2013 IL App (4th) 120987-U

NO. 4-12-0987

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
August 28, 2013
Carla Bender
4th District Appellate
Court, IL

CORINA MERRIWEATHER,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
ANDREW COREY, d/b/a SPECIALTY PROPERTY MANAGEMENT,	)	No. 10L58
Defendant-Appellee.	)	Honorable
	)	Patrick W. Kelley,
	)	Judge Presiding.

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.
Justices Appleton and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court concluded that summary judgment in defendant's favor was proper because even when viewed in the light most favorable to plaintiff, the evidence presented was insufficient to establish as a matter of law that defendant owed a duty of care to protect plaintiff from the criminal actions of third parties.

¶ 2 In March 2010, plaintiff, Corina Merriweather, sued defendant, Andrew Corey, d/b/a Specialty Property Management, alleging that he failed to properly maintain and repair a common door lock and lighting for the apartment building, which proximately caused the injuries she sustained when a third party gained access to her apartment and shot her. In July 2012, defendant filed a motion for summary judgment asserting that he did not owe plaintiff a duty to protect her from the criminal actions of third parties. In September 2012, the trial court granted defendant's summary-judgment motion.

¶ 3 As we later clarify, plaintiff argues that the trial court erred by granting defen-

dant's motion for summary judgment. Defendant filed a motion to strike portions of plaintiff's brief and argument, asserting that documents relied upon by plaintiff are hearsay. We deny defendant's motion but nonetheless affirm.

¶ 4 I. BACKGROUND

¶ 5 The following facts are derived from the record, including the discovery depositions of plaintiff, plaintiff's mother, and defendant.

¶ 6 A. Facts Pertaining to Plaintiff's Injury

¶ 7 In January 2007, plaintiff and her mother (who signed a 12-month lease) moved into an apartment located on Ladley Court in Springfield, Illinois, which defendant owned and managed. The two-story apartment building contained four units—two on ground level and two on the second story. At the front of the building was a door that led to a common area with a staircase. Plaintiff's apartment was located on the second story of the building and had rear doors that provided access to a balcony.

¶ 8 Between 4 a.m. and 5 a.m. on March 16, 2008, plaintiff was at home celebrating a friend's birthday. At some point, two of plaintiff's friends came inside the apartment and told plaintiff they thought they heard somebody "cock a gun." Plaintiff's friends were unsure whether the sound came from outside the building or in the hallway. Plaintiff told her friends to lock the apartment door. Approximately 5 to 10 minutes later, someone "kicked in" the locked apartment door and began shooting, while a second shooter, who had gained access to the second-story balcony, began shooting into the apartment from the balcony. Plaintiff was struck by a bullet and sustained severe injuries. Plaintiff believed that the person who shot her entered the apartment building through the front (common area) door.

¶ 9 Plaintiff's mother, who was sleeping when the shots began, testified that the person who shot plaintiff came in through the common area door. However, she did not see the person come in the door, nor had she spoken to anyone who did. She further explained that another person had climbed up the exterior of the building, got onto her balcony, broke a window on the balcony door, and fired into the apartment.

¶ 10 B. Facts Pertaining to the Common Area Door

¶ 11 According to defendant, on the date of plaintiff's injury, the front door leading into the common area of the apartment building had a lock on it that prevented inside access to the building without a key. Defendant kept a key to the apartment building on his keychain.

¶ 12 Plaintiff recalled that when she and her mother moved into the apartment, the doorknob on the door leading into the common area was "barely hanging on" and the top lock was missing. Plaintiff's mother also noted that at the time they moved in, the door to the common area did not have a lock on it and that the knob "jiggled." According to plaintiff's mother, defendant told her that he would fix the knob and make the door secure by requiring a key to enter the building. During the next six to eight months, plaintiff's mother discussed the door lock with defendant every month but later "gave up." According to plaintiff, she witnessed approximately seven of these conversations between her mother and defendant.

¶ 13 No repair work was performed on the door from January 25, 2007 (the date plaintiff and her mother moved in), through March 16, 2008 (the date plaintiff suffered her injury).

¶ 14 C. Facts Pertaining to the Lighting

¶ 15 According to defendant, one large light fixture hung in the middle of the interior

common area of the apartment building and two light fixtures were attached to the outside of the building, one on each side of the common area door. Each of these fixtures used standard lightbulbs that were lit 24 hours per day. Attached to the corners of the building were "security" or "flood" lights that turned on when they detected motion. Defendant noted that all of these lights were working properly on the date plaintiff was injured.

¶ 16 Plaintiff's mother averred that the lightbulbs on the outside of the building had been burnt out and not replaced. She added that two additional light fixtures in the interior common area of the building had also burnt out. Although plaintiff's mother had previously replaced those bulbs herself, on the night plaintiff was injured, those lights had not been functioning for months.

¶ 17 Plaintiff testified that one light on the outside of the building repeatedly "blew out." Although defendant would eventually replace the bulb, the outside light had been out for three days prior to her injury. Plaintiff also explained that the interior light in the common area had previously burnt out and was not functioning on the day she suffered her injuries.

¶ 18 D. Facts Pertaining to Violent Crime

¶ 19 Plaintiff averred that sometime after she moved into the apartment building, but before she was shot, she became aware of a shooting that had occurred on Normandy Street, which is near Ladley Court. Plaintiff also noted another shooting that had taken place on the outside of a building near her home five or six days before she was shot. Her mother's car had also been broken into when it was parked in the parking lot on Ladley Court.

¶ 20 Plaintiff's mother explained that she was aware of one shooting that had occurred at or near the parking lot on Ladley Court, and confirmed the vandalism of her car.

¶ 21 Defendant testified that he was not aware of any prior criminal activity taking place within a five-block radius of the apartment building around the time plaintiff was shot.

¶ 22 E. Procedural History

¶ 23 In March 2010, plaintiff sued defendant, complaining that he was negligent for failing to maintain and repair proper security measures for access into the building. Specifically, plaintiff asserted that defendant had a duty to exercise ordinary and reasonable care with respect to the safety of plaintiff and others within the apartment building. Additionally, plaintiff alleged that as owner and property manager of the apartment building, defendant knew or should have known that the area in which the apartment building was located had a history of violent activity, including instances in which violent members of the public entered the apartment building, causing violence and committing various criminal acts.

¶ 24 In April 2010, defendant filed a demand for a bill of particulars, asking plaintiff to specify the history of violent behavior alleged in her complaint. The following month, defendant filed a motion to dismiss, arguing that he did not owe a duty to plaintiff. Specifically, defendant contended that under Illinois law, a landlord does not generally have a duty to protect his tenants from the criminal actions of third parties. Defendant further asserted that neither the voluntary undertaking exception nor the notice of prior criminal acts exception applied in this case. Plaintiff did not provide a response, and no hearing was held on defendant's motion to dismiss.

¶ 25 On August 5, 2010, plaintiff filed her bill of particulars in which she attached a 26-page "incident search report" that contained alleged instances of violent behavior and/or violent activities occurring on or about the property that are similar to the event alleged in the complaint, purportedly from the public records of the Springfield police department.

¶ 26 In July 2012, defendant filed a motion for summary judgment, again asserting, as he did in his May 2010 motion to dismiss, that he did not owe plaintiff a duty. Following a September 2012 hearing, the trial court granted defendant's motion for summary judgment, finding as follows: (1) providing a common area entry door with a lock and exterior lighting on the outside of the building does not give rise to a duty; (2) the mere promise to repair the lock on the common area door is insufficient, as a matter of law, to constitute a voluntary undertaking to protect against the type of criminal activity that resulted in plaintiff's injuries; (3) even if such a promise could give rise to a duty, plaintiff failed to prove she relied on defendant's promise; and (4) plaintiff failed to put forth any evidence of prior similar criminal acts related to the physical condition of the apartment building, or knowledge of any such acts by defendant.

¶ 27 This appeal followed.

¶ 28 II. ANALYSIS

¶ 29 Plaintiff argues that the trial court erred by granting defendant's motion for summary judgment because "a material question of fact existed as to the duty of [defendant]." Specifically, plaintiff contends that defendant had a duty to protect her against the criminal actions of third parties because he (1) voluntarily undertook to provide security measures but was negligent in performing those undertakings and (2) had notice of prior criminal acts connected with the physical condition of the property. We first clarify plaintiff's argument and then address her contentions in turn.

¶ 30 A. Clarification of Plaintiff's Negligence Claim and the Standard of Review

¶ 31 As previously explained, plaintiff claims that the trial court erred by granting

summary judgment in defendant's favor, asserting that "a material question of fact existed as to the duty of [defendant]." This assertion, however, mistakes the law applicable to summary judgment proceedings. "Whether or not the duty of care exists is a question of law to be determined by the court." *Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 421, 592 N.E.2d 1098, 1100 (1992); see also *Hills v. Bridgeview Little League Ass'n*, 195 Ill. 2d 210, 228, 745 N.E.2d 1166, 1178 (2000) ("Whether a duty exists is a question of law."). Indeed, the familiar "material fact" terminology from section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2010)) pertains to the facts underlying the claim itself, not, as plaintiff's argument suggests, the legal question of whether a duty exists.

¶ 32 The sole issue in this case concerns the propriety of the trial court's grant of summary judgment in defendant's favor, a determination governed, of course, by section 2-1005 of the Code. Pursuant to that section, "summary judgment should be granted only where the pleadings, depositions, admissions and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact and that the moving party is clearly entitled to judgment as a matter of law." *Pielet v. Pielet*, 2012 IL 112064, ¶ 29, 978 N.E.2d 1000.

¶ 33 In summary judgement proceedings, the trial court considers (1) the *uncontested* evidence presented by the parties and (2) the *contested* evidence in the light most favorable to the nonmoving party. When that collective evidence—and all the reasonable inferences that could be drawn from such evidence—is insufficient to establish, as a matter of law, that the defendant owed a duty of care to protect the plaintiff from the actions of third parties, then summary judgment is appropriate.

¶ 34 When determining whether a duty exists, "the 'touchstone *** is to ask whether [the] plaintiff and [the] defendant stood in such a relationship to one another that the law imposed upon the defendant an obligation of reasonable conduct for the benefit of the plaintiff.' " *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280-81, 864 N.E.2d 227, 232 (2007) (quoting *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436, 856 N.E.2d 1048, 1057 (2006)). A trial court's answer to that question is a legal determination that we review *de novo*.

¶ 35 B. Landlord's Duty To Protect Others From Criminal Activity by Third Parties

¶ 36 Generally, absent a special relationship, a landowner has no duty to protect others from the criminal activities of third parties. *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 215-16, 531 N.E.2d 1358, 1364 (1988). "[T]he landlord-tenant relationship is not a 'special relationship' imposing a general duty on a landlord to protect her tenants against third-party criminal acts." *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 995, 841 N.E.2d 96, 107 (2005). However, Illinois courts have recognized two exceptions to this general rule: (1) the voluntary-undertaking exception and (2) the notice exception.

¶ 37 1. *The Voluntary-Undertaking Exception*

¶ 38 The first exception in which Illinois courts may find the existence of a duty is when the landlord voluntarily undertakes to provide security measures but is negligent in the performance of those undertakings and such negligence is the proximate cause of the injury to the plaintiff. *Rowe*, 125 Ill. 2d at 217, 531 N.E.2d at 1365. In assessing whether a defendant's actions constitute a voluntary undertaking, courts distinguish between cases of malfeasance (negligent performance) and nonfeasance (failure to perform). *N.W. v. Amalgamated Trust &*

Savings Bank, 196 Ill. App. 3d 1066, 1072-74, 554 N.E.2d 629, 634-635 (1990).

¶ 39 To establish liability for nonfeasance, or the failure to perform, "a plaintiff must show: (1) a promise by the defendant to do an act or to render a service; (2) reliance upon the defendant's promise; and (3) injury which was a proximate result of the defendant's omission to perform the voluntary undertaking." *Amalgamated Trust*, 196 Ill. App. 3d at 1073, 554 N.E.2d at 634 (citing Restatement of Torts § 325 (1934)).

¶ 40 To establish liability for misfeasance, a plaintiff must show she (1) suffered physical harm and (2) that the harm is the result of the defendant's failure to exercise reasonable care where (a) his failure to exercise reasonable care increases the plaintiff's risk of harm, or (b) plaintiff suffered the harm due to his reliance on defendant's undertaking. Restatement (Second) of Torts § 323 (2012); see also *Frye v. Medicare-Glaser Corp.*, 153 Ill. 2d 26, 32, 605 N.E.2d 557, 560 (1992) (adopting section 323 of the Restatement (Second) of Torts).

¶ 41 Initially, we note that plaintiff concedes that the record is devoid of evidence that she relied on defendant's promise. However, plaintiff argues that defendant breached his duty to her when he voluntarily undertook to provide security measures to the apartment building, but negligently did so, which proximately caused her injuries. Defendant asserts plaintiff's theory of liability is one of nonfeasance based on the argument that defendant voluntarily undertook to protect plaintiff from the criminal acts of third parties by providing a lock on the common area door and interior and exterior lighting, but then failed to fix the common area door lock as promised and failed to provide light on the date of plaintiff's injuries. In contrast, plaintiff contends in her reply brief that her theory of liability is misfeasance, based on defendant's negligence in maintaining the door lock and lights. Because plaintiff asserts that

her theory of the case is based on misfeasance, we focus our analysis on misfeasance.

¶ 42 For purposes of this appeal, this court views the facts in the light most favorable to plaintiff. Thus, we presume that on the date of plaintiff's injury (1) there was no lock on the common area door; or if a lock was there, it was inoperable; and (2) neither the exterior nor interior lights were functioning.

¶ 43 a. Common Area Door Lock

¶ 44 Plaintiff cites *Rowe*, 125 Ill. 2d at 222, 531 N.E.2d at 1367, and *Shea v. Preservation Chicago, Inc.*, 206 Ill. App. 3d 657, 565 N.E.2d 20 (1991), for the proposition that a landlord's retention of keys to gain access to a rented building constitutes a voluntary undertaking to protect tenants from third-party criminal actions. We disagree.

¶ 45 Contrary to plaintiff's assertion, *Rowe* held that the *negligent* retention of keys can make a landlord liable. In *Rowe*, the defendants created and maintained master and grandmaster keys to the subject office units and were aware that some of those keys had gone missing. *Rowe*, 125 Ill. 2d at 221-22, 531 N.E.2d at 1367. Despite the knowledge that some keys had gone missing, the defendants did nothing to remedy the situation, *e.g.*, changing the locks. One of the missing keys was then used by an intruder to access a rented office and shoot the victim and decedent. Unlike *Rowe*, nothing in this case suggests that plaintiff's injuries were in any way caused by a missing key. In fact, plaintiff's theory of liability rests on the argument that no key was needed to enter the apartment building because the lock was broken. Further, the door at issue in *Rowe* opened directly into the rented office space, rather than a common area.

¶ 46 In *Shea*, an intruder gained access to the apartment building due to the landlord's failure to repair the *interior* security door and safety lock as promised. *Shea*, 206 Ill. App. 3d at

660, 565 N.E.2d at 22. Despite the defendant's efforts to repair the door, he failed to do so. *Id.* at 659-60, 565 N.E.2d at 22. As a result of the defendant's negligence in fixing the door, the intruder gained access to the apartment and assaulted the plaintiff. *Id*. at 660, 565 N.E.2d at 22. In finding the defendant had a duty to protect the plaintiff from third-party criminal actions, the *Shea* court pointed out nothing in the record suggested that interior security doors and safety locks were commonly provided by landlords. *Id.*, at 664, 565 N.E.2d at 25. Here, the door at issue was a common area rather than an interior security door and safety lock.

¶ 47 Plaintiff also cites *Phillips v. Chicago Housing Authority*, 89 Ill. 2d 122, 431 N.E.2d 1038 (1982), to support her argument that defendant was negligent in his voluntary undertaking to provide security measures. In *Phillips*, the plaintiff filed suit against her landlord after she was sexually assaulted and thrown out a window. In her complaint, she alleged that her landlord undertook to close and secure certain floors to prevent access by criminals but did so negligently. *Id*. at 125, 431 N.E.2d at 1039. Contrary to this case, the sole issue in *Phillips* was whether the trial court erred by striking the plaintiff's complaint for failure to state a cause of action. *Id*. at 126, 431 N.E. 2d at 1040. Thus, the court's analysis focused on the validity of the complaint, not the substantive issue of whether the landlord had negligently performed a voluntary undertaking. See *Chelkova v. Southland Corp.*, 331 Ill. App. 3d 716, 725, 771 N.E.2d 1100, 1108 (2002) (distinguishing its facts from *Phillips* for the same reason).

¶ 48 As defendant points out, a common area door with a lock is commonplace, provided by the majority of landlords, and does not constitute a voluntary undertaking by a landlord to protect an individual from the criminal actions of third parties. See *Martin v. Usher*, 55 Ill. App. 3d 409, 410-11, 371 N.E.2d 69, 70 (1977) (affirming the dismissal of the plaintiff's

claim where her theory of liability was that the landlord failed to maintain the common area door locks in working order and to provide adequate lighting in the common areas); *Amalgamated Trust*, 196 Ill. App. 3d at 1074, 554 N.E.2d at 635 ("door locks are also commonplace and furnished by virtually every landlord"); *Sanchez v. Wilmette Real Estate & Management Co.*, 404 Ill. App. 3d 54, 63, 934 N.E.2d 1029, 1037 (2010) (citing *Rowe* for the proposition "an agreement to repair locks and provide lights cannot be regarded as the assumption of a duty to protect against criminal acts"). Plaintiff does not cite any authority to the contrary, nor are we aware of any. Thus, even viewing the record in the light most favorable to plaintiff, we conclude that defendant did not voluntarily undertake to protect plaintiff from the criminal actions of third parties by providing a common area door with a lock.

¶ 49 b. Lighting

¶ 50 Plaintiff cites *Bourgonje*, 362 Ill. App. 3d at 995-96, 841 N.E.2d at 107, in support of her argument that defendant voluntarily undertook to provide security lights to protect her from the criminal actions of third parties. In *Bourgonje*, the defendant landlord was showing the plaintiff the property (prior to signing the lease). The plaintiff then mentioned that she was a single person who often worked nights. When the plaintiff asked defendant about lighting on the premises, the defendant responded that it was absolutely well-lit and taken care. The defendant explained that she was also a single woman and she knew how important it was to live somewhere and feel safe. *Id*. at 990-91, 841 N.E.2d at 103. When the plaintiff was moving her possessions into the apartment, she noticed that none of the exterior lights were working. *Id*. at 991, 841 N.E.2d at 103. According to the plaintiff, she told the defendant about the nonworking lights on several occasions within 10 days of moving in and also wrote defendant a memo

regarding the lights. *Id*. at 991-92, 841 N.E.2d at 103-04. The defendant's handyman confirmed that he had conversations with both the plaintiff and the defendant regarding the lights and had attempted to, but was unable to, repair the lights. *Id*. at 992, 841 N.E.2d at 104.

¶ 51 A short time after having these conversations, the plaintiff was returning home when she was attacked outside, pushed through the gate into an alcove, and sexually assaulted. *Id*. at 990, 841 N.E.2d at 102-03. The plaintiff's attacker was apprehended, confessed to the crime, and explained to the State's Attorney that " 'he then told her to open up the gate so he could drag the woman back to someplace that was dark and no one could see him rape her.' " *Id*. at 1010, 847 N.E.2d at 119.

¶ 52 Based on these facts, the *Bourgonje* court concluded that a reasonable trier of fact could find that the defendant landlord had specifically agreed to light the premises in order to protect the plaintiff from attacks at night. *Id.* at 1003-04, 847 N.E.2d at 113. In reversing the grant of summary judgment, the court noted this was a case of nonfeasance (although the record also contained evidence of possible misfeasance) and, thus, liability could be imposed only if the plaintiff could establish reliance on the defendant's promise. *Id*. at 997, 847 N.E. 2d at 108. The court concluded by noting that there comes a point, after promises have been repeatedly broken, that a plaintiff may no longer reasonably rely on it. *Id*. at 1006, 847 N.E. 2d at 115.

¶ 53 In finding the plaintiff could have reasonably relied on the defendant landlord's promise, the appellate court noted that she was induced into signing the lease by the promise that the lights would be fixed, the time between the last promise and the attack was a little more than two weeks, and this was not a case about numerous broken promises over an extended period of time. *Id*. at 1005-06, 847 N.E.2d at 115. The court also noted that breaking the lease so early

into the tenancy was an unreasonable action and it would be absurd to assume the plaintiff could have made her own repairs given that an electrician had to be employed to fix the lighting. *Id*. at 1106-07, 847 N.E.2d at 116. Because the court found the defendant landlord had made a specific promise to the plaintiff, and that the plaintiff had reasonably relied on the promise, summary judgment was not appropriate. *Id*. at 1011-12, 847 N.E.2d at 120.

¶ 54 Plaintiff argues that the outcome in this case should be the same as that in *Bourgonje* because the facts are similar. We disagree.

¶ 55 Initially, we note that *Bourgonje* was a case of nonfeasance rather than misfeasance. Further, the record in this case is devoid of any evidence that defendant made an explicit promise to plaintiff, or her mother, that he would keep the area lit to protect them from the criminal actions of third parties. We further note that the mere fact that defendant referred to the floodlights as "security lights" is an insufficient basis to give rise to an inference that he promised plaintiff he would protect her from third-party criminal actions.

¶ 56 Accordingly, we hold that defendant did not—by providing common area lighting and a door lock—voluntarily undertake to protect plaintiff from the criminal actions of third parties.

¶ 57 2. *The Notice Exception*

¶ 58 The second exception in which Illinois courts may impose liability on a landlord for a third party's criminal act is when the landlord had notice of prior criminal acts (1) connected with the physical condition of the premises and (2) similar to the one that caused the plaintiff's injury. *Hill v. Chicago Housing Authority*, 233 Ill. App. 3d 923, 933, 599 N.E.2d 1118, 1125 (1992). To be liable, the landlord's negligence must facilitate the criminal activities of the third

party, and the criminal activities must be reasonably foreseeable. *Id*. Although the injury need not be identical to the prior incidents of which the landlord had notice, the injury must have resulted from the same risk as was present in the prior incidents. *Id*.

¶ 59 Plaintiff asserts that defendant knew, or should have known, of the prior criminal activity surrounding the apartment building and that he failed to keep the common areas of the apartment building in a reasonably safe condition. We are not persuaded.

¶ 60 a. Motion To Strike

¶ 61 In support of her complaint, and at defendant's request, plaintiff filed a bill of particulars with the trial court which included a 26-page "incident search report" that contained alleged violent behavior and/or violent activities occurring on or about the property that were similar to the event alleged in the complaint, purportedly from the public records of the Springfield police department. Our review of this "incident search report" reveals that it is a computer-generated printout listing all calls placed to the police department by date and time, including the address, incident type, and general disposition, if any.

¶ 62 Defendant has filed a motion to strike portions of plaintiff's brief and argument which relies on this 26-page "incident search report," asserting that these documents are hearsay and cannot be used to defeat a motion for summary judgment, or by extension, cannot be used by this court to overturn a grant of summary judgment. Plaintiff filed a response to defendant's motion to strike, contending that (1) the document at issue is admissible as a business record and (2) defendant relied on this document in its reply to its motion for summary judgment and cannot now claim it is inadmissible as evidence.

¶ 63 We agree with plaintiff that defendant cannot now object to the use of this report.

In his motion for summary judgment, defendant referred to the "incident search report" attached to plaintiff's bill of particulars by arguing, in part, as follows:

> "Plaintiff and her mother's testimony and the Springfield Police Department records attached to Plaintiff's Bill of Particulars, do not provide any support for the proposition that any prior criminal activity had occurred within 2405 Ladley Court as a result of any physical condition of the building. At most, the testimony and documents establish that over a period of years, there was some varied criminal activity in the neighborhoods surrounding 2405 Ladley Court. The fact that other crimes have occurred in the same general area as the apartment complex has nothing to do with the Plaintiff's injuries and certainly nothing to do with the physical characteristics of the building."

Further, in his reply to plaintiff's response to defendant's motion for summary judgment, defendant points out alleged defects in plaintiff's response and calls the "incident search report" to the attention of the court. Moreover, defendant uses the report to make his own argument that the complaints documented in the report are not relevant because the alleged crimes are not related to the physical condition of the apartment building.

¶ 64 Because defendant failed to object to the use of the "incident search report" and, moreover, acquiesced in its use by relying on the report in his own motions, we deny defendant's motion to strike. See, *e.g.*, *People v. Williams*, 139 Ill. 2d 1, 15, 563 N.E.2d 431, 437 (1990) ("[T]he failure to object to hearsay during trial not only waives the issue on appeal, but allows

such evidence to be considered by the trier of fact and to be given its natural probative effect"). As such, we need not determine whether the report is a business record.

¶ 65 b. *Application of the Notice Exception*

¶ 66 Plaintiff relies extensively on the "incident search report" to support her argument that despite his deposition testimony, defendant knew, or should have known, of prior acts of criminal activity connected with the physical condition of Ladley Court, and despite that knowledge, failed to keep the common areas of the apartment building in a reasonably safe condition. Specifically, plaintiff points out that in the year preceding her injuries (based on the "incident search report"), reports were made of shots being fired, home invasions, assault, batteries, burglaries, and attempted burglaries in the neighborhood.

¶ 67 Initially, we note that the majority of incidents relied on by plaintiff did not occur at her specific apartment complex on Ladley Court. The incidents listed in this "incident search report" for her specific apartment complex on Ladley Court include a call for a battery that occurred approximately six months before plaintiff's injury and a call for robbery that occurred approximately 11 months prior to plaintiff's injury. Also, this report is very general in nature and lists all calls placed to the police department from or pertaining to an address on Ladley Court. The report does not include information as to whether the alleged crime actually occurred. Further, the dispositions documented, if any, are generic and include such dispositions as "Information for Officers Only," "Report Made," "Checked Area No Activity," "Citation Issued," and "Arrest Made."

¶ 68 Plaintiff cites *Stribling v. Chicago Housing Authority*, 34 Ill. App. 3d 551, 340 N.E.2d 47 (1975), and *Duncavage v. Allen*, 147 Ill. App. 3d 88, 497 N.E.2d 433 (1986), to

support her proposition that a landlord who has prior notice of criminal activity has a duty to protect his tenants from the criminal actions of third parties. Our review of these cases reveals that they offer plaintiff no support.

¶ 69 In *Stribling*, the plaintiffs lived in an apartment building. The two apartments adjacent to theirs were vacant. *Stribling*, 34 Ill. 3d at 553, 340 N.E.2d at 48. The plaintiffs observed persons entering and leaving these vacant apartments on several occasions and had notified the defendant of this unauthorized use and demanded the apartments be made secure. *Id.* at 553, 340 N.E.2d at 48-49. The defendant did not secure the vacant apartments and the plaintiffs' apartment was burglarized by persons who gained access by breaking a hole through the wall between the plaintiffs' apartment and a vacant apartment. *Id*. at 554, 340 N.E.2d at 49. The defendant was notified of this burglary but again failed to secure the vacant apartments. *Id.* As a result, the plaintiffs' apartment was burglarized a second time in the same manner. *Id*. The defendant was notified of the second burglary, but again failed to secure the vacant apartments. *Id.* Consequently, the plaintiffs' apartment was burglarized a third time in the same manner. *Id*. The court held that the defendant did not owe the plaintiffs a duty to guard against the first burglary. *Id*. at 556, 340 N.E.2d at 50. However, because the defendant had notice of the first burglary and the means in which the burglary was effected, a duty arose to protect the plaintiffs because another burglary became "eminently foreseeable." *Id*.

¶ 70 In *Duncavage*, the plaintiffs' decedent rented an apartment from the defendant. Early one morning, an intruder came into the yard and hid himself in the darkness of the unlit area and in high weeds. *Duncavage*, 147 Ill App. 3d at 92, 497 N.E.2d at 435. The intruder used a ladder that the defendant had stored in the yard adjacent to the decedent's apartment, climbed

through an unlockable window into the decedent's apartment, and murdered the decedent. *Id*. at 92-93, 497 N.E.2d at 435. In reversing the trial court's dismissal of the plaintiff's claim for failure to state a cause of action, the court noted that the defendant knew the ladder had earlier been used to burglarize the same apartment and that the burglar had gained access through the same unlockable window. *Id*. at 96, 497 N.E.2d at 437.

¶ 71 In *Hill*, the plaintiff was shot in the lobby of a Chicago housing project. *Hill*, 233 Ill. App. 3d at 933, 599 N.E.2d 1125. The plaintiff alleged that the defendant was aware of other shootings that had occurred in the housing project. *Id*. Police officers testified that in the two years prior to the plaintiff being shot, there were 10 shootings and 3 to 4 stabbings in the housing project of which the defendant was aware. *Id.* However, the *Hill* court found that these incidents were not related to the physical condition of the building. *Id*. The only incidents relating to the actual condition of the building were found in the plaintiff's deposition testimony. *Id*. In one incident, a friend of the plaintiff's had been shot in the building. *Id.* In another, a female Jehovah's witness had been grabbed in a dark hallway of the building. *Id*. However, in upholding summary judgment for the defendant landlord, the *Hill* court distinguished its facts from *Stribling* and *Duncavage*, finding the plaintiff's vague allegations concerning prior criminal activity against unnamed victims at unspecified times did not raise an issue as to foreseeability. *Id*. at 934, 599 N.E.2d at 1125.

¶ 72 Similar to *Hill*, the overwhelming majority of the criminal incidents reported in the "incident search report" relied on by plaintiff in this case did not occur at the apartment building. Rather, these alleged crimes occurred off of the premises and, thus, were not in any way connected to the physical condition of the apartment building. The "incident search report"

documents an alleged battery and a robbery at the apartment building in the year preceding plaintiff's injury, but we find no evidence in the record that would support an inference that plaintiff's injuries were foreseeable based on this report. Unlike *Stribling* and *Duncavage*, where the defendant landlords had notice of specific prior criminal acts related to the physical conditions of the apartment buildings, defendant in this case does not have such notice. The record here contains evidence that one intruder may have entered through the unlocked common door of the apartment building which was unlit, and then kicked in plaintiff's locked apartment door; while the other scaled the outside wall of the building, gained access to the balcony of plaintiff's apartment, and broke an exterior window. This record, however, is devoid of any evidence from which we could infer that persons used this means of entry in the past to commit a criminal act. Moreover, the criminal activity in this case was not related to the physical condition of the apartment building.

¶ 73 Accordingly, we conclude that plaintiff failed to prove that defendant had notice of prior criminal activity related to the physical condition of the apartment complex and, therefore, defendant did not owe plaintiff a duty to protect her from the criminal actions of third parties based upon such notice.

¶ 74 III. CONCLUSION

¶ 75 For the reasons stated, we affirm.

¶ 76 Affirmed.