lease. (*Id.* ¶ 4; *see also* Plaintiff's Affirm in Opp, Ex B [Lease dated July 2012], NYSCEF Doc No 50.)

VI. Deposition of Timothy Rooney (Fire Marshal)

Fire Marshal Timothy Rooney arrived at the scene of subject incident around 3 AM on May 11, 2017, to investigate the incident and origin of the fire, and he drafted a Fire Incident Report[2] (the "Rooney Report") based on his investigation. (Rooney EBT at 10:14-18; 11:22-12:18.) His investigation determined that the fire was started by a candle burning in the living room of the premises. (*Id.* at 18:11-19-21.) According to a certified copy of the Rooney Report, the fire was called in at 1:18 AM on May 11, 2017. The investigation further determined based on discussion with the fire department that there was a smoke detector located in the apartment, but it was not operating. (*Id.* at 23:11-25.) It also confirmed that there was a working smoke detector in the common hallway outside the apartment at the time of the fire. (*Id.* at 20:07-21:5.) Rooney stated that he himself did not test the smoke detectors for their operability. (*Id.* at 34:02-17.) Rooney stated that the firemen told him that the smoke detector in the hallway was "going off and [the firemen] took the battery out." (*Id.* at 20:25-21:05.) Lastly, the investigation determined that in April 2017, electricity to the apartment had been turned off by Con Edison for nonpayment. (*Id.* at 37:20-38:14.)

Fire Marshal Rooney was also asked about a Fire Incident Report Request Form prepared by Battalion Chief Michael T. Leanza (the "Leanza Report") on the scene of the incident. (*Id.* at 29:12-25; *see also* NYSCEF Doc No 65.) Rooney was specifically asked about the notation on the Leanza Report where it stated that there was no detector present. (*Id.* at 31:16-22; 33:22-25 [referring to the Leanza Report at 5].) Rooney stated that he had not reviewed the Leanza Report. (*Id.* at 31:25-32:06.)

VII. The Parties' Contentions

Presently, Defendant moves for summary judgment dismissing Plaintiff's Complaint, arguing that it complied with the Administrative Code by giving a working smoke detector to the Lawrences. (Memo in Supp, NYSCEF Doc No 36, at 2.)

Defendant further argues that the sole proximate cause of Plaintiff's injuries were his own actions, namely: "(a) becoming intoxicated in an apartment when candles were burning and [] he knew from past experience the smoke detector wasn't working; (b) failing to call the Fire Department when a fire was discovered; (c) not availing himself of a fire escape directly outside the room where he was; (d) leaving a room where there was no fire burning and entering a burning room in an attempt to fight the fire[.]" (*Id.* at 11.)

In opposition, Plaintiff argues that the smoke detector in the apartment at the time of the incident was not operational. (Affirm in Opp, NYSCEF Doc No 58, at 5, citing Ex C [lease renewal dated September 2016] & D's ex Ex E 23:11-25; *see also id.* at 6.)

Further, Plaintiff argues that even if Defendant complied with the Administrative Code provisions, a property owner nonetheless "has a common law duty to maintain its property in a

---

[2] Although the EBT refers to the Fire Marshal's report as part of Defendant's Exhibit V, this exhibit is not included in the record.

reasonably safe condition in light of all the surrounding circumstances." (Affirm in Opp, NYSCEF Doc No 58, at 2.)

Plaintiff further argues Defendant breached this duty, arguing:

> "The evidence which [D]efendant has submitted in support of its motion when viewed in conjunction with the affidavit from the superintendent [Villanueva] of the [D]efendant's building at the time of the fire, which is being submitted in opposition to the motion, establishes that [D]efendant failed to take even the minimum precaution of replacing an inoperable smoke detector even though it had received numerous complaints from tenants voicing fear that there was going to be a fire in the building because the apartment had no electricity and was being lit with candles by individuals, at least some of who were drug addicted and mentally ill."

(*Id.* at 3.) Plaintiff argues that Defendant breached this duty "in light of the foreseeability of a fire and the likelihood of injury to the others, the potential seriousness of the injuries which would result from a fire, and the relatively slight burden of significantly reducing the risk of those injuries by installing a working smoke detector." (*Id.*)[3]

Regarding proximate causation, Plaintiff argues that it cannot be determined as a matter of law that "the attempt by [P]laintiff, who believed there may have been someone trapped in the apartment, to extinguish the fire rather than immediately escape it was the sole proximate cause of the accident." (*Id.* at 3.) Plaintiff further argues that since this attempt was "directly related to the risk which [D]efendant created when it failed to take even minimum precautions to reduce that risk, summary judgment on the issue of proximate cause would clearly be improper." (*Id.* at 4.)

Plaintiff further reiterates that although the record tenants signed a tenant certification form when they first leased Apartment 5N acknowledging that there was an operable smoke detector and carbon monoxide detector in the apartment, they "never signed either the lease renewal [dated September 2016] or the smoke detector acknowledgement that [D]efendant sent them in September of 2016." (*Id.* at 4-5.)

In its reply brief in further support of its motion for summary judgment, Defendant makes three points: (1) the opposing affidavit of Villaneuva is not based on personal knowledge and contains hearsay that is insufficient to raise any issue of fact; (2) Plaintiff's legal arguments are contrary to controlling authority and that Defendant does not owe a common law duty to Plaintiff; and (3) no act or omission on the part of Defendant proximately caused any injury to Plaintiff. (Reply Affirm at 2, 4.)

---

[3] To note, although Plaintiff does not specify what caused the fire in the Complaint, in the opposition papers, Plaintiff asserts that the fire was caused by "a candle burning in the living room." (*Id.* at 6, citing Ex. 6 37:20-38:14; 16:11-19:21) This is undisputed by Defendant. (*See* Memo in Supp at 5.)

DISCUSSION

I. Standard of Review

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact. (*See Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact. (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true. (*See Roth v Barreto*, 289 AD2d 557 [2001]; *O'Neill v Town of Fishkill* 134 AD2d 487 [1987].)

II. Applicable Law and Analysis

Administrative Code § 27–2045, in relevant part, provides that:

> a. It shall be the duty of the owner of a class A multiple dwelling which is required to be equipped with smoke detecting devices pursuant to section 907.2 of the New York city building code or sections 27-978, 27-979, 27-980 and 27-981 of the 1968 building code to:
>
> > (1) provide and install one or more approved and operational smoke detecting devices in each dwelling unit and replace such devices in accordance with article 312 of chapter 3 of title 28 of the administrative code of the city of New York. Such devices shall be installed at locations specified in reference standard 17-12 of the 1968 building code or section 907.2.10 of the New York city building code, as applicable.
> >
> > (2) post a notice in a form approved by the commissioner in a common area of the building informing the occupants of such building (i) that the owner is required by law to install one or more approved and operational smoke detecting devices in each dwelling unit in the building and to periodically replace such devices upon the expiration of their useful life in accordance with article 312 of chapter 3 of title 28 of the administrative code of the city of New York and (ii) that each occupant is responsible for the maintenance and repair of such devices and for replacing any or all such devices which are stolen, removed, missing or rendered inoperable during the occupancy of such dwelling unit with a device meeting the

requirements of article 312 of chapter 3 of title 28 of the administrative code of the city of New York.

(3) replace any smoke detecting device which has been stolen, removed, missing or rendered inoperable during a prior occupancy of the dwelling unit and which has not been replaced by the prior occupant prior to the commencement of a new occupancy of a dwelling unit with a device meeting the requirements of article 312 of chapter 3 of title 28 of the administrative code of the city of New York.

(4) replace within thirty calendar days after the receipt of written notice any such device which becomes inoperable within one year of the installation of such device due to a defect in the manufacture of such device and through no fault of the occupant of the dwelling unit.

b. Notwithstanding the provisions of subdivision a of section 27-2005 of article one of this subchapter and subdivision c of section 27-2006 of article one of this subchapter, it shall be the sole duty of the occupant of each dwelling unit in a class A multiple dwelling in which a smoke detecting device has been provided and installed by the owner pursuant to the provisions of section 907.2 of the New York city building code or sections 27-978, 27-979, 27-980 and 27-981 of the 1968 building code to:

(1) keep and maintain such device in good repair; and
(2) replace any and all devices which are either stolen, removed, missing or rendered inoperable during the occupancy of such dwelling unit with a device meeting the requirements of article 312 of chapter 3 of title 28 of the administrative code of the city of New York.

c. Except as otherwise provided in paragraphs three and four of subdivision a of this section and article 312 of chapter 3 of title 28 of the administrative code of the city of New York, an owner of a class A multiple dwelling who has provided and installed a smoke detecting device in a dwelling unit pursuant to this section shall not be required to keep and maintain such device in good repair or to replace any such device which is stolen, removed, missing or rendered inoperable during the occupancy of such dwelling unit.

New York City, N.Y., Code § 27-2045, New York City, N.Y., Code § 27-2045; *see also Peyton v State of Newburgh, Inc.*, 14 AD3d 51, 53 [1st Dept 2004]; *Fairclough v 679 Magenta LLC*, 309 AD2d 619, 620 [1st Dept 2003]; *Acevedo v Audubon Mgt., Inc.*, 280 AD2d 91, 93-94 [1st Dept 2001].)

Defendant in the present case establishes prima facie that it fulfilled its duties under the Administrative Code Sections 27–2045(a)(1) and 27–2045(b). Defendant submitted evidence showing that it installed a functional smoke detector in the apartment at the commencement of the tenancy of the Lawrences in 2012 and had not received written notice of an inoperable detector between that time and the time of the incident. (*See* Administrative Code §§ 27-2045[a][1], [3], [4]; *Tucker v 64 W. 108th St. Corp.*, 2 AD3d 193, 194 [1st Dept 2003] [holding that landlord satisfied its statutory duty when it installed an operational smoke detector in the apartment ten years prior to the fire]; *Curry v 1716 Ave. T Realty, LLC*, 89 AD3d 978, 978-79 [2d Dept 2011] [landlord was not liable for personal injuries and wrongful death in an apartment fire as the building superintendent and the plaintiff both stated that landlord installed a working smoke detector ten years prior at the commencement of plaintiff's tenancy]; *Peyton*, 14 AD3d at 53 [landlord was not liable for personal injuries and wrongful death in an apartment fire as tenant had signed a lease three years prior at the commencement of the tenancy acknowledging that the apartment had a working smoke detector]; *Fields v S & W Realty Assoc.*, 301 AD2d 625, 625 [2d Dept 2003] ["The defendants met their initial burden of establishing their entitlement to judgment as a matter of law by submitting both a signed form acknowledging the installation of a smoke detector in subject apartment, and an affidavit from the building manager identifying the signature on the form as the tenant's."]; *see also Figueroa v Parkash*, 179 AD3d 583 [1st Dept 2020]; *Vanderlinde v 600 W. 183rd St. Realty Corp.*, 101 AD3d 583, 583 [1st Dept 2012]; *Martinez v Avila*, 2001 NY Slip Op 40228[U], 2 [App Term Aug. 1, 2001]; *Suhina v 780 E. 2nd St. Co., LLC*, 2008 N.Y. Slip Op. 32646[U] [N.Y. Sup Ct, Kings County 2008].)

In support of its testimony that an operable smoke detector was installed in the apartment, Defendant submits into the record a rider that is attached and incorporated within the lease titled "Smoke Detector and Carbon Monoxide Verification Form Acknowledgement" dated July 18, 2012, where Joseph Lawrence and [Karimah] Lawrence both acknowledged that apartment 5N was equipped with a working smoke detector and a working carbon monoxide detector. (Ex B, Lease dated July 2012 at 11 [Smoke Detector and Carbon Monoxide Verification Form].) Defendant's broker Ocasio witnessed the Lawrences sign the lease. (Ocasio Aff ¶¶ 3-5.) The rider reads as follows: "I, Joseph Lawrence & Karimah Lawrence, as tenant of above referenced apartment [5N], hereby certify that I have inspected the apartment and that [one] 1 smoke detector, and that [one] 1 carbon monoxide detector were present and in operable condition. The rider is signed by both Joseph Lawrence and Karimah Lawrence. (Smoke Detector and Carbon Monoxide Verification Form.) Defendant also submits the deposition testimony of Maguizo, who was a property manager for Defendant at the time of the incident, stating that a random check of the premises was conducted in February of 2015 to ensure that a working smoke alarm was present in every apartment, with the exception of one apartment on a different floor. (Maguizo EBT at 23:21-44:16.)

In turn, Plaintiff fails to raise a genuine material triable issue of fact as to whether Defendant complied with its statutory duty under the Administrative Code. (*Zuckerman*, 49 NY2d at 562-63; *Fields v. S & W Realty Assoc.*, 301 A.D.2d 625, 625 [2003].) Any oral complaints about the smoke detector did not impose a duty upon Defendant. (*See* Administrative Code § 27-2045[a][4]; *see also Mateo v Uphattan Corp.*, 2011 N.Y. Slip Op. 32012[U] [N.Y. Sup Ct, New York County 2011] [the plaintiff's allegation that she repeatedly made oral complaints is a bare unsubstantiated assertion and is not sufficient to raise a triable issue of fact

when she signed a lease acknowledging that the apartment had an operable smoke detector]; *Suhina*, 2008 N.Y. Slip Op. 32646[U] [same].) Likewise, it is not sufficient to defeat a motion for summary judgment here that the record tenants rather than the occupants, who were allegedly renting the rooms from the record tenants at the time of the incident, signed the rider acknowledging the smoke detector. (*Peyton*, 14 AD3d at 53; *see also Martinez*, 2001 NY Slip Op 40228(U), 2.) As to Plaintiff's statement that the smoke detector was not working when the female occupant of Apartment 5N burned food and the alarm did not sound, this is mere speculation that the smoke detector was inoperable, and it does not create a duty to the landlord. Mere speculation is not enough to raise a triable issue of fact. (*Compare Carter v Grenadier Realty*, 83 AD3d 640, 641 [2d Dept 2011] [a triable issue of fact was raised when the plaintiff through her affidavit stated that "the device never worked while she lived in the apartment"].) Likewise, any notation on the Leanza Report indicating no detector was present at the incident scene is clarified by the testimony of Fire Marshal Rooney explaining that there was in fact a smoke detector inside the apartment but it was not operating. (Rooney EBT at 23:11-25.)

Furthermore, assuming there was a violation of the cited standard, there is no showing that any negligence by Defendant in regard to the inoperability of any smoke detector(s) was a proximate cause of Plaintiff's injuries. While an operable smoke alarm may have alerted Plaintiff to the fire sooner, it was not a legal cause of Plaintiff's injuries. An operable smoke detector's purpose is the early detection of fire. By sensing smoke and sounding the alarm, the detector alerts the occupants of the building that there is possibly a fire in the premises and "assure[s] safe egress from a building imperiled by fire." (*Alloway v 715 Riverside Dr., LLC.*, 298 AD2d 148, 149 [1st Dept 2002].) Here, Plaintiff and his friends were alerted to smoke and fire when they smelled smoke coming in from underneath the door and saw the fire outside the room that they were in. As Plaintiff himself acknowledged, he had the option to go the other way—as Matamoros and Rodriguez did—and exit the room through the fire escape. Plaintiff's chosen act in attempting to put out the fire where "such peril was so obvious was a superseding cause for which [Defendant] cannot and should not be held responsible." (*Alloway*, 298 AD2d at 149.)

Moreover, to place a "common law" burden on landlords to regularly inspect apartments for working smoke detectors would be contrary to the Administrative Code and would create an unreasonable and unrealistic burden on landlords; and it would force landlords to interfere with their tenants' quiet enjoyment in a way that most tenants would find intolerable.

Further, even assuming arguendo that superintendent Villaneuva's affidavit was admissible for the purposes of this motion, there has been no showing that the fire had anything to do with the use of crack cocaine, other drugs or squatters or other undesirable persons.

Moreover, whereas Villaneuva states that the smoke detector had been removed, the Rooney Report and the testimony of the Fire Marshall Rooney establish that a smoke detector was in fact present but was not working at the time of the fire. The mere fact that a tenant may temporarily remove or temporarily disable a smoke detector does not by itself put a landlord on notice of a reasonably foreseeable risk of fire. To hold otherwise would ignore the reality that many New Yorkers temporarily disable their smoke detectors while cooking.

Likewise, while candles—just like any open flame (including an apartment stove)—are capable of causing fire, their mere use does not put a landlord on notice of a reasonably foreseeable risk of fire.

Lastly, although Villaneuva and, supposedly other tenants, had understandable concerns about the "high traffic" and drug use in apartment 5N, these facts and concerns do not establish that Defendant was put on notice of a reasonably foreseeable risk of fire. Further, Defendant has put forth evidence that it attempted to address these concerns by initiating eviction proceedings, and Plaintiff has not raised an issue of fact as to such mitigation attempts. Accordingly, this Court finds that Defendants are entitled to summary judgment dismissing the complaint.

That the Court finds in favor of Defendant here should not be construed as holding that a landlord will never have an obligation to act when they are put on notice that an apartment lacks an operating smoke detector or that there is some risk of fire. It is only to say that *under these circumstances* Defendant was not put on notice of a reasonably foreseeable risk of fire and any action or inaction by Defendant did not proximately cause Plaintiff's injuries. In a similar vein, a landlord may be within its rights to address complaints from other tenants living in the building as to any activities by one tenant that may intrude upon their quiet enjoyment—just as those tenants may also be within their rights to report and complain about such issues, including suspected illegal activities, to the relevant government authorities. The instant decision here only finds that Defendant did not breach a duty by acting in the manner that it did and any action or inaction by Defendant did not proximately cause Plaintiff's injuries.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by Defendant 2108 Amsterdam LLC ("Defendant") for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the Complaint by Plaintiff Edison Garcia Zelaye ("Plaintiff") is granted; and it is further,

ORDERED that the counsel shall serve, via NYSCEF, a copy of the instant decision and order with notice of entry within ten (10) days of the filing date of the instant decision and order; and it is further,

ORDERED that the clerk shall enter judgment accordingly.

The foregoing constitutes the decision and order of this Court.

08/03/2020
DATE

ROBERT DAVID KALISH, J.S.C.

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