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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SAN DIEGO**

11 OSCAR RENDON,	)	Case No.: 37-2022-00037995-CU-PO-CTL
	)	
12 Plaintiff,	)	
	)	POINTS AND AUTHORITIES IN
13 vs.	)	SUPPORT OF STEPHEN WHITBURN'S
	)	MOTION FOR SUMMARY JUDGMENT
14 WILLIAM RODRIGUEZ-KENNEDY;	)	
15 STEPHEN WHITBURN; and DOES 1	)	Action Filed: September 22, 2022
TO 20,	)	Trial Date: July 12, 2024
	)	
16 Defendants.	)	Date: April 19, 2024
	)	Time: 9:00 a.m.
	)	Dept: C-67

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1 **I. INTRODUCTION**

2 This litigation arises out of an alleged sexual assault on plaintiff Oscar Rendon by
3 another individually named defendant at an apartment the defendants share in the East Village
4 neighborhood of downtown San Diego, California (referred hereinafter as the “Apartment”)
5 on August 19, 2021. Stephen Whitburn (“Whitburn”) is the co-tenant in the Apartment.
6 Plaintiff Rendon alleges he came home with defendant Rodriguez-Kennedy, but because he
7 was inebriated does not remember driving home with Kennedy-Rodriguez or consenting to
8 having sex with Rodriguez-Kennedy. Whitburn had no notice whatsoever of any wrongful or
9 alleged criminal activity taking place in the Apartment on the night in question.

10 As explained in this motion, Whitburn cannot be liable under a premises liability
11 theory for the events that took place on August 19, 2021, as Whitburn owed no duty to
12 plaintiff since no special relationship existed, and because the alleged sexual assault was not
13 reasonably foreseeable to Whitburn. Accordingly, Defendant SLJ is entitled to Summary
14 Judgment as a matter of law to have the two issues address in this motion summarily
15 adjudicated in its favor.

16 **II. OPERATIVE PLEADINGS**

17 On September 22, 2022, plaintiff filed his initial complaint against the defendants. On
18 September 26, 2022, plaintiff filed a First Amended Complaint against the defendants (the
19 “FAC”). The FAC is the operative pleading in this matter. Although the FAC alleges eight
20 causes of action, the only cause of action against Whitburn is the eighth cause of action for
21 premises liability.

22 On November 17, 2022, Whitburn filed his answer to the FAC.

23 **III. FACTS RELEVANT TO SUMMARY JUDGMENT**

24 Stephen Whitburn has known William Rodriguez-Kennedy for 13 years. (Separate
25 Statement of Undisputed Material Facts (“SSUF”) 1.) They have been roommates since 2017,
26 having decided to share an apartment to save money on rent. (SSUF 2) The apartment has two
27 bedrooms and is in the East Village neighborhood of downtown San Diego near Cortez Hill
28

1 (the “Apartment”). (SSUF 3) Whitburn and Rodriguez-Kennedy each have their own
2 bedroom and bathroom. (SSUF 4)

3 In the 13 years Whitburn has known Rodriguez-Kennedy, at no point have he heard
4 of, let alone witnessed, any incidents of sexual misconduct or domestic violence by or
5 involving Mr. Rodriguez-Kennedy. (SSUF 5)

6 Around 1:00 AM on August 19, 2021, Whitburn was home alone and asleep when the
7 Apartment doorbell rang. Mr. Rodriguez-Kennedy had forgotten his keys and needed to be let
8 in. Whitburn got out of bed and went to the front door. (SSUF 6) When Whitburn opened the
9 door, Rodriguez-Kennedy and plaintiff were together smiling and laughing and enjoying each
10 other’s company. (SSUF 7) Whitburn was not surprised to see Rodriguez-Kennedy and
11 plaintiff together because they had been dating on and off for about a year. (SSUF 8) It was
12 not unusual for them to come to the Apartment together late in the evening. (SSUF 9)

13 In letting them in, Whitburn did not notice that either was intoxicated or impaired in
14 any way. (SSUF 10) Because it was late and because they had woken Whitburn up, he made
15 a point of observing that they both appeared to be fine and in good spirits. (SSUF 11) After
16 letting them in, saying hello and exchanging pleasantries, Whitburn went to his bedroom and
17 closed his door for the rest of the night. (SSUF 12) Whitburn was awake for approximately
18 10 minutes before falling back asleep. (SSUF 13) During those 10 minutes he did not hear
19 anything that made me think someone needed assistance or was in any kind of distress.

20 (SSUF 14) Whitburn then fell back asleep and did not wake up for the rest of the night.

21 (SSUF 15) Nothing Whitburn saw, heard, or in any way witnessed in the early morning of
22 August 19, 2021 alerted him to any danger, distress or anything else that would have led him
23 to believe plaintiff required any assistance or steps taken by Whitburn to protect plaintiff.

24 (SSUF 16)

25 Whitburn continued seeing plaintiff and Rodriguez-Kennedy together in the
26 Apartment for approximately four more months until December 2021, and nothing Whitburn
27 saw or heard during those four months indicated to me that plaintiff had required any
28 assistance or steps to protect him in the early morning of August 19, 2021. (SSUF 17)

1 **IV. SUMMARY JUDGMENT STANDARD**

2 Code of Civil Procedure § 437c allows a defendant to move for summary judgment.
3 (CCP §437c.). A defendant seeking summary judgment must show the plaintiff's entire case
4 has "no merit." (CCP § 437c.) Summary judgment shall be granted when it is established that
5 there is no triable issue as to any material fact and that the defendant is entitled to judgment as
6 a matter of law. (*Inglewood Radiology Med. Group, Inc. v. Hospital Shared Servs., Inc.*
7 (1989) 217 Cal.App.3d 1366

8 , 1369.)

9 The purpose of the summary judgment procedure is to determine whether the parties
10 possess evidence giving rise to issues of material fact that require the weighing of facts at
11 trial. (*Molko v. Holy Spirit Assoc. for the Unification of World Christianity* (1988) 46 Cal.3d
12 1092, 1107.) Once the defendant has met the burden, the burden then shifts to the plaintiff to
13 show a triable issue of material fact exists as to a cause of action. (*City of Oceanside v.*
14 *Superior Court* (2000) 81 Cal.App.4th 269, 274.) "An issue of fact can only be created by a
15 conflict of evidence. It is not created by "speculation, conjecture, imagination or guesswork".
16 Further, an issue of fact is not raised by "cryptic, broadly phrased, and conclusory assertions",
17 or mere possibilities, or by allegations in the complaint." (*Lyons v. Security Pacific National*
18 *Bank* (1995) 40 Cal.App.4th 1001,1014, internal citations omitted.)

19 The issues on a summary judgment motion are framed by the complaint, and the
20 motion need only address the allegations contained therein. (*Aguilera v. Henry Soss & Co.*
21 (1996) 42 Cal.App.4th 1724, 1728) "[T]he pleadings determine the scope of relevant issues
22 on a summary judgment motion." (*Nieto v. Blue Shield of California Life & Health Ins. Co.*
23 (2010) 181 Cal.App.4th 60, 74.) The pleadings serve as the "outer measure of materiality" in
24 a summary judgment motion, and the motion may not be granted or denied on issues not
25 raised by the pleadings. (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258.) "A
26 moving party seeking summary judgment or adjudication is not required to go beyond the
27 allegations of the pleading, with respect to new theories that could have been pled, but for
28 which no motion to amend or supplement the pleading was brought, prior to the hearing on

1 the dispositive motion. [Citation.]" (*Howard v. Omni Hotels Management Corp.* (2012) 203
2 Cal.App.4th 403, 421.) "A party may not oppose a summary judgment motion based on a
3 claim, theory, or defense that is not alleged in the pleadings," and "[e]vidence offered on an
4 unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the
5 pleadings." (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3)

6 Summary judgment is warranted when the admissible evidence shows that the plaintiff
7 does not possess, and cannot reasonably be expected to obtain, evidence sufficient to create
8 triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854.)
9 The burden then shifts to the responding party to come forward with evidence necessary to
10 prove that a triable issue of material fact exists. (*Union Bank v. Superior Court* (1995) 31
11 Cal.App.4th 573, 590.) Upon a showing that no triable issue of material fact exists, the court is
12 empowered to terminate the action without the necessity of trial. (*Ibid.*; *Molko v. Holy Spirit*
13 *Association* (1988) 46 Cal.3d 1092, 1107; *Stationers Corp. v. Dun & Bradstreet, Inc.* (1965)
14 62 Cal.2d 412, 417.)

15 As explained below, the granting of a motion for summary judgment in the favor of
16 Whitburn is appropriate under these standards.

17 **V. THE COURT CAN DETERMINE THAT WHITBURN OWED NO DUTY TO**
18 **PLAINTIFF TO PREVENT THE ALLEGED SEXUAL ASSAULT**
COMMITTED BY ANOTHER INDIVIDUAL

19 As discussed above, the court can decide an issue of duty. (Code of Civil Procedure §
20 437c(f)(1).) Specifically, the court can determine whether a defendant either owed or did not
21 owe a duty to plaintiff. (*See, Linden Partners v. Wilshire Linden Assocs.* (1998) 62
22 Cal.App.4th 508, 518.)

23 "A tort, whether intentional or negligent, involves a violation of a legal duty, imposed
24 by statute, contract or otherwise, owed by the defendant to the person injured. Without such a
25 duty, any injury is 'damnum absque injuria' – injury without wrong." (*Nally v. Grace*
26 *Community Church* (1988) 47 Cal.3d 278, 292.) In a negligence action against a property
27 owner or tenant in possession for criminal assault by a third person, plaintiff must provide
28 evidence that the assault "was more probable than not, but for the [person responsible for the

property’s] negligence.” (*Leslie G. v. Perry Associates* (1996) 43 Cal.App.4th 472, 488.) “[P]roof of causation cannot be based on mere speculation, conjecture and inferences drawn from other inferences to reach a conclusion unsupported by any real evidence, or on an expert’s opinion based on inferences, speculation and conjecture.” (*Ibid.*)

The existence and scope of a tenant’s duty to protect against third party crime is a question of law for the court to resolve.¹ (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213.) Here, the Court can determine that Whitburn did not owe a duty to plaintiff to prevent the alleged sexual assault. Despite plaintiff’s conclusory allegations in the FAC, Whitburn had no notice whatsoever that his roommate of many years would allegedly commit criminal acts against the roommate’s on again off again boyfriend. As a co-tenant, Whitburn reasonably expected his co-tenant to comply with the provisions of the law, and not commit any criminal or violent acts in the Apartment. Whitburn certainly cannot be held as the insurer of safety of any person who a co-tenant invites into the Apartment. The issue of duty therefore should be adjudicated in Whitburn’s favor.

VI. THE ALLEGED ACTS WERE UNFORESEEABLE AND NO SPECIAL RELATIONSHIP EXISTED

“A landlord generally owes a tenant the duty, arising out of their special relationship, to take reasonable measures to secure areas under the landlord’s control against foreseeable criminal acts of third parties.” *Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213. Here, there is no special relationship that exists between plaintiff and Whitburn that gives rise to a duty as Defendant is not plaintiff’s landlord. Plaintiff was not even Whitburn’s guest. He was Rodriguez-Kennedy’s guest.

In *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, the Supreme Court recognized exceptions to the general no-duty-to-protect rule and one of exception is the “special relationship” doctrine. (p. 235.) When an exception exists to the general “no-duty-to-protect rule,” such as the existence of a special relationship, courts analyze the foreseeability of risk

¹ Cases for premises liability generally are brought against the owner of the property. A tenant in circumstances such as those in plaintiff’s claims stands in the shoes of a landlord and so the duties are analogous.

1 from the third-party conduct at issue. (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 531-
2 532.) “[A] duty to take affirmative action to control the wrongful acts of a third party will be
3 imposed only where such conduct can be reasonably anticipated.” (*Ann M., v. Pacific Plaza*
4 *Shopping Center* (1993) 6 Cal.4th 666, 676.) “[T]he scope of duty is determined in part by
5 balancing the foreseeability of the harm against the burden of the duty to be imposed.”
6 (*Delgado, supra*, 36 Cal.4th at p. 237 citing *Ann M., supra*, 6 Cal.4th at p. 666, *Isaacs v.*
7 *Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 125.) “In cases where the burden of
8 preventing future harm is great, a high degree of foreseeability may be required.” (*Ibid.*)

9 “In determining whether this heightened standard of foreseeability has been
10 established, the defendant’s knowledge is critical. [Citation.] When the court engages ‘in any
11 analysis of foreseeability, the emphasis must be on the specific, rather than more general,
12 facts of which a defendant was or should have been aware.’” (*Melton, supra*, 183 Cal.App.4th
13 at p. 536 (internal quotations and citations omitted).) In addition, the “[foreseeability] analysis
14 must focus on the foreseeability of harm occurring, not its probability, a more stringent
15 standard.” (*Id.* at p. 538 (citations omitted).)

16 In 2005, California Supreme Court recognized as “well established” the proposition
17 that a proprietor’s general duty of maintenance, which is owed to tenants and patrons,
18 includes the duty to take reasonable steps to secure common areas against foreseeable
19 criminal acts of third parties that are likely to occur in the absence of such precautionary
20 measures. (*Delgado, supra*, 36 Cal.4th at p. 235.) The Supreme Court restated the *Rowland*
21 factors to decide whether defendant had a duty to protect plaintiff from harm: (1) the degree
22 of certainty that plaintiff suffered harm; (2) the causal nexus between defendant’s conduct and
23 the harm; (3) defendant’s moral blame; (4) the policy of preventing future harm; (5) the extent
24 of the potential burden on defendant and those similarly situated in imposing a duty and
25 resulting liability; and (6) the availability, cost, and prevalence of insurance for the risk.
26 (*Delgado, supra*, 36 Cal.4th at p. 245, fn. 15, citing *Rowland v. Christian* (1968) 69 Cal.2d
27 108, 113.)

1
2 **A. No Foreseeability of Harm to Plaintiff Existed**

3 Foreseeability, when analyzed to determine the existence or scope of a duty, is a
4 question of law to be decided by the court.” *Ann M., supra*, at 678. “[T]he decision to impose
5 a duty of care to protect against criminal assaults requires ‘balancing the foreseeability of the
6 harm against the burden of the duty to be imposed.’” (*Wiener v. Southcoast Childcare*
7 *Centers, Inc.* (2004) 32 Cal.4th 1138, 1146–1147.) Thus, the existence and scope of the
8 landlord/tenant’s duty under the circumstances turns, fundamentally, on whether the third-
9 party conduct could reasonably be anticipated. (*Robison v. Six Flags Theme Parks Inc.* (1998)
10 64 Cal.App.4th 1294, 1300-1305; see also, *Jefferson v. Qwik Korner Market, Inc.* (1994) 28
11 Cal.App.4th 990, 993.)

12 A party responsible for real property owes a duty only when ‘heightened’
13 foreseeability of third-party criminal activity on the premises exists—shown by prior similar
14 incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in
15 that location. In *Ann M., supra*, the manager and owners of a shopping center were sued by a
16 lessee’s employee who was raped during business hours by an unknown assailant. The
17 defendants moved for summary judgment, arguing they owed plaintiff no duty or care. The
18 California Supreme Court affirmed, noting that the requisite degree of foreseeability “rarely,
19 if ever, can be proven in the absence of prior similar incidents of violent crime on the
20 landowner’s premises.” (p. 679.) “To hold otherwise,” *Ann M.* emphasized, “would be to
21 impose an unfair burden upon landlords and, in effect, would force landlords to become the
22 insurers of public safety, contrary to well-established policy in this state.” (*Id.*)

23 Here, plaintiff has no evidence, and can foster no evidence, that Rodriguez-Kennedy
24 committed a prior criminal act or sexual assault or that any criminal act ever occurred in the
25 Apartment. There were no “similar incidents of violent crimes” that would have placed
26 Whitburn on notice that the Apartment (this is a premises liability case after all) was
27 dangerous and action needed to be taken. This Court can readily conclude, under these
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1 circumstances of plaintiff as a guest, being allegedly assaulted by another person, could not
2 meet the requisite degree of foreseeability to establish a duty on Whitburn.

3 In *Williams v. Fremont Corners, Inc.*, (2019) 37 Cal.App.5th 654, the court held that
4 “knowing there is a general potential for rowdy or troublesome conduct by bar patrons,
5 however, does not make the category of aggressive parking lot assaults reasonably
6 foreseeable, any more so than the presumed awareness of previous assaults and robberies or
7 problems with transients on the property establishes the foreseeability of a violent sexual
8 assault.” (pp. 671–672.) In *Kadish v. Jewish Community Centers of Great Los Angeles* (2003)
9 112 Cal.App.4th 711, the Court found that a violent criminal assault at a Jewish summer camp
10 was not reasonably foreseeable, despite previous threats of violence. A duty cannot be
11 imposed based on vague threats of violence, absent prior armed assaults or other similar
12 incidents. (*Id.*)

13 A showing of heightened foreseeability is required in all premises liability cases,
14 regardless of the extent of the burden sought to be imposed upon the defendant. (*Delgado*,
15 *supra*, 36 Cal.4th at p. 244.) In *Delgado*, the Court concluded that plaintiff produced
16 insufficient evidence of heightened foreseeability in the form of prior similar incidents or
17 other indications of a reasonably foreseeable risk of a violent criminal assault on defendant’s
18 premises that would have imposed upon defendant an obligation to provide any guard, or
19 additional guards, to protect against third party assaults. (*Id.* at p. 245.) Plaintiff was a
20 customer of defendant Trax Bar Grill who had two security guards, one stationed outside and
21 the other inside the bar. (*Id.* at p. 230.) Plaintiff expressed his concern to a security guard of a
22 possible fight with another patron, and later plaintiff was assaulted by the patron. (*Id.* at p.
23 231.) The Court analyzed that heightened foreseeability is satisfied by a showing of prior
24 similar criminal incidents. (*Id.* at p. 245.) The Court concluded that, although the record refers
25 to a few prior altercations between patrons, the Court agreed that plaintiff produced
26 insufficient evidence of heightened foreseeability of prior similar incidents of a reasonably
27 foreseeable risk of a violent criminal assault on defendant’s premises that would have
28

1 imposed upon defendant an obligation to provide any guard, or additional guards, to protect
2 against third party assaults. (*Ibid.*)

3 Here, Whitburn had no notice whatsoever of an impending assault upon plaintiff.
4 Whitburn had no way to anticipate that his co-tenant would purportedly commit criminal acts.
5 To Whitburn's knowledge, Rodriguez-Kennedy had never sexually assaulted anyone nor
6 committed any prior criminal acts and certainly no such acts had occurred in the Apartment
7 before. Rodriguez-Kennedy had the same rights and responsibilities as his co-tenant
8 Whitburn. It was not foreseeable to Whitburn his co-tenant would act criminally as alleged in
9 the FAC. Whitburn clearly could not have done anything to prevent this unforeseen criminal
10 act as alleged by plaintiff.

11 **B. There is No Connection Between Whitburn's Conduct and Plaintiff's Injuries**

12 In *Delgado*, although it was undisputed that plaintiff was injured there, the connection
13 between the conduct of the defendant business owner and the harm to plaintiff was highly
14 attenuated, and very little moral blame was attached to defendant's conduct. (*Delgado, supra*,
15 36 Cal.4th at p. 257.) The same is true here.

16 Even assuming plaintiff's allegations of criminal conduct by Rodriguez-Kennedy are
17 true, the connection between Whitburn's conduct and the harm to plaintiff is highly attenuated
18 and there was no conduct by Whitburn that merits any moral blame in this alleged incident.
19 Whitburn literally just unlocked the front door for his co-tenant and then went to bed. It was
20 the unforeseeable alleged criminal conduct of another individual defendant alone that caused
21 plaintiff's injuries, not the conduct of Whitburn. Furthermore, as the alleged assault occurred
22 between Whitburn's co-tenant and the co-tenant's guest, it is unclear how Whitburn could
23 have prevented the alleged incident. Given the facts and circumstances pled by plaintiff, there
24 is no causal nexus between any actions of Whitburn and the incident, much less an argument
25 that Whitburn shoulders any moral blame for the alleged incident.

26 As discussed, the alleged harm to plaintiff was not foreseeable, and the connection
27 between the conduct of Whitburn and the harm allegedly suffered is highly attenuated.
28 Specifically, Whitburn could not have foreseen a criminal assault on one of his co-tenant's

1 guests, allegedly committed by the co-tenant. In the absence of highly specific prior
2 knowledge, Whitburn certainly cannot anticipate and prevent violent criminal conduct by his
3 co-tenant against his guest. There is simply no argument that supports any responsibility by
4 Whitburn for the occurrence of this incident.

5 **C. Policy Considerations and Potential Burden Support No Duty is Owed**

6 The “well-established policy in this state” is that landlords (and therefore persons
7 responsible for real property) are not the insurers of public safety. (*Delgado, supra*, 36 Cal.4th
8 at p. 238.) The policy considerations and potential burden support the conclusion that
9 Whitburn did not owe a duty to prevent plaintiff’s injuries. Here, plaintiff would require co-
10 tenants to be responsible for all the conduct of their co-tenants in an Apartment they share.
11 Such a policy would have unclear results, and certainly result in astronomically increased
12 financial burdens on roommates.

13 In the absence of a prior similar incident, Whitburn can only guess when, where, and
14 how a criminal assault between a co-tenant and his guest on co-leased property might occur,
15 and what protective measures among an infinite number of possible precautions should be
16 taken. Here, it is unclear what lead to the alleged assault on plaintiff or how any action by
17 Whitburn could or would have deterred it. The consequences of such a burden being imposed
18 on Whitburn are far too great. As the incident involving plaintiff was not foreseeable, there
19 are virtually no policy arguments supporting a duty, and the burden of that duty would be far
20 too great. Plaintiff will not be able to establish that Whitburn owed him a duty to prevent this
21 alleged incident.

22 **VII. PLAINTIFF CANNOT ESTABLISH WHITBURN WAS A SUBSTANTIAL**
23 **FACTOR FOR HIS INJURIES**

24 In determining whether a defendant’s negligence was the proximate cause of the
25 plaintiff’s injuries courts use the substantial factor test. (*Saelzler v. Advanced Group 400*
26 (2001) 25 Cal.4th 763, 774.) Thus, even if one were to assume Whitburn owed a duty of care
27 to plaintiff and breached that duty of care, plaintiff must still establish that such a breach was
28 the proximate or legal cause of his injuries. (*Id.* at p. 773.) To prevail on the substantial factor

1 test, plaintiff must show it is more probable than not “butfor” Whitburn’s negligence, the
2 injury would not have occurred. (*Sandoval v. Bank of America* (2002) 94 Cal.App.4th 1378,
3 1385.) Absent such proof, plaintiff’s claim fails as a matter of law.

4 Elaborating on the element of legal causation, the Court in *Sandoval v. Bank of*
5 *America*, made the following observations:

6 The first element of legal cause is cause in fact: i.e., it is necessary to show that the
7 defendant’s negligence contributed in some way to the plaintiff’s injury, so that ‘but
8 for’ the defendant’s negligence the injury would not have been sustained. If the
9 accident would have happened anyway, whether the defendant was negligent or not,
10 then his negligence was not a cause in fact, and of course cannot be the legal or
11 responsible cause. The ‘but for’ rule has traditionally been applied to determine cause
12 in fact. [Citations.] [P] The Restatement formula uses the term ‘substantial factor’ ‘to
13 denote the fact that the defendant’s conduct has such an effect in producing the harm
14 as to lead reasonable men to regard it as a cause.’ [Citation.] And ‘the actor’s
15 negligent conduct is not a substantial factor in bringing about harm to another if the
16 harm would have been sustained even if the actor had not been negligent.’” (6 Witkin,
17 Summary of Cal. Law (9th ed. 1988) Torts, § 968, pp. 358-359.) The Supreme Court
18 has observed that the “‘substantial factor’ test subsumes the ‘but for’ test. ‘If the
19 conduct which is claimed to have caused the injury had nothing at all to do with the
20 injuries, it could not be said that the conduct was a factor, let alone a substantial factor,
21 in the production of the injuries.’” [Citations.]

22 (*Sandoval, supra*, 94 Cal.App.4th at p. 1384-1385.)

23 Courts have observed that “[c]riminal conduct which causes injury will ordinarily be
24 deemed the proximate cause of an injury, superseding any prior negligence which might
25 otherwise be deemed a contributing cause.” (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444,
26 1449.) Plaintiff must establish that Whitburn was a substantial cause of his injuries. Even
27 where, unlike here, there can be a “general finding of the foreseeability of some kind of future
28 injury or assault on the [owner’s] premises,” that does not “inevitably establish that the
defendant’s omission caused plaintiff’s own injuries.” (*Saelzler, supra*, 25 Cal.4th at p. 778.)

Similarly, in order to prevail on the sixth cause of action for Premises Liability,
plaintiff has to establish that a) Whitburn controlled the property; b) Whitburn was negligent
in the use or maintenance of the property; c) that plaintiff was harmed, and d) that Whitburn’s
negligence was a **substantial factor** in causing Plaintiff’s harm. (CACI 1000, emphasis
added.)

Here, plaintiff cannot adequately demonstrate Whitburn's negligence was an actual, legal cause of his injuries and Whitburn's motion for summary judgment should be granted. Similar to *Saelzler*, plaintiff cannot prove it was "more probable than not" that any action by Whitburn would have prevented the assault by his co-tenant upon the co-tenant's guest. Whitburn's alleged omissions were not a substantial factor in causing his injuries. Instead, it is the alleged actions by the Rodriguez-Kennedy's criminal acts that caused his injuries. Unlike the circumstances in *Saelzler*, in which the plaintiff claimed high foreseeability that violent crime would occur on the premises, plaintiff in this case cannot even prove this. Whitburn anticipates plaintiff will argue Whitburn was somehow aware that Rodriguez-Kennedy had done similar acts before or was prone to violence and therefore Whitburn was on notice of the potential for harm in the Apartment. First, Whitburn has never heard of any such prior acts or propensities. (SSUF 5) Furthermore, notification that has committed prior sexual misconduct is a far cry from the possibility that Rodriguez-Kennedy may be committing sexual assaults upon his on again off again boyfriend. Therefore, plaintiff cannot establish a "reasonably probable causal connection" between Defendant Whitburn's alleged breach of duty and plaintiff's injuries, which were caused by an assault allegedly committed by a third party.

VIII. PLAINTIFF CANNOT SHOW CAUSATION BETWEEN HIS INJURIES AND WHITBURN'S DUTY

To substantiate a finding of liability, plaintiff must show some substantial link or nexus between omission and injury. (*Saelzler, supra*, 25 Cal.4th at p. 778.) In cases in which the specific conduct of third parties is brought to the attention of a defendant property owner sufficiently in advance of the injury to give the defendant an opportunity to act to prevent the injury, the causal connection between failure to act and the injury is patent. (*Noble v. Los Angeles Dodgers, Inc.* (1985)168 Cal.App.3d 912, 916.) In the context of evaluating causation, the California Supreme Court held that an apartment owner (who had provided nighttime security guards in a large complex with a history of serious violent crime) could not be liable for its failure to provide daytime security guards and failure to maintain functioning

1 locked gates without an actual causal link showing that the additional security measures could
2 have prevented the assault on the plaintiff. (*Saelzler, supra*, 25 Cal.4th at p. 775-77.)

3 Defendant Whitburn moves for summary judgment on the basis that plaintiff is unable
4 to establish any substantial causal link between Whitburn's omissions and plaintiff's injuries
5 as in *Saelzler*. Plaintiff cannot present evidence that Whitburn knew of any prior criminal
6 activity or sexual misconduct by Rodriguez-Kennedy, or any other guest at the Apartment.
7 Plaintiff has no evidence that Whitburn reasonably or effectively could have warned plaintiff
8 of unspecified dangers from his on again off again boyfriend of over a year. Nor can plaintiff
9 explain what Whitburn could have reasonably done to prevent the incident. This case is
10 similar to *Leslie G.*, in which the court affirmed the defendant business owner's summary
11 judgment in the absence of any prior similar incident. (*Leslie G., supra*, 43 Cal.App.4th at
12 477.) As there is no causal nexus between plaintiff's injuries and Whitburn's actions or
13 inactions, where there was no notice or evidence that the incident could have been prevented,
14 Whitburn should not be responsible for plaintiff's injuries.

15 **IX. CONCLUSION**

16 For all of the reasons set forth in this motion, the Court can readily conclude that
17 Whitburn owed no duty to plaintiff, and cannot be held responsible for the alleged August 19,
18 2021 incident. Defendant Whitburn is entitled to summary judgment as a matter of law.

19
20 THE CABRERA FIRM, A.P.C.

21
22 By:


23 Guillermo Cabrera
24 Attorneys for Stephen Whitburn
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Attorneys for Stephen Whitburn

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

02/02/2024 at 08:39:00 AM

Clerk of the Superior Court
By Nora Lopez, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

OSCAR RENDON,	)	Case No.: 37-2022-00037995-CU-PO-CTL
	)	
Plaintiff,	)	
	)	STEPHEN WHITBURN'S NOTICE OF
vs.	)	MOTION AND MOTION FOR
	)	SUMMARY JUDGMENT
WILLIAM RODRIGUEZ-KENNEDY;	)	
STEPHEN WHITBURN; and DOES 1	)	Action Filed: September 22, 2022
TO 20,	)	Trial Date: July 12, 2024
	)	
Defendants.	)	Date: April 19, 2024
	)	Time: 9:00 a.m.
	)	Dept: C-67

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on April 19, 2024, at 90:00 a.m., in Department C-67 of this court, located at 330 West Broadway, San Diego, California 92101, Defendant STEPHEN WHITBURN ("WHITBURN"), will and hereby does move pursuant to Code of Civil Procedure section 437c and Rule 3.1350 of the Rules of Court, for an order granting summary judgment in favor of WHITBURN and against plaintiff OSCAR RENDON ("Plaintiff") and for costs of suit incurred herein.

Pursuant to Code of Civil Procedure § 437c, the motion is made on the grounds that the eighth cause of action against WHITBURN is without merit, and no triable issue of material fact exists, entitling WHITBURN to Summary Judgment as a matter of law.

1 Specifically, no duty to control the wrongful acts of a third party is imposed unless such
2 conduct can be reasonably anticipated. In the case of alleged criminal conduct, an
3 extraordinarily high degree of foreseeability is required. Here, the element of foreseeability
4 does not exist, and therefore WHITBURN did not have a duty to protect Plaintiff Rendon
5 against the alleged criminal conduct of the individual other named defendant in this case.

6 This motion will be based upon this Notice of Motion and Motion, the Memorandum
7 of Points and Authorities filed concurrently herewith, the Declaration of Stephen Whitburn;
8 and the Separate Statement of Undisputed Material Facts, all of which are served and filed
9 herewith, such other evidence and arguments as may be presented to this Court either prior to
10 or at the hearing on this matter, and the complete files on record herein.

11 THE CABRERA FIRM, A.P.C.

12
13
14 By:



Guillermo Cabrera
Attorneys for Stephen Whitburn

1 4. In the 13 years I have known Mr. Rodriguez-Kennedy, at no point have I heard
2 of, let alone witnessed, any incidents of sexual misconduct or domestic violence by or
3 involving Mr. Rodriguez-Kennedy.

4 5. Around 1:00 AM on August 19, 2021, I was home alone and asleep when the
5 Apartment doorbell rang. Mr. Rodriguez-Kennedy had forgotten his keys and needed to be let
6 in. I got out of bed and went to the front door.

7 6. When I opened the door, Mr. Rodriguez-Kennedy and Mr. Rendon were
8 together smiling and laughing and enjoying each other's company. I was not surprised to see
9 Mr. Rodriguez-Kennedy and Mr. Rendon together because they had been dating on and off
10 for about a year. It was not unusual for them to come to the Apartment together late in the
11 evening.

12 7. In letting them in, I did not notice that either was intoxicated or impaired in
13 any way. Because it was late and because they had woken me up, I made a point of observing
14 that they both appeared to be fine and in good spirits. After letting them in, saying hello and
15 exchanging pleasantries, I went to my bedroom and closed my door for the rest of the night.

16 8. I was awake for approximately 10 minutes before falling back asleep. During
17 those 10 minutes I did not hear anything that made me think someone needed assistance or
18 was in any kind of distress. I then fell back asleep and did not wake up for the rest of the
19 night.

20 9. Nothing I saw, heard, or in any way witnessed in the early morning of August
21 19, 2021 alerted me to any danger, distress or anything else that would have led me to believe
22 Mr. Rendon required any assistance or steps taken by me to protect him.

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10. I continued to see Mr. Rendon and Mr. Rodriguez-Kennedy together at the Apartment for approximately four more months until December 2021, and nothing I saw or heard during those four months indicated to me that Mr. Rendon had required any assistance or steps to protect him in the early morning of August 19, 2021.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed this 1st day of February, 2024 at San Diego, California.

Styler Whitson

Stephen Whitburn

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Attorneys for Stephen Whitburn

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

02/02/2024 at 08:39:00 AM

Clerk of the Superior Court
By Nora Lopez, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

OSCAR RENDON,	)	Case No.: 37-2022-00037995-CU-PO-CTL
	)	
Plaintiff,	)	
	)	STEPHEN WHITBURN'S SEPARATE
vs.	)	STATEMENT OF UNDISPUTED
	)	MATERIAL FACTS IN SUPPORT OF
WILLIAM RODRIGUEZ-KENNEDY;	)	MOTION FOR SUMMARY JUDGMENT
STEPHEN WHITBURN; and DOES 1	)	
TO 20,	)	Action Filed: September 22, 2022
	)	Trial Date: July 12, 2024
Defendants.	)	
	)	Date: April 19, 2024
	)	Time: 9:00 a.m.
	)	Dept: C-67

Pursuant to the Code of Civil Procedure section 437c(b) and Rule 3.1350 of the Rules of Court, Defendant Stephen Whitburn submits the following Separate Statement of Undisputed Material Facts, together with references to supporting evidence, in support of Defendant Stephen Whitburn's Motion For Summary Judgment.

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Undisputed Material Facts and Supporting Evidence		Opposing Party's Response and Supporting Evidence	
1.	Stephen Whitburn has known William Rodriguez-Kennedy for 13 years. Declaration of Stephen Whitburn in Support of Defendants' Motion for Summary Judgment ("Whitburn Decl."), at ¶2.	1.	
2.	Whitburn and Rodriguez-Kennedy have been roommates since 2017, having decided to share an apartment to save money on rent. Whitburn Decl., at ¶3.	2.	
3.	The apartment has two bedrooms and is in the East Village neighborhood of downtown San Diego near Cortez Hill (the "Apartment"). Whitburn Decl., at ¶3.	3.	
4.	Whitburn and Rodriguez-Kennedy each have their own bedroom and bathroom. Whitburn Decl., at ¶3.	4.	
5.	In the 13 years Whitburn has known Rodriguez-Kennedy, at no point have he heard of, let alone witnessed, any incidents of sexual misconduct or domestic violence by or involving Mr. Rodriguez-Kennedy. Whitburn Decl., at ¶4.	5.	
6.	Around 1:00 AM on August 19, 2021, Whitburn was home alone and asleep when the Apartment doorbell rang. Mr. Rodriguez-Kennedy had forgotten his keys and needed to be let in. Whitburn got out of bed and went to the front door. Whitburn Decl., at ¶5.	6.	

7.	When Whitburn opened the door, Rodriguez-Kennedy and plaintiff were together smiling and laughing and enjoying each other's company. Whitburn Decl., at ¶6.	7.	
8.	Whitburn was not surprised to see Rodriguez-Kennedy and plaintiff together because they had been dating on and off for about a year. Whitburn Decl., at ¶6.	8.	
9.	It was not unusual for them to come to the Apartment together late in the evening. Whitburn Decl., at ¶6.	9.	
10.	In letting them in, Whitburn did not notice that either was intoxicated or impaired in any way. Whitburn Decl., at ¶7.	10.	
11.	Because it was late and because they had woken Whitburn up, he made a point of observing that they both appeared to be fine and in good spirits Whitburn Decl., at ¶7.	11.	
12.	After letting them in, saying hello and exchanging pleasantries, Whitburn went to his bedroom and closed his door for the rest of the night. Whitburn Decl., at ¶7.	12.	
13.	Whitburn was awake for approximately 10 minutes before falling back asleep. Whitburn Decl., at ¶8.	13.	
14.	During those 10 minutes he did not hear anything that made me think someone needed assistance or was in any kind of distress. Whitburn Decl., at ¶8.	14.	

15.	Whitburn then fell back asleep and did not wake up for the rest of the night. Whitburn Decl., at ¶8.	15.	
16.	Nothing Whitburn saw, heard, or in any way witnessed in the early morning of August 19, 2021 alerted him to any danger, distress or anything else that would have led him to believe plaintiff required any assistance or steps taken by Whitburn to protect plaintiff. Whitburn Decl., at ¶9.	16.	
17.	Whitburn continued to see plaintiff and Rodriguez-Kennedy together at the Apartment for approximately four more months until December 2021, and nothing Whitburn saw or heard during those four months indicated to me that plaintiff had required any assistance or steps to protect him in the early morning of August 19, 2021. Whitburn Decl., at ¶10.	17.	

THE CABRERA FIRM, A.P.C.

By:


Guillermo Cabrera

Attorneys for Stephen Whitburn

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 02/09/2024

TIME: 01:30:00 PM

DEPT: 2103

JUDICIAL OFFICER PRESIDING: Kevin A. Enright

CLERK: Marc David

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: Steve James

CASE NO: **37-2022-00037995-CU-PO-CTL** CASE INIT.DATE: 09/22/2022

CASE TITLE: **RENDON vs Rodriguez-Kennedy [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: PI/PD/WD - Other

EVENT TYPE: Settlement Conference (Civil)

APPEARANCES

Daniel M Gilleon, counsel, present for Plaintiff(s).

OSCAR RENDON, Plaintiff is present.

Marlea F Dell'Anno, counsel, present for Defendant(s).

William Rodriguez-Kennedy, Defendant is present.

SETTLEMENT CONFERENCE

Settlement conference held. Case is not settled.

Counsel and all parties to continue settlement discussions outside the presence of the Court.