Filed 1/11/17 Lozano v. Palm Communities CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

AFRA LOZANO et al., Plaintiffs and Appellants, v. PALM COMMUNITIES et al., Defendants and Respondents.	E062594 (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. Eisner for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Arthur K. Cunningham and Lann G. McIntyre for Defendants and Respondents.

Plaintiffs and appellants Afra Lozano, individually and as guardian ad litem for Emigdio Renee Lozano (Afra's youngest son); Felipe Lozano, Sr.; and Yuli Reynoso (wife of Felipe Lozano, Jr., and mother of Doria Zoe Lozano-Reynosa; collectively,

Plaintiffs) appeal the grant of summary judgment in favor of defendants and respondents Palm Communities, PD Hovley L.P. (PD Hovley) and ConAm Asset Management Company (ConAm; collectively, Defendants).

In 2010, PD Hovley and Palm Communities were the owners of the Hovley Garden Apartments (Hovley Gardens) in Palm Desert. AWI Management Corporation (AWI) managed Hovley Gardens until December 31, 2010. On January 1, 2011, ConAm took over as the apartment manager. On April 8, 2011, Afra was injured, her son Felipe and his daughter, Doria Zoe Lozano-Reynosa, 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 while holding a stick and had engaged in bizarre behavior by following and staring at her family.

Plaintiffs filed a complaint against AWI and Defendants. AWI filed a motion for summary judgment on the grounds 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. In an unpublished opinion filed on April 6, 2016, in *Lozano v. AWI Management Corporation,* case No. E060992, we affirmed the grant of summary judgment, finding that the acts of Alcala were not foreseeable.

Plaintiffs claim in this appeal that there was a triable issue of fact as to whether the brutal attack that gave rise to this action was foreseeable to Defendants. 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:

In 2003, Afra moved into Apartment B5 at Hovley Gardens. On or about August 12, 2009, Alcala moved into Apartment B6. In 2010, while AWI was still managing Hovley Gardens, AWI received several complaints from Afra and her family regarding Alcala.

Alcala followed Fabian Lozano, Afra's son, to work and stared at him. On April 16, 2010, Alcala was in his car and was looking inside their apartment for a long time. On April 17, 2010, between 2:00 and 5:00 a.m., Alcala knocked on the wall between their apartments with a stick. Afra went over to Alcala's apartment and confronted him. She asked him not to hit the walls. He grabbed a big stick and pointed it at her and said, "you're the ones who have to stop." Afra reported the incident to the on-site manager, Sonia Gandara, who told her to call the police. Afra could not recall if she told Gandara that Alcala had threatened to kill her. The police were called but Alcala was not arrested.

On April 23, 2010, Alcala knocked on Afra's door and told her "stop talking bad things about him." He also threatened that if they did not stop making noise, he would "do something" against them. Several letters were sent to AWI at the time, but did not include information about any death threat or any threat of a gun by Alcala.

Plaintiffs remained tenants for the one-year period between the incidents mentioned *ante*, and the shooting that occurred in April 2011. They renewed their lease in September 2010. A few days prior to the shooting, Plaintiffs complained of Alcala

"car-keying" one of their cars. Felipe, Afra's deceased son, spoke with Rosie Zazueta, who was the manager employed by ConAm, that he saw Alcala key one of their cars. The police were called but no arrest was made. The responding officer indicated that Alcala's keys did not match the marks. Zazueta asked Plaintiffs to obtain the police report and she would forward the incident report to "corporate."

Several days prior to the shooting, Afra called someone in the apartment manager's office and complained that Alcala was staring into Plaintiffs' apartment. Afra said she was afraid and that someone should come help. On April 8, 2011, the day following the car-keying incident, Alcala opened fire on Afra, Felipe and Doria in their apartment. Felipe and Doria died.

Even if Defendants had begun eviction proceedings the day after the car-keying incident, Alcala would have still been in the apartment.

Plaintiffs never advised PD Hovley, Palm Communities or ConAm that Alcala had committed an act of violence against them or that he owned or used a gun.

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 Defendants. Defendants failed to take any remedial action. Due to Defendants' 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 DEFENDANTS*

On May 23, 2014, Defendants filed their motion for summary judgment (motion).[1] It was based on the undisputed facts and exhibits. Defendants recognized that a motion for summary judgment had already been granted in AWI's favor on February 21, 2014. As for the negligence and premises liability cause of action, Defendants argued that the causes of action failed as a matter of law because the acts committed by Alcala were not foreseeable. The undisputed facts showed that Alcala never threatened bodily harm nor that he would use a firearm against Plaintiffs. Further, despite the problems claimed by Afra in April 2010, Plaintiffs chose to renew their lease in September 2010. Further, the complaints were made one year prior to the shooting.

Additionally, any notice Defendants had due to the car-keying incident, that incident occurred just days prior to the shooting, and no action of any kind could have been taken in time.

Attached to the motion for summary judgment was a declaration from Grace Pickford. She was a regional manager employed by ConAm. She had not received any complaints that Alcala had committed any acts of physical violence prior to the shooting.

[1] As noted by Plaintiffs, the motion did not distinguish between the different actions of ConAm, PD Hovley and Palm Communities.

Bobbie Barnett declared she was the Vice President of asset management for Palm Communities. Afra renewed her lease in September 2010. It would take 45 to 60 days to evict a tenant.

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 recorded my children and I [*sic*] 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 in 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 . . . were so scared and gathered in the living room. When I realized that the noise came from his home, I went 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 rapidally [*sic*] 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 safe environment apartment complex. [¶] Anything you can help with this matter is really appreciated for the whole family." A letter from Fabian was also included in which he stated Alcala followed him to work and stared at him. He also stated, "He Pounded on the wall with a stick at 2am through 5am repeatedly. My mom went over and knocked on his door and asked him to please stop pounding on the walls. He aggressively told my mom that we need to stop while he was holding the stick in a ready to swing position."

Afra's deposition was also provided. She was asked, "And he was threatening to kill you?" She responded, "Yes." Afra ran to Sonia Gandara's apartment. She told Gandara that Alcala had threatened her but could not recall if she told Gandara he threatened to kill her. She recalled that a couple of days prior to the shooting Alcala was only a few steps away from her house staring in; she called the manager to complain.

Rosaugra Zazueta's deposition was attached to the motion. She worked as the manager for ConAm at the Hovley Gardens. She wrote an incident report regarding Alcala keying a car belonging to one of the Plaintiffs. According to the report, Felipe reported to her that Alcala had keyed his brother's car. Felipe also reported that the police had responded but there was not enough evidence to arrest Alcala. Felipe was frustrated nothing was being done by the officers. Zazueta promised to forward a police report to management if was provided to her by Plaintiffs. Zazueta had no idea that Alcala owned a gun.

Riverside County Sheriff's Deputy John Cleary's deposition was provided. He responded to the call regarding the keying of a car belonging to one of the Plaintiffs on

April 7, 2011. Deputy Cleary inspected all of Alcala's keys and determined they were not used on the car.

Reynoso's deposition was also included. Doria and Felipe went to the Hovley Garden apartments on April 8, 2011, because Felipe needed something from Afra. Reynoso told him not to go. Felipe went anyway because, "He never imagined what he was going to do, the guy who killed him." Afra never told Reynoso that it was dangerous to come to her apartment because of Alcala.

A lease rider signed by Alcala was provided, which stated that eviction could only be performed for good cause.

3. *PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT*

Plaintiffs' filed opposition to Respondent's summary judgment motion (opposition). Plaintiffs argued that Alcala engaged in threatening and intimidating behavior and Defendants were aware of the behavior. Plaintiffs advised management that Alcala threatened to kill them. Zazueta, the manager, had not read the tenant files when ConAm took over. Causation was shown by Defendants' inaction.

Plaintiffs argued that Defendants should have (1) started eviction proceedings against Alcala; (2) contacted and counseled Alcala on the severity of the offenses and probable future eviction if he did not stop; (3) the management company should have contacted the police; (4) security should have been hired; and (5) Defendants should have installed surveillance.

Additional exhibits were provided that were not included with the motion. Fabian's deposition was taken on March 31, 2014, after the summary judgment motion was granted in favor of AWI. In his deposition, Fabian was asked what led up to him and Afra going to the manager's office. He stated, "Mr. Alcala knocked on our door and pretty much threatened to kill us. He did. Me and my mom were in fear and went to the manager. . . . [¶] We let [Gandara] know he was trying to kill us." He heard Afra say to Gandara, "She was—like the guy next door came to the house and threatened to kill us, me and my family pretty much." He could not recall how Gandara responded.

Additional parts of Afra's deposition were provided. She did not recall if anyone went with her to talk to Gandara on the night of April 17, 2010 after the "stick" incident; she did not recall whether she told Gandara Alcala had threatened to kill her. She did not recall if she called the police about the threat.

A declaration by Michael F. Burke was included. He was the vice president of AWI. AWI was terminated as the property manager of Hovley Gardens as of January 1, 2011. He reviewed the complaints in Plaintiffs' file. It included only Plaintiffs complaints of Alcala following them and knocking on the wall. Also a non-specific threat that he was going to do something to Plaintiffs. There were no reports that Alcala had a gun or that he had been engaged in acts of physical violence.

Plaintiffs also attached a Riverside County Sheriff's citation regarding a citizen arrest by Felipe against Alcala for the car-keying incident. Also included were the incident reports filed by Zazueta regarding the car-keying incident and the shooting.

Portions of Gandara's deposition was provided. She explained that it was AWI policy that if a complaint was received for a tenant, and the tenant was considered a nuisance, a violation letter would be sent to the tenant. If there was a threat of bodily harm, she would contact the district manager. She would make an incident report. Gandara claimed she had no information while she was the manager at Hovley Gardens that Afra was in fear for herself and her family.

Further deposition testimony from Barnett was provided. AWI was let go as management because of problems with financial issues on the corporate level. It was AWI's responsibility once they received the letters 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.

Also attached was a declaration from Michael T. Chulak, who was employed by a third party property management firm.

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

Defendants filed their reply to the opposition on August 6, 2014. They contended that only four of the facts were disputed by Plaintiffs and no further facts were provided by Plaintiffs to support their objections. The decision was a matter of law. There was no triable issue of fact as to the foreseeability of Alcala's acts. There was no evidence of the violent acts by Alcala that would trigger the duty to evict. Further, Defendants stated that they had no knowledge of the complaints made to AWI in 2010. Those complaints were too remote to show foreseeability. The car-keying incident occurred one day prior to the

shooting and no action could have been taken in time. Further, Plaintiffs chose to remain in their apartment between 2010 and 2011, clearly not foreseeing the acts by Alcala.

5. *RULING*

The trial court provided the parties with a tentative ruling prior to the September 4, 2014 hearing. It ruled that Defendants did not owe a duty to Plaintiffs. The trial court first set forth the law regarding duty and foreseeability. It then found, "Although the SAC only alleges generally that Ds had a duty to take remedial action to protect Ps, Ps' argue in their opposition that Alcala should have been evicted based upon his harassing them. However, the evidence of harassment submitted in support of Ps' opposing separate statement consist of letters given to the previous apartment managers, D AWI, by Afra Lozano and Fabian Lozano on 04/25/2010, approximately one year before the shooting. Ps' exhs 2 and 3. The letter written by Afra documents two incidents in April 2010 but does not include a threat of violence by Alcala. Afra does state that during the first incident Alcala 'threatened me by saying if we do not stop making noise and spying he'll do something against us.' Afra also states that during the second incident in which she went to his apartment to complain about the noise from his alleged banging on the walls Alcala'"grabbed a big stick pointing at me very angry and said: "You're the ones that have to stop.'" When specifically asked during her deposition whether she advised the manager that Alcala had threated to kill her, Afra could not remember. (Depo Afra, page 3, line 25-page 32, line2.) Fabian Lozano also addressed that second incident, writing Alcala 'aggressively told my mom that we need to stop while he was holding the stick in a ready to swing position.' Fabian, however, did not observe that encounter.

Fabian did testify that at his deposition that: 'We let [Gandara] know he was trying to kill us.' (Depo Fabian, page 8, lines 20-21.) These complaints were made approximately one year prior to the incident. There were no other reported incidents of threats and no reported incidents of violence which would have cause[d] a reasonable person to believe that heightened foreseeability of danger necessary to impose a heavily burdensome duty on a landlord to hire security guards, the plaintiff seeking to establish the landlord's liability for injuries suffered in criminal incident must show the existence of prior similar incidents at the premises or other sufficiently serious indications of a reasonably foreseeable risk of violent criminal assaults; criminal incidents immediately proximate substantially similar business establishment can help to show the requisite foreseeability."

The trial court recognized that Plaintiffs had complained about Alcala following them and that the police were called. The trial court also stated that Chulak's declaration was properly excluded. It further noted, "There were no other reported incidents of threats, no reported incidents of violence and no reported similar incidents involving Alcala. Under the facts before the court, and applying the factors set forth in *Castaneda* [*v. Olsher* (2007) 41 Cal.4th 1205 (*Castaneda*)] the evidence is insufficient to impose a duty on Ds." The trial court concluded, "As to the 1st and 2nd factors, which are, the measures the landlord should have taken as well as their financial and social burden on the landlord, there is no evidence. However, the financial and social cost can be assumed to be minimal. As to the third factor, the nature of the third party conduct that could have been prevented had Ds evicted P, no evidence is offered that shows how eviction would

have prevented Alcala from committing the same acts. And as to the 4th factor, foreseeability that Alcala would shoot the Lozanos, such a shooting was not foreseeable based upon Alcala's general threats."

The matter was heard on August 15, 2014. Plaintiffs argued Zazueta and ConAm never realized that the letters from 2010 were in Plaintiffs' file. The owners were required to investigate and possibly evict Alcala. ConAm should have investigated the file. Plaintiffs also pointed to the evidence Fabian had been deposed and said that Afra told Gandara Alcala threatened to kill them. Also, ConAm took no action after the car-keying incident. Felipe had the police report on the morning of the shooting and was going to take it to ConAm.

Plaintiffs argued that ConAm should have investigated the matter. They should have installed surveillance cameras, hired a security guard, and contacted the police to do something.

Defendants argued there were no disputed issues of fact. ConAm did not have time to take any action after the car-keying incident. There was no duty on behalf of Defendants at the time of the shooting. The facts in *Castaneda* were more egregious than the ones in the instant case.

The only question from the trial court was whether the threat to kill made by Alcala was ever reported to the police. Plaintiffs responded it was not reported to the police.

The trial court adopted the tentative ruling. Judgment was entered in favor of Defendants on October 8, 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 Defendants, we consider the facts most favorably to Plaintiffs. We liberally construe Plaintiffs' evidentiary submissions, strictly construe the evidence submitted by Defendants, 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 there were triable issues of fact as to whether Defendants knew or should have known sufficient information to make Alcala's shooting of Afra, Felipe and Doria foreseeable. We have already rejected this claim against AWI, and find that no additional evidence was presented here to change that decision.

"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.) "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*, *supra*, 41 Cal.4th 1205, 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.'" (*Id*. 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, the 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* (1989) 207 Cal.App.3d 1401, the defendant, a tenant, killed the son of other tenants when the son walked by the defendant's apartment. (*Id.* at pp. 1402-1403.) Prior to the shooting, complaints to the landlord about the defendant 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 the defendant 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 argue here that Defendants should have investigated the actions of Alcala further, they should have hired security guards or evicted Alcala. The burdensome action of eviction and hiring a security guard was not necessary as the acts of Alcala were not foreseeable. Here, Alcala only made two threats against Afra and her family in 2010. Alcala came to their door and told them 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. At no time did Alcala threaten Afra and her family with a gun. Although Plaintiffs insisted that Afra told Gandara that defendant threatened to kill them, there was no evidence that Alcala had a gun or that he committed any act of physical violence against Plaintiffs. The circumstances here were less egregious than that actions in *Davis* and *Castaneda.* Moreover, "in the absence of prior similar incidents of violent crime on the landowner's premises" foreseeability will not be proven. (*Ann M. v. Pacific Plaza Shopping Center*, *supra*, 6 Cal.4th at p. 679.) Plaintiffs had no idea that Alcala possessed a gun and did not believe he would have committed such acts. The acts in the instant case were simply unforeseeable.

Moreover, it is not clear that evicting Alcala, investigating the threats or installing surveillance cameras would have eliminated the harm here. The actions in 2010 were not followed by any reported incidents to AWI or Defendants until just before the shooting. Even Plaintiffs did not know that Alcala had a gun, they chose to stay at the apartments from 2010 to 2011 despite their reported fear of Alcala. Even if ConAm had investigated the 2010 letters, there was no evidence of potential gun violence. Moreover, the car-keying incident occurred one day prior to the shooting. It is inconceivable that

Defendants could take any action in one day. Plaintiffs failed to provide evidence that the violent acts of Alcala were foreseeable or that further investigation would have stopped Alcala. Defendants 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.[2]

Summary judgment was proper because Defendants established that Plaintiffs could not demonstrate a duty on behalf of Defendants to prevent the harm suffered.

DISPOSITION

The judgment is affirmed. As the prevailing party, Defendants are awarded their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

HOLLENHORST
Acting. P. J.

McKINSTER
J.

[2] In their reply brief, Plaintiffs try to distinguish this case from this court's finding in the case involving AWI by providing that there was evidence presented with the opposition that they reported to Gandara that Alcala threatened to kill Plaintiffs in 2010. Plaintiffs mistakenly state that this court relied upon the fact that the death threat was not communicated to AWI in reaching our decision. Moreover, there still was no evidence that Alcala had a gun or committed any physical acts of violence. Further, Plaintiffs chose to renew their lease in 2010 and no further threats were made until the shooting over one year later. The acts of Alcala simply were not foreseeable.