NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

AFRA LOZANO et al.,

Plaintiffs and Appellants,

v.

AWI MANAGEMENT CORPORATION,

Defendant and Respondent.

E060992

(Super.Ct.No. INC1301793)

OPINION

APPEAL from the Superior Court of Riverside County. John G. Evans, Judge. Affirmed.

Thon Beck Vanni Callahan & Powell, Daniel P. Powell; Esner, Chang & Boyer and Stuart B. Esner for Plaintiffs and Appellants.

Horvitz & Levy, Stephen E. Norris, Bradley S. Pauley; Kuluva, Armijo & Garcia, Kenyon M. Young, Mark D. Shields; Law Offices of Thomas J. McDermott, Jr., and Thomas John McDermott, Jr., for Defendant and Respondent.

Plaintiffs and appellants Afra Lozano, individually and as guardian ad litem for Emigdio Renee Lozano[1] and Felipe Lozano, Sr., and Yuli Reynoso individually (collectively, Plaintiffs) appeal the grant of summary judgment in favor of defendant and respondent AWI Management Corporation (AWI). In 2010, AWI managed the Hovley Garden Apartments (Hovley Gardens) in Palm Desert. Afra[2] was injured and her son, Felipe, and her granddaughter, Doria Zoe Lozano-Reynosa,[3] were killed when another tenant in their apartment building, Juan Carlos Alcala, shot them. Afra had warned the AWI property manager at the apartment building almost one year prior to the shooting that Alcala had threatened her with a stick, and had engaged in bizarre behavior by following and staring at her family.

Plaintiffs filed a complaint against AWI; ConAm Asset Management Company (ConAm), who took over management of Hovley Gardens in 2011; and PD Hovley L.P. (PD Hovley) and Palm Communities, who owned Hovley Gardens. AWI had ceased managing the building 90 days prior to the shooting. AWI filed a motion for summary judgment on the ground that they did not owe a duty to Plaintiffs to prevent the harm caused by Alcala; the trial court granted AWI's summary judgment motion.

Plaintiffs claim on appeal that there was a triable issue of fact as to whether the brutal attack that gave rise to this action was foreseeable to AWI. Further, the 90 days

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[1] Emigdio was Afra's other son.

[2] We use first names for the sake of clarity. No disrespect is intended.

[3] Yuli Reynosa was Doria's mother.

between when AWI ceased being the property manager and when the shooting occurred did not establish the lack of a duty of care. We conclude that the motion for summary judgment was properly granted.

FACTUAL AND PROCEDURAL HISTORY

A. STATEMENT OF FACTS

The following facts are taken from the undisputed material facts presented by AWI, and the additional facts provided by Plaintiffs.

In 2003, Afra moved into Hovley Gardens. On August 1, 2007, AWI entered into an agreement with PD Hovley whereby AWI would serve as the property management company for Hovley Gardens. AWI had the exclusive right to rent, operate and manage Hovley Gardens. As of January 1, 2011, the agreement between AWI and PD Hovley was terminated and AWI no longer managed Hovley Gardens.

In 2010, while AWI was still managing Hovley Gardens, AWI received several complaints from Afra and her family regarding Alcala acting bizarrely and holding a stick while threatening to "do something" if they were not quiet. Afra did not report being threatened by Alcala with a gun, or that he had a gun. On April 8, 2011, Alcala opened fire on Afra, Felipe and Doria in their apartment. Felipe and Doria died.

B. PROCEDURAL HISTORY

1. *COMPLAINT*

Plaintiffs filed the complaint on March 20, 2013. They named Palm Communities; PD Hovley; AWI: ConAm; and Alcala as defendants. The first cause of action was for general negligence. Plaintiffs alleged that Alcala repeatedly harassed,

threatened, intimidated and committed other criminal activity directed at Afra and her family. Afra reported the conduct to AWI. AWI failed to take any remedial action. Due to AWI's inaction, Alcala shot and injured Afra, and killed Felipe and Doria. The second cause of action was against Alcala only for intentional tort. The third cause of action was for premises liability based on negligence. Plaintiffs alleged that defendants should have taken appropriate action and/or eviction in order to protect the health and safety of Plaintiffs.

2. *SUMMARY JUDGMENT MOTION FILED BY AWI*

On November 26, 2013, AWI filed its summary judgment motion. The motion was based on the separate statement of undisputed facts, the declaration of Kenyon M. Young, and other attached exhibits. AWI asked for summary adjudication as follows:

As for negligence and premises liability, the causes of action failed because AWI could not be held responsible for acts that occurred after it transferred possession of the property. On April 8, 2011, AWI was not the manager of Hovley Gardens. The property was transferred on December 31, 2010, and they had no control over the property after that date. AWI owed no legal duty to Plaintiffs on the date of the incident due to the transfer of the property.

AWI further argued that the causes of action for negligence and premises liability failed as a matter of law because the acts committed by Alcala were not foreseeable. Afra had only reported to AWI that Alcala had knocked on a shared wall in the middle of the night and made nonspecific threats that Afra and her family needed to stop spying on

him and making noise. Afra was not aware that Alcala owned a gun or threatened to use a gun. There were no complaints that he had a gun.

Attached to the motion for summary judgment was a copy of the letter sent to AWI on April 25, 2010, from Afra. It provided as follows: "It was Friday afternoon when our neighbor knocked at the door. I opened it and he was telling me to stop talking bad things about him. He also said that he recored my children and I conversations. He threatened me saying 'If we do not stop making noise and spying he'll do something against us. [¶] Also on April 16, 2010 our next door neighbor (Apt. B-6) was outside his car looking at our house for a really long time. When I was aware, I closed the windows immediately. Then in a hidden place, I looked at him for about 10 minutes; He was still looking. I felt chills of fear. Then he drove home. [¶] On or about 4:00 to 4:15 am of April 17th my four children and I were awake because of strong noises coming from our neighbor's home. He was hitting the walls that divide his home and ours. We all we were so scared and gathered in the living room. When I realized that the noise came from his home, I went out and knocked at his door. I asked him to please stop hitting the walls, then he grabbed a big stick pointing at me very angry and said: 'You're the ones that have to stop.' I was astonished because he has been doing that noise, looking at our windows, and threaten us. [¶] My son and I rapidly went to the manager's house to report it. Sonia (the Hovley Garden Apartments' Manager) told us to call the police, so we did. The police came and spoke with us and our neighbor about our responsibilities and rights. Since then, my children and I are so scared and we do not feel in a <u>safe</u> environment apartment complex. [¶] Anything you can help with this matter is really

appreciated for the whole family." [*Sic*.] (Underscore omitted.) AWI also provided other letters from family members living in the apartment that recounted essentially the same complaints.

3. *PLAINTIFFS' OPPOSITION TO AWI'S MOTION FOR SUMMARY JUDGMENT*

Plaintiffs filed opposition to AWI's summary judgment motion. Plaintiffs alleged that Afra had signed a lease addendum with Hovley Gardens that included a provision forbidding any tenant or any member of the tenant's household to engage in criminal activity, including threatening or intimidating assault. It included that a violation of the provisions of the agreement were good cause for termination of the tenancy. No lease addendum signed by Alcala was provided.

Further, on October 8, 2013, Sonia Gandara, who was the onsite property manager for AWI at the Hovley Gardens in 2010, was deposed. She had no recollection of receiving any complaints from Afra or her family regarding Alcala. She admitted the letters from Afra were in the AWI tenant files. If she had seen the letters, she would have prepared an incident report and faxed it to her supervisor because it was a threat by a tenant to another tenant.

On November 21, 2013, Bobbie Barnett, who was the vice president of asset management for Palm Communities Company and PD Hovley, was deposed. It was AWI's responsibility once they received the complaints from Afra to notify the regional manager, notify counsel, investigate the claim, and evict if necessary. It was Barnett's

understanding that AWI did not do anything about the complaints from Afra. She was "shocked" nothing was done.

Plaintiffs argued that AWI owed a duty of care to them. It should have enforced the rules and regulations in the lease, and owed a common law duty of care. AWI breached that duty the moment it received oral and written notification of Alcala's threatening behavior and took no action to protect Plaintiffs. The fact that ConAm had taken over management at the time of the shooting did not absolve AWI of responsibility. The obligation continued into the foreseeable future. The court should look to the foreseeability of the harm which arose from the breach of duty.

Plaintiffs attached several exhibits, including the lease addendum signed by Afra, the letters from the family that had already been provided by AWI with the summary judgment motion, and the depositions from Gandara and Burnett as detailed *ante*.

Afra's deposition was also attached, in which she claimed that Alcala threatened to kill her and her family while he was holding a big stick. Afra did not immediately call the police. She went and talked to Gandara. Afra told Gandara that Alcala had threatened her, but she did not remember if she told Gandara that he had threatened to kill her. Gandara told her to call the police. Afra did not recall how she delivered the letters to Gandara. The letters written did not reference that Alcala threatened to kill them.

Plaintiffs also attached a Riverside County Sheriff's citation regarding a citizen arrest by Felipe against Alcala for vandalism reported April 7, 2011. Also included was an incident report filed by the manager of Hovley Gardens at the time of the shooting.

She was employed by ConAm. She included that she had attached previous complaints by Afra that had been in the tenant file.

Plaintiffs also included responses by AWI to form interrogatories and requests for admissions. AWI averred that on or after July 12, 2006, Hovley Garden tenants had to sign a crime-free lease addendum.

4. *AWI'S REPLY TO PLAINTIFF'S OPPOSITION*

AWI filed its reply to the opposition. AWI argued that Plaintiffs had failed to show there was a triable issue of fact. It was undisputed that AWI had managed Hovley Gardens up until three months prior to the shooting. There was no concealment of danger by AWI from ConAm. Alcala's threats appeared in the tenant file and there were additional problems once ConAm took over. AWI had no control over the property. Plaintiffs did not dispute that AWI had no prior knowledge that Alcala owned a gun or had a history of gun violence. Further, since AWI did not conceal the danger, they were not responsible. There was no liability and summary judgment should be granted.

AWI made several objections to evidence offered by Afra including the crime free agreement signed by Afra (hearsay); the Riverside County Sheriff's citation (lacked foundation, hearsay); and the incident form prepared by the ConAm manager (hearsay).

5. *RULING*

The trial court provided the parties with a tentative ruling prior to the February 18, 2014, hearing. It did not address AWI's objections to evidence offered by Plaintiffs. It ruled that AWI did not owe a duty to Plaintiffs. The trial court first found, "the 98 day time period between the date AWI was terminated as property manager and the proximity

of the citizen's arrest of Alcala and the incident, the court concludes a common law duty of care should not be imposed on AWI in the circumstances of this case." The trial court then addressed where previous courts had found there was a special relationship between landlords and tenants that established a duty on behalf of the landlord for the actions of third parties. It found, "The instant matter is similar to *Davis v. Gomez* (1989) 207 Cal.App.3d 1401, 1404 in which the court found no duty where a mentally disturbed tenant acted strangely but none of her past behavior 'involved any physical violence or real threat to cause bodily harm . . .' to other tenants so the landlord could not have foreseen she would shoot a co-tenant who was walking down the corridor."

The trial court found that there were no threats of violence communicated to AWI. The letter written by Afra and sent to AWI did not include a threat of violence by Alcala. Afra stated in her letter that Alcala threatened her saying that if her and her family did not stop making noise, he would do something against the family. She also reported that Alcala pointed the stick at her "very angry" when she asked him to stop banging it against the wall and he told her that her family members were the ones who needed to stop. Felipe also wrote a letter stating that Alcala had aggressively told Afra to stop while he was holding the stick "in a ready to swing" position. However, he did not observe the encounter. They also reported that Alcala followed them and stared at them.

The trial court concluded, "The evidence is that what was communicated to AWI was that there were at least two face to face incidents between Afra and Alcala in April 2010, one each at the door of the Lozano's apartment and Alcala's apartment, that in each of those incidents Alcala had a stick; that he threatened 'he'll do something against us'

and that Alcala followed the Lozanos and stared at them. There was no physical violence and no threat of physical violence communicated to management. It should be noted that although Afra testified in her deposition that Alcala threatened to kill them, she did not remember having told that to management."

At the hearing on the motion on February 18, 2014, Plaintiffs argued that the tentative ruling was wrong. Plaintiffs first argued that *Davis* was distinguishable because the woman in that case had acted bizarrely, but never threatened anyone. Further, the tentative ruling did not address the lease addendum that all tenants signed, which required them to abstain from threatening or intimidating behavior, and if they did, they were subject to eviction. Plaintiffs argued the letter written by Afra was unequivocal that they were being threatened by Alcala; AWI did nothing.

Thereafter, Alcala scratched Felipe's car and Alcala was cited. This put Alcala over the edge and he shot Felipe while Felipe was holding his daughter. Gandara's and Barnett's depositions, which were not addressed in the tentative ruling, were proof that AWI should have investigated the situation. Plaintiffs were not arguing Alcala should have been evicted; but rather, that AWI should have investigated Alcala. If they had conducted the investigation, they would have discovered that Alcala was a very dangerous man. They would have discovered he threatened to kill Afra.

The trial court then asked on what date AWI ceased to be involved in the management of Hovley Gardens. The trial court inquired, "[H]ow long after . . . December 31st, 2010 would AWI, according to your analysis, be on the hook? I mean, so if the incident took place a year and a half later, would that be too long? I mean,

there's a cutoff date." Plaintiffs' attorney responded that it was a "reasonable cutoff date." It was not three months, and the question of foreseeability and approximate cause were jury questions. Plaintiffs' attorney argued, "The nexus between, do you have a duty to do something and you didn't do it. Then the operative effect of the damage happened somewhere down the road. It's a matter of reasonableness. The killing took place about three months after their last day." The trial court responded, "And that is pretty much the point that I'm wrestling with."

AWI's counsel argued that the question was the nature of the complaints made because that is what leads to foreseeability. There was no threat of violence that gave notice to AWI. There was no warning that he was going to use a gun and shoot someone. Alcala engaged in bizarre but not violent behavior. AWI argued that the shooting that occurred three months after AWI left the property was not foreseeable. It was not foreseeable that Alcala would shoot and kill Felipe and his daughter over a complaint for keying the car.

The trial court stated it was a "difficult" case. The trial court asked what would have happened if AWI had tried to evict Alcala and he shot and killed Felipe and his daughter because of the complaints that led to his eviction. Plaintiffs responded that AWI would not be liable because they would have taken action to solve the problem. Plaintiffs also argued that the length of time that AWI was responsible after the termination of their management was a jury question. The trial court took the matter under submission.

The trial court adopted the tentative ruling. Judgment was entered in favor of AWI on March 26, 2014. Plaintiffs filed their notice of appeal on April 11, 2014.

DISCUSSION

A. STANDARD OF REVIEW

"A trial court will grant summary judgment where there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law. A defendant moving for summary judgment must prove the action has no merit. He does this by showing one or more elements of plaintiff's cause of action cannot be established or that he has a complete defense to the cause of action. At this point, plaintiff then bears the burden of showing a triable issue of material fact exists as to that cause of action or defense." (*Towns v. Davidson* (2007) 147 Cal.App.4th 461, 466.)

Because we review this matter after summary judgment was entered in favor of AWI, we consider the facts most favorable to Plaintiffs. We liberally construe Plaintiffs' evidentiary submissions, strictly construe the evidence submitted by AWI, indulge all reasonable inferences in support of Plaintiffs, and resolve all evidentiary doubts or conflicts in favor of Plaintiffs. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

B. ANALYSIS

Plaintiffs contend that there were triable issues of fact as to whether AWI knew or should have known sufficient information to make Alcala's assault foreseeable.

"To succeed in a negligence action, the plaintiff must show that: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the duty, and (3) the breach

proximately or legally caused (4) the plaintiff's damages or injuries." (*Yu Fang Tan v. Arnel Management Company* (2009) 170 Cal.App.4th 1087, 1095.)

"It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition. [Citations.] In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674, superseded by statute with respect to the standard adopted for summary judgment as reflected in *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767-768.) "Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court." (*Id.* at p. 678.)

In *Castaneda v. Olsher* (2007) 41 Cal.4th 1205 (*Castaneda*), the court explained the steps required in the duty analysis: "'First, the court must determine the specific measures the plaintiff asserts the defendant should have taken to prevent the harm. This frames the issue for the court's determination by defining the scope of the duty under consideration. Second, the court must analyze how financially and socially burdensome these proposed measures would be to a landlord, which measures could range from minimally burdensome to significantly burdensome under the facts of the case. Third, the court must identify the nature of the third party conduct that the plaintiff claims could have been prevented had the landlord taken the proposed measures, and assess how foreseeable (on a continuum from a mere possibility to a reasonable probability) it was

that this conduct would occur. Once the burden and foreseeability have been independently assessed, they can be compared in determining the scope of the duty the court imposes on a given defendant. The more certain the likelihood of harm, the higher the burden a court will impose on a landlord to prevent it; the less foreseeable the harm, the lower the burden a court will place on a landlord.'" (*Castaneda*, at p. 1214.)

In *Castaneda*, the plaintiff sued the owners of the mobile home park where he was a resident after he was shot and injured as the result of a gang confrontation involving another tenant. Prior to the shooting, residents had complained to the owners that they had seen gang members hanging around the other tenant's mobile home. (*Castaneda, supra,* 41 Cal.4th at pp. 1210-1211} One resident complained that each time she and her sons walked by the offending mobile home, the tenants would have their pit bull growl at them to scare them. (*Id*. at p. 1211.) The offending tenants also had been throwing rocks and breaking windows. (*Ibid*.)

The question in *Castaneda* was whether the owners had a duty to evict tenants who were gang members, or not to have rented to them in the first place. The court concluded that refusing to rent to suspected gang members would be contrary to public policy, and that evicting such tenants would be excessively burdensome. (*Castaneda, supra,* 41 Cal.4th at pp. 1216-1219.) The court additionally concluded that the possibility of gun violence at the mobile home park did not rise to the level of "heightened foreseeability" required to impose a "heavily burdensome duty such as hiring security guards" to prevent violent criminal assaults. (*Id.* at pp. 1222; see also *Ann M. v. Pacific Plaza Shopping Center, supra,* 6 Cal.4th at p. 679, fn. omitted ["[W]e conclude that a

high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards. We further conclude that the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises. To hold otherwise would be to impose an unfair burden upon landlords and, in effect, would force landlords to become the insurers of public safety, contrary to well-established policy in this state"].)

The *Castaneda* court also addressed the burden of eviction proceedings. It found, "'A landlord is not obliged to institute eviction proceedings whenever a tenant accuses another tenant of harassment.'" (*Castaneda*, *supra*, 41 Cal.4th at p. 1222.) "[U]ndertaking eviction of a tenant cannot be considered a minimal burden. The expense of evicting a tenant is not necessarily trivial, and eviction typically results in the unit sitting vacant for some period." (*Id.* at p. 1219.) "Not surprisingly in light of the burden involved, courts in this and other states have recognized a tort duty to evict a vicious or dangerous tenant only in cases where the tenant's behavior made violence toward neighbors or others on the premises highly foreseeable." (*Id*. at p. 1219.)

In *Davis v. Gomez*, *supra*, 207 Cal.App.3d 1401, the case relied upon by the trial court here, Davis, a tenant, killed the son of other tenants when the son walked by Davis's apartment. (*Id.* at pp. 1402-1403.) Prior to the shooting, complaints to the landlord about Davis included that she talked to herself, appeared to be casting spells on anyone who walked by her apartment, and a gun had been seen in her apartment. (*Ibid*.) On appeal, the plaintiffs argued that the landlord should have investigated further to determine whether Davis posed a serious threat to other tenants. The appellate court

rejected this argument finding that even if the landlord had conducted an investigation, it was unclear what action could have been taken to prevent the harm. (*Id.* at p. 1406.)

Plaintiffs alleged in the complaint that AWI, and the other defendants, were required to take "appropriate action and/or eviction of" Alcala. Plaintiffs have repeated numerous times in their opening and reply briefs that AWI had a duty to investigate, which would have led to other actions being taken. Again at oral argument, Plaintiff's contended that the landlord had a duty to further investigate Afra's claims. We find nothing in *Castaneda* that requires further investigation. *Castenada* provides, "In assessing the danger an existing tenant poses, the landlord can rely on his or her own observations or those of a property manager and, where the circumstances make these reliable, on complaints of the other tenants." (*Castaneda, supra,* 41 Cal.4th at p. 1219.) There was no duty to investigate. Additionally, Plaintiffs do not specify how further investigation could have *prevented* the shooting in this case, as no one knew that Alcala had a gun

Moreover, the eviction of Alcala was not necessary as the acts of Alcala were not foreseeable. Here, Alcala only made two threats against Afra and her family. When Afra came to his door he told Plaintiffs to be quiet or he would do something. Further, he held a stick while talking to Afra telling her to be quiet. He also stared at the apartment. Afra could not recall if she ever told the landlord prior to the shooting that Alcala had made a death threat. At no time did Alcala threaten Afra and her family with a gun. They had no idea that he possessed a gun. The acts in the instant case were simply unforeseeable. Furthermore, it is not clear that evicting Alcala or investigating the threats would have

eliminated the harm here as he simply could have retaliated based on knowledge Afra and her family got him evicted. Plaintiffs failed to provide evidence that the violent acts of Alcala were foreseeable. AWI negated the duty element of Plaintiffs' negligence claim and Plaintiffs failed to show a triable issue of material fact on that element.

Plaintiffs rely upon *Madhani v. Cooper* (2003) 106 Cal.App.4th 412 to support their claim. In *Madhani*, the court held the landlord owed a duty of care to protect the tenant from *foreseeable* future assaults by Moore, a fellow tenant and neighbor. (*Id*. at p. 415.) Moore shoved, bumped and physically blocked the plaintiff and her mother on several occasions, as well as berating them. Despite the plaintiff's frequent complaints to the defendant's property manager, no action was taken against the assailant, who ultimately pushed the plaintiff down the building's stairs. (*Ibid*.) The Court of Appeal held the landlord had a duty to evict the assaultive tenant if necessary, finding that, "[i]t is difficult to imagine a case in which the foreseeability of harm could be more clear." (*Ibid*.) The evidence showed "the landlords knew or should have known Moore had engaged in repeated acts of assault and battery against Madhani as well as her mother." (*Ibid*.)

Here, unlike in *Madhani*, the violent acts committed by Alcala were not foreseeable. As a matter of law, it was not foreseeable that Alcala would use a gun against Afra and her family. The prior incidents—which occurred over one year prior to the shooting—did not involve similar acts of violence against Afra and her family.

We need not address the issue of AWI no longer being in charge of Hovley Gardens at the time of the shooting because, even if AWI was responsible, they did not

owe a duty to protect Plaintiffs from Alcala's act of violence. Summary judgment was proper because AWI established that Plaintiffs could not demonstrate a duty on behalf of AWI to prevent the harm suffered.

DISPOSITION

The judgment is affirmed. As the prevailing party, AWI is awarded its costs on appeal.

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MILLER
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.