

## NEW YORK COUNTY

## PREMISES LIABILITY

Negligent Repair and/or Maintenance — Inadequate or Negligent Security

## Landlord ignored broken door lock, assault victim claimed

**VERDICT** Defense

**CASE** Chrishema Clarke, an Infant Under the Age of 14 Yrs., by Her m/n/g, Terri Thompson-Gomillion, and Terri Thompson-Guillion, Ind. v. The City of New York, the New York City Housing Authority and Leonidez Caraballo, No. 109350/06

**COURT** New York Supreme

**JUDGE** Robert R. Reed

**DATE** 5/8/2014

**PLAINTIFF**

**ATTORNEY(S)** Gary B. Pillersdorf, Gary B. Pillersdorf and Associates, P.C., New York, NY

**DEFENSE**

**ATTORNEY(S)** Paul A. Krez, Krez & Flores, LLP, New York, NY (New York City Housing Authority, City of New York)  
None reported (Leonidez Caraballo)

**FACTS & ALLEGATIONS** On Sept. 27, 2005, plaintiff Chrishema Clarke, 12, was assaulted. The incident occurred in an elevator at her residence, an apartment building that was located at 74 W. 92nd St., in Manhattan.

Chrishema's mother, Terri Thompson-Gomillion, acting individually and as Chrishema's parent and natural guardian, sued the apartment building's owner, the city of New York; the building's operator, the New York City Housing Authority; and Chrishema's assailant, Leonidez Caraballo. The plaintiffs alleged that Caraballo committed assault, that the remaining defendants were negligent in their maintenance of the premises, and that the assault was a result of a lack of proper maintenance.

Caraballo did not answer the complaint, and plaintiffs' counsel did not pursue the claim against him. The matter proceeded to a trial against the remaining defendants.

Plaintiffs' counsel claimed that Caraballo, who was not a resident of the building, entered via a lobby door whose lock was not functioning. He noted that, while being questioned by investigating police officers, Caraballo stated that he entered the building via an open door. Plaintiffs' counsel noted that New York City Housing Authority records indicated that the door was confirmed to be broken during an inspection that occurred 15 days prior to the incident. He presented a repairman who claimed that he had repeatedly attempted to

fix the door but that the lock continued to malfunction. The repairman also claimed that he had advised that the only effective repair would be a total replacement of the door.

Plaintiffs' counsel also noted that, some 12 months prior to the accident, an intruder raped and killed a girl on the premises.

Defense counsel challenged the credibility of Chrishema and her mother. He noted that the women contradicted prior testimony in which they stated that they saw Caraballo and three of the building's tenants near the building's entrance shortly before the incident.

Defense counsel also challenged the contention that Caraballo was an intruder. He suggested that Caraballo may have been admitted to the building by one of the three tenants with whom he was said to have been associating. Defense counsel also claimed that Caraballo's wife, a former resident of the premises, had given Caraballo a key for the building's entrance. He further noted that Chrishema and her mother acknowledged having frequently seen Caraballo in and around the building and having exchanged greetings with him. He argued that Caraballo could have easily accessed the building even if the door's lock was functioning properly.

In response, plaintiffs' counsel contended that defense counsel could not prove that Caraballo possessed a key to the premises' entrance, and he argued that the central issue was the fact that Caraballo entered the building via a broken, unlocked door.

**INJURIES/DAMAGES** *emotional distress; mental/psychological; sexual assault*

Chrishema claimed that Caraballo lifted her shirt and bra, grabbed and sucked one of her breasts, and threatened to take her to the building's roof and rape her. She claimed that she has experienced emotional and psychological distress since the accident, and she further claimed that her distress has led to incidences of self-inflicted harm, including attempted suicides. She also claimed that she remains reclusive and afraid of men. She has undergone extensive psychotherapy and psychological counseling. The treatment is ongoing.

Chrishema's mother sought recovery of damages for Chrishema's past and future pain and suffering. She also presented a derivative claim. The plaintiffs sought a total of \$3 million.

Defense counsel claimed that Chrishema experienced instances of audio and visual hallucinations during the years that preceded the accident. He also challenged Chrishema's claim that she remains reclusive and afraid of men. He presented evidence that suggested that she is socially and sexually active.

**RESULT** The jury rendered a defense verdict. It found that the defendants were negligent in their maintenance of the subject premises, but that the defendants' negligence was not a proximate cause of the assault of Chrishema.

**DEMAND** \$3,000,000 (total, by both plaintiffs, from the city of New York and the New York City Housing Authority)

**OFFER** None

VIII/18-10 SUBWAY MUGGING -- TRAUMATIC LEG AMPUTATION -- DEFENSE VERDICT

Patricia Harvin v. NYCTA 2-week trial Judge Joseph B. Williams, Kings Supreme

VERDICT: Defense verdict on liability (6/0). Jury: 2 male, 4 female.

Pltf. Atty: Robert L. Conason of Gair, Gair & Conason, Manhattan  
Def. Atty: Paul A. **Krez**, Manhattan

Facts: The incident occurred on 5/15/84 at approximately 5 PM at the DeKalb Ave. subway station in Brooklyn on the BMT line. The 28-year-old Pltf., who made mirror frames for a living, claimed that she was being mugged at the station when she caught her left foot between the side of a subway car of the L train and the platform. She claimed that the train conductor then closed the subway doors and ordered that the train be started, causing her left leg to be amputated below the knee. Def. claimed that the mugging occurred between cars on the subway as the train was leaving the DeKalb station and that Pltf., who was struggling with the mugger, slipped or was pushed to the tracks when her assailant jumped from the moving train to the platform. Def. argued that the conductor could not have seen the incident and, therefore, had no notice or possibility to prevent it.

Def. also called an eyewitness to the incident who testified that he jumped down to the tracks and picked Pltf. up and placed her on the platform, which contradicted Pltf.'s testimony that the incident occurred on the platform and that she never fell to the tracks. Demonstrative evidence: photos of subway and platform; blowup of station plans; model subway cars. Pltf.'s assailant was caught, convicted, and served 5 years in jail. He testified for Def. No offer; demand: \$2,500,000. There was no expert testimony.

Attorney: Paul **Krez**  
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EVIDENCE prior inconsistent statement not admissible where cross-examiner did not infer that testimony was a fabrication

TRAUMATIC LEG AMPUTATION defense verdict on liability affirmed

Appellate Division  
SECOND DEPARTMENT

Harvin v. NYCTA  
3 JRD 221 Harvin v. New York City Transit Authority, 603 N.Y.S.2d 893 (A.D. 2 Dept. 1993) (3 JRD 221).

Verdict or Lower Court Award: Defense verdict on liability. Pltf. appealed. Trial court: Kings Supreme, Judge Joseph B. Williams.

Appellate Result: Affirmed.

Discussion: In this memorandum decision, the Second Department affirmed a liability verdict in a personal injury action concerning a leg amputation.

The opinion does not describe the facts of the case. According to The New York Jury Verdict Reporter, Volume VIII, Issue 18, Case 10, Pltf.'s decedent, then age 28, claimed that she was being mugged at a subway station when she caught her left foot between the side of a subway car and the platform. She claimed that the train conductor then closed the subway doors and ordered that the train be started, causing her left leg to be amputated below the knee. Deft. contended that the mugging occurred between cars, and that Pltf., who was struggling with the mugger, slipped or was pushed to the tracks when her assailant jumped from the moving train to the platform. The conductor could not see the incident, Deft. argued, and therefore, had no opportunity to prevent it. The jury returned a verdict for Deft., and Pltf. appealed.

Pltf. was deceased by the time of appeal. The reviewing court held that Pltf.'s decedent was correctly precluded from bolstering her trial testimony by the use of a prior inconsistent statement. That type of evidence is admissible only where the cross-examiner has created the inference that a witness' testimony is a recent fabrication. Defense counsel made no such inference in this case. The court also rejected a claim that the court improvidently exercised its discretion in refusing Pltf.'s decedent's request to present rebuttal evidence. The court found that the evidence sought to be presented would merely have attempted to bolster Pltf.'s case, and could have been presented during the direct case in any event.

Attorneys: Gair, Gair, Steigman & Mackauf, Manhattan (Herman Schmertz, of counsel), for appellant.  
Paul A. **Krez**, of counsel, for respondent.

Memorandum decision before Bracken, J.P., and Balletta, Miller and Pizzuto, JJ.

XIII/31-4 ASSAULT TENANT STABBED IN APARTMENT BUILDING NONFUNCTIONING DOOR LOCKS DEFENSE VERDICT

Alberto Vargas v. NYCHA 121028/93 1½-week trial Judge Louise Gruner-Gans, New York Supreme

VERDICT: Defense verdict (5/1). Post-trial motions were denied. Jury: 3 male, 3 female.

Pltf. Atty: Jaime M. Wolf of Roura & Melamed, Manhattan

Def. Atty: Paul A. **Krez**, Manhattan

Facts: The incident occurred on 2/20/93 at 2881 Eighth Ave. in Manhattan, at the Polo Grounds complex. Pltf., age 28 at the time of the incident, claimed that he was stabbed multiple times in the chest, abdomen, and pubic area by an assailant who gained entry through unlocked front doors after Pltf. had entered the building. The attack occurred on the fourth floor. The assailant was never apprehended or identified. Although Def.'s building had electromagnetic locks, they were not activated because no intercom was installed in this 30-story building. Pltf. claimed that working locks would have prevented the attack.

Def. contended that this was a planned assassination attempt that Pltf. survived, and that it would have occurred whether or not the locks were working. Pltf. was employed as a payroll clerk at the time of trial.

Injuries: seven stab wounds to the chest, abdomen, and pubic area with lacerations of the kidneys, liver, diaphragm, and intestines; pneumothorax; hemothorax; reactive depression and post-traumatic stress disorder; 27x.5-cm surgical scar. Demonstrative evidence: photos of injuries; medical records; NYCHA

ballots regarding intercom installation. Offer: \$50,000; demand: \$450,000; amount asked of jury: \$2,500,000. Jury deliberation: 1½ days.

BUS INCIDENT PASSENGER ALLEGES ASSAULT BY DRIVER DEFENSE VERDICT ON LIABILITY

Edina Ruben v. New York City Transit Authority and Javier Ceballos 2-day trial Kings Supreme

Judge: Martin Schneier

Verdict: Defense verdict on liability (6/0). Post-trial motions were denied. Jury: 2 male, 4 female (2008).

Pltf. Atty: Robert M. Salzman of Salzman & Salzman, Brooklyn

Def. Atty: Paul A. **Krez**, Manhattan

Facts: Pltf., a 51-year-old bed maker in a nursing home, was a bus passenger in the area of Nostrand and Flatbush Aves. in Brooklyn. Pltf. claimed that after she complained to the bus driver, Deft. Ceballos, that he passed her stop, he verbally abused her using foul language and then directed her to leave the bus at a non-bus stop area. Pltf. further claimed that Deft. Ceballos then got off of the bus and assaulted her, punching her to the ground and then, while she was still on the ground, continued to beat her about the head. She claimed that she followed the driver back to the bus to get witnesses names and, as she attempted to board the bus, the driver closed the doors on her hand and then began to move the bus with her hand stuck in the doors, forcing her to run next to the bus for several feet. Pltf. produced a witness who claimed to have been a passenger on the bus, and who corroborated Pltf. s version of the events.

The driver contended that Pltf. insisted on having him stop the bus at a non-designated stop, and became violent and abusive when he refused to do so. He contended that Pltf. grabbed him by his tie and tried to pull him as the bus was in motion, and struck and spit at him. He became concerned for his own safety and the safety of the other passengers and allowed Pltf. to get off of the bus. The driver contended that Pltf. took several steps and then fell to the ground, causing her own injuries.

Injuries: (not before the jury) head injury with dementia and organic brain damage; post-traumatic stress disorder. Demonstrative evidence: photographs of the bus; accident and incident reports; order of protection obtained by Ceballos against Pltf. Offer: \$40, 000; demand: \$100,000. Jury deliberation: 1 hour.

IX/27-5 SUBWAY ACCIDENT SUICIDE PASSENGER WALKS ON TRACKS WITH CHILD IN HER ARMS WRONGFUL DEATH OF MOTHER CLAIMED CHILD SUFFERS AMPUTATION OF ARM ACTION FOR WRONGFUL DEATH DISMISSED VERDICT FOR CHILD SET ASIDE

Alex Figueroa by his f/n/g Hector Figueroa, indiv. and as Adm. of the Est. of Luz Figueroa v. NYCTA 16837/86

9-day trial Judge M. Randolph Jackson, Kings Supreme

VERDICT: \$550,000 for Alex F. Breakdown: \$100,000 for past pain and suffering; \$150,000 for future pain and suffering; \$100,000 for future medical expenses; \$200,000 for future lost earnings. The action for wrongful death on behalf of Luz Figueroa was dismissed during trial.

Def't.'s motion for J.N.O.V. was granted by Judge Jackson in a 10-page written decision, and the complaint was dismissed. See below. Notice of Appeal by Pltf.

Pltf. Atty: Allan A. Blank of Blank, Goolnick & Dittenhoefer, Manhattan

Def't. Atty: Paul A. **Krez**, Manhattan

Facts: On 7/4/85 at about 4 AM, Pltf.'s mother, Luz Figueroa, committed suicide by jumping in front of a subway train at the elevated Van Siclen Ave. station on the Brooklyn "J" line. She was holding the 11-month-old Pltf. in her arms when she stepped in front of the train. Mrs. Figueroa was killed instantly. Pltf.'s arm was traumatically amputated above the elbow and he was thrown 30 feet down to the street.

Approximately 20 minutes before this incident, a motorman noticed decedent, holding a baby, on the roadbed near the tracks. He notified an NYCTA police officer who spoke to decedent. The officer testified that he told her to come up to the platform, where he asked her if she was alright and if she wanted to ride on the train. He testified that decedent told him that she was alright and that she did not want to ride on the train but wanted to go home. The officer escorted her to the stairs leading to the street, and then he got back on the train. About 20 minutes later, decedent returned to the tracks and committed suicide.

Judge Jackson dismissed the action for wrongful death, noting that because decedent was committing wrongful acts (suicide and the attempted murder of her son), her estate could not be allowed to benefit.

Pltf. contended that Def't.'s police officer was negligent for failing to remove decedent from the subway station and for failing to place her in protective custody. Pltf. called a police procedures expert who testified that the officer should have made a thorough inquiry into decedent's mental status. He contended that the officer should have either taken her to a Transit police precinct or escorted her to her home, which was two blocks from the station. He contended that the officer's failure to do so was a departure from accepted police procedures. Pltf. also contended that the motorman of the train that hit decedent was negligent for failing to keep a proper lookout and for failing to stop the train in time. Def't. argued that decedent was hiding in the shadows underneath the platform and that the motorman could not have seen her. The jury found that the motorman was not negligent. Offer: \$150,000; demand: \$2,000,000; amount asked of jury: \$4,350,000. Pltf. Experts: Robert Lonergan, police procedures; Dr. Nina Lief, child psychiatrist, Manhattan; Dr. Giovanna Rasile, rehabilitative medicine, Brooklyn. Def't. Experts: Robert Baldwin, P.E., accident reconstruction; J.J. Michalski, railroad car inspector.

Def't. contended that the police officer had no special duty to protect decedent from herself, and moved to dismiss the action. Judge Jackson reserved decision, and the jury awarded Pltf. \$550,000.

Def't. moved for summary judgment on the eve of trial. The decision was reserved, and the motion was merged with Def't.'s post-trial motion to set aside the verdict. Def't. contended that it did not owe a duty to Pltf. to prevent his mother from attempting to kill him. Def't. also contended that the Transit police officer did not take affirmative action with respect to Pltf. and his mother, and therefore did not owe a duty to Pltf. Judge Jackson agreed, noting that "The New York City Transit Authority owes no duty to protect a person on its premises from assault by a third person, absent facts establishing [sic] a special relationship between the authority and the person assaulted." Decision at p. 3, citing *Weiner v. Metropolitan Transportation Authority*, 55 N.Y.2d 175, 178 (1982). He noted that for a special relationship to exist, the following must be present: "(1) an assumption by the municipality through promises or action of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking." Decision at p. 3, citing *Kircher v. State of Jamestown*, 74 N.Y.2d 251 (1987) and *Cuffy v. City of New York*, 69 N.Y.2d 252

(1987). Judge Jackson found that "it is clear" that Deft., through its officer's conversation with decedent, " did not assume, through promises or actions, an affirmative duty to act on the child's behalf, nor did the officer have knowledge that inaction could lead to harm." *Id.* at 3. Pltf. contended that the officer should have known that decedent was acting irrationally and that she posed an immediate danger to Pltf. because she was standing on the trackbed. Judge Jackson found, however, that "[t]he courts could not expect the police officer in the case at bar to know that inaction might lead to harm . . . A special relationship, therefore, did not exist." Decision at p. 5, citing Kircher, *supra*. "[A]lthough the jury found the . . . officer was guilty of using poor judgment in allowing Mrs. Figueroa to remain in the vicinity of the subway platform, he had no duty to act." He found that since the officer never assumed the duty to act on their behalf, a special relationship was not created. Decision at p. 7. As to Pltf.'s contention that the officer improperly performed police procedures in an " affirmatively negligent way" and that therefore special duty rules do not apply and ordinary negligence principles determine Deft.'s liability, Judge Jackson found that while "police officers are liable for their acts of affirmative negligence, the police officer in this case did not take any affirmative action." Decision at p. 7, citing *Parvi v. City of Kingston*, 41 N.Y.2d 553 (1976) and other cases. Judge Jackson found that decedent put herself and her child at risk and although the officer might have done more to remove her from the subway station, he did not cause her to walk onto the tracks and step in front of a train.

VIII/13-3 FALSE ARREST AND EXCESSIVE FORCE -- DEFENSE VERDICT

Samuel Owens v. NYCTA 7028/89 10-day trial Judge Barry Salman, Bronx Supreme

VERDICT: Defense verdict (6/0). Jury: 4 male, 2 female.

Pltf. Atty: Ernest Holzberg, Manhattan

Deft. Atty: Edward A. **Flores** , Brooklyn

Facts: On 1/3/85, a Transit Authority conductor was attacked by a passenger while the conductor was on duty on a southbound IRT traveling between Allerton and Burke Ave. in the Bronx. The passenger tried to stab the conductor with a pocket knife, but the conductor fought him off and called police. Before the police arrived, other passengers on the train physically ejected the assailant from the car. The assailant fled and was not apprehended. The next day, January 4, the conductor was told by a passenger who had witnessed the previous day's attack that the assailant was again on the train. The conductor testified that he saw Pltf. in the subway car, identified him as his assailant, and then called police who arrested Pltf. Pltf. was charged with second-degree attempted assault and criminal possession of a weapon. He was held in police custody for 7½ hours, and was released when the conductor could not positively identify him for the District Attorney's office.

Pltf., a 68-year-old retired construction worker at the time of the incident, claimed that the police arrested him without probable cause and used excessive force in arresting and handcuffing him. Deft. contended that its officer had reasonable cause to arrest Pltf. based on the conductor's identification of him. The Court directed a verdict for the Transit Authority on the issue of probable cause. The arresting officer and the conductor both testified that Pltf. was cooperative during his arrest and that his arms were not forced behind him when he was handcuffed. The officer also testified that Pltf. never complained of pain or requested medical attention during his confinement. After a directed verdict on the issue of probable cause, the jury found for Deft. on the issue of the conductor's reasonableness in making the arrest. Injuries: 20° limitation of motion in the left elbow; psychiatric injuries. Pltf. subpoenaed Deft.'s examining psychiatrist who testified that Pltf. was afraid to ride on subways and was afraid to leave his neighborhood since the incident. On cross-examination, the psychiatrist testified that his fears are common to many people his age. Deft.'s expert testified that Pltf. had a permanent loss of motion in the left elbow, but contended that Pltf. had a 25-year history of osteoarthritis in the same elbow and that this could cause the limitation of motion. Offer: \$ 10,000; demand: \$250,000; amount asked of jury: \$500,000.



X/2-18 EXCESSIVE USE OF FORCE AND FALSE ARREST DEFENSE VERDICT

Antonio and Gloria Bermo v. Town of Cornwall, Village of Cornwall-on-Hudson, Paul Toner, and James Kavanagh 91 Civ 3654 6-day trial Judge Charles Brieant, Southern District

VERDICT: Defense verdict (6/0). Pltf. discontinued against Deft. Village before trial and against Town before submission of the case to the jury. Jury: 3 male, 3 female.

Pltf. Atty: Robert N. Isseks of John S. McBride, Goshen

Deft. Atty: Edwin H. **Knauer**, Manhattan.

David L. Posner of McCabe & Mack, Poughkeepsie, for Village and Kavanagh

Facts: Pltf., a 58-year-old owner of a construction company, brought this action for excessive use of force, false arrest, and malicious prosecution. The charges stem from an incident that took place on 3/17/91. Deft. Toner, a police officer for the Deft. Town of Cornwall, received a call of a possible drug overdose. He accompanied the Cornwall Volunteer Ambulance Corps. to the scene, where they found Pltf.'s daughter in a somewhat dazed condition; she was placed in a stretcher and was brought outside. Deft. Kavanagh, an off-duty officer with the Cornwall police, responded to the scene to see if Officer Toner needed assistance. At this point, Pltf. burst upon the scene, shouting "I'll kill!" It was unclear at trial to whom this threat was directed. Pltf. approached the house and pulled the storm door off its hinges, throwing it at the ambulance crew and his prostrate daughter. He then began kicking the front door. Defts. Toner and Kavanagh approached Pltf. to tell him that his daughter was being attended, but he shoved Toner aside and ran to the side of the house. Toner conceded that he struck Pltf. numerous times to subdue him. Deft. Kavanagh approached at this time and helped Toner to handcuff Pltf.

A neighbor and a member of the ambulance corps both testified that they saw Deft. Toner strike Pltf. while Pltf. was handcuffed and also saw Toner knee him in the right upper thigh. The court dismissed the malicious prosecution claim because there was no favorable determination for Pltf. on the charges made against him. The false arrest claim against Deft. Kavanagh was also dismissed because he was not the arresting officer.

Pltf.'s claim against Deft. Kavanagh was that he did not attempt to stop Toner from beating him. The jury found that Kavanagh did nothing physical to Pltf. other than place handcuffs on him. Pltf. sought punitive damages, but this claim was dismissed by the court.

Injuries: small tears in the medial and lateral menisci with arthroscopic surgery. Pltf. claimed that these injuries were inflicted by Deft. Toner, but Deft. contended that Pltf. suffered these injuries while he was trying to kick in the door of the house. Pltf.'s expert testified that the injuries could have been degenerative or that they resulted from Pltf. kicking the door. Deft. produced a letter written by Pltf.'s expert to the Orange County District Attorney in lieu of giving Grand Jury testimony in which he stated that he did not believe that the injury was traumatically induced. He further testified that he discharged Pltf. from his care when he could no longer find any objective basis for Pltf.'s complaints of pain. He testified that Pltf.'s arthroscopic surgery and the quad cane he had been using since were both unnecessary. Deft.'s expert testified that he could find no objective basis for Pltf.'s complaints of pain, but conceded that the injuries could have been traumatic in nature. Offer: \$35,000; demand: \$900,000. Jury deliberation: 5 hours.