SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 31, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, McGuire, DeGrasse, Manzanet-Daniels, JJ.

1722 Armando Gonzalez, as auxiliary executor for the estate of Antonio Laurentino Tubel, et al.,
Plaintiffs-Appellants,

-against-

Societe Generale,
Defendant-Respondent.

Index 605012/98

Bolatti & Griffith, LLP, New York (Edward Griffith of counsel), for appellants.

Friend & Reiskind, New York (Ed Reiskind, Jr. of counsel), for respondent.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered November 24, 2008, dismissing the complaint upon defendant's motion to set aside the jury verdict, unanimously affirmed, without costs.

In October 1992, funds belonging to plaintiffs, or certain of them, and the late Antonio Laurentino Turbel were transferred from their account with defendant in New York to an account in the name of Jorge Gerrona at Banco Hispanoamericano in New York. The transfer occurred after defendant received an electronic communication from Banco Supervielle Societe Generale (BSSG), an Argentinean bank affiliated with defendant, instructing that the

funds be so transferred. Plaintiffs allege that the transfer was unauthorized in that Turbel actually had instructed the funds to be transferred to an account of his at Banco Basel.

The court correctly found that defendant is not liable to plaintiffs for the transfer of the funds because BSSG was acting not as defendant's agent but as plaintiffs' agent when it sent the erroneous transfer instructions to defendant. The trial testimony established that plaintiffs were longstanding clients of BSSG and that they selected BSSG to assist them in identifying a foreign bank in which to place their funds. By carrying out plaintiffs' instructions, BSSG was acting as plaintiffs' agent. Contrary to plaintiffs' contention, UCC 4-A-202(1) does not support the imposition of liability on defendant. To the contrary, this statute provides that "[a] payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency."

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 31, 2010

CLERK

Gonzalez, P.J., Moskowitz, Freedman, Richter, Román, JJ.

2436 Madison Realty Capital, LP, et al., Index 602415/09
Plaintiffs-Appellants,

-against-

Scarborough-St. James Corporation, et al.,
Defendants-Respondents.

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Westerman Ball Ederer Miller & Sharfstein, LLP, Uniondale (Jeffrey A. Miller of counsel), for appellants.

LeClairRyan, New York (Michael T. Conway of counsel), for respondents.

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Order, Supreme Court, New York County (James A. Yates, J.), entered October 23, 2009, which denied plaintiffs' application for a stay of arbitration and injunctive relief, unanimously affirmed, with costs.

In October 2008, plaintiff Madison Realty Capital, LP bought a shopping center in Michigan at a foreclosure sale. It subsequently assigned its rights therein to plaintiff 67500 South Main Street, Richmond LLC[1]. The issue on this appeal is whether Madison purchased the property subject to an existing lease between former owner Richmond Realty LP (Richmond) and defendant MCANY of Richmond Fund II LP (MCANY).

Richmond acquired the shopping center from First Richborough

[1]For purposes of this appeal, Madison and 67500 South Main will be referred to collectively as either plaintiffs or Madison.

Realty Corp (FRRC) in 1985. FRRC took a wraparound mortgage on the property, Richmond assigned revenue from the shopping center to FRRC, and FRRC agreed to pay all of the shopping center's expenses. The lease commenced on August 1, 1985, and it was to terminate on December 31, 2023. It was recorded with the register of deeds in Macomb County, Michigan in December 1985. Also in 1985, FRRC sold its rights in the lease to a predecessor of MCANY, which assigned its rights to MCANY in 1994. Defendant Scarborough-St. James Corp. (SSJC) agreed to service the lease.

In December 2003, following a dispute between SSJC and FRRC and Richmond that resulted in Richmond taking over the management of the shopping center, both SSJC and FRRC filed Chapter 11 petitions in the United States Bankruptcy Court for the Southern District of New York. In July 2004, Richmond obtained a $2 million mortgage loan from Warren Bank and Carmen LLC, and various agreements were made impacting mortgages on the property, including the FRRC mortgage and MCANY's interests. On June 26, 2006, in settlement of the dispute, Richmond and MCANY entered into an amended and restated lease. The settlement agreement was approved by the Bankruptcy Court.

The amended lease broadly defines "Landlord" (i.e. Richmond) as the owner of the premises, and provides that "in the event of a sale, assignment, or transfer by any such owner of its interest in the Premises," all "covenants and obligations [of Landlord]

shall be binding upon each new owner of the Premises . . ." (paragraph 15.02). It contains a subordination clause, which provides that the Intermediate Net Lease was

> "subject and subordinate to any mortgage placed upon the Premises by Landlord, *provided that* the loan documents provide that the Tenant's possession pursuant to this Lease shall not be disturbed so long as Tenant is not in material and uncured default of the terms and provisions of this Lease" (paragraph 6.01) (emphasis added).

It also contains a New York choice of law provision (paragraph 18.12), and an arbitration clause requiring all disputes "arising out of or relating to this Agreement between the Parties hereto, their assignees, their affiliates, . . . or agents, [to] be settled by arbitration in New York City" administered by JAMS (paragraph 18.13). The amended lease was recorded in 2009.

Simultaneous with execution of the amended lease, MCANY and SSJC entered into a written servicing agreement which delineates SSJC's authority to collect gross revenues and fulfill MCANY's obligations under the lease. That agreement provides that in exchange for its services, SSJC is entitled to receive an annual fee "equal to the excess income" collected, over the amount of MCANY's obligation to Richmond.

Unable to meet its obligations to Warren Bank and Carmen, in 2006, Richmond also filed a Chapter 11 petition in the United States Bankruptcy Court for the Southern District of New York. Its case was jointly administered with the FRRC and SSJC cases, and all three debtors continued to operate as debtors in

possession. Plaintiff Madison Realty Capital agreed to lend Richmond $3.1 million in exchange for a note and mortgage, in consideration of which Richmond agreed to provide security to Madison in the form of a superpriority lien and a collateral assignment and security interest in all "leases, rents and other income" of the shopping center. By order dated April 20, 2007, the Bankruptcy Court approved this debtor-in-possession (DIP) loan and granted Madison a perfected first-priority lien and superior interests in all Richmond's assets and other property. The DIP order defined "Assets" as all unencumbered pre-petition and post-petition property of Richmond, and granted Madison a "first priority, perfected security interest in and liens on all" of Richmond's property (section 6[b]) and "perfected priming liens" on Richmond's assets, including such specified liens as those held by Warren Bank, Carmen, SSJC, FRRC, and MCANY II (section 6[c]).

In 2008, Richmond defaulted on the DIP loan, and Madison commenced foreclosure proceedings. SSJC attempted to find a substitute lender to take over Madison's loan, and subsequently sought, unsuccessfully, to temporarily restrain the foreclosure sale. However, on October 24, 2008, Madison bought the shopping center at a foreclosure sale. Following the sale, Madison retained a company to act as a property agent, and instructed the tenants of the shopping center to make rent payments to the new

property manager.

On May 8, 2009, SSJC demanded arbitration pursuant to paragraph 18.13 of the lease. It sought a declaration that the Intermediate Net Lease survived the foreclosure, an order enjoining Madison from breaching the covenant of quiet enjoyment, and an award of consequential damages. Supreme Court issued a TRO precluding Madison from contacting the shopping center tenants, other than as provided in the lease, and from interfering with SSJC's management of the center.

Madison removed the state court proceeding to Bankruptcy Court, and moved for an order staying the arbitration on the ground that that court had exclusive jurisdiction. It also sought to vacate the TRO and be granted injunctive relief consistent with the DIP order. The Bankruptcy Court denied the application on the ground that the interpretation of the DIP order was a matter of contract law, appropriately interpreted by either a Michigan state court or an arbitration panel, and declined to extend the TRO, which had dissolved by its own terms.

Madison then moved in Supreme Court for a stay of arbitration and to enjoin defendants from taking actions, including collecting rents, with respect to the shopping center. The court denied the motion. We affirm, on the ground that Madison stepped into Richmond's position as the owner and landlord of the shopping center pursuant to the terms of the

lease when it foreclosed on the property. Accordingly, it is required to arbitrate the instant dispute.

Under Michigan law, applicable here, a lease recorded before a foreclosure is generally not extinguished if the foreclosure is accomplished through advertisement (as opposed to court action) (MCLA § 600.3204). When Madison purchased this shopping center, it did so in a foreclosure sale by advertisement (MCLA § 600.3204[1]). Thus, the foreclosure per se did not extinguish the lease.

Moreover, Michigan law also provides that a foreclosing mortgagee takes its interest in property subject to all leases that were recorded prior to its mortgage and that it had constructive knowledge of (*see First of Am. Bank--West Mich. v Alt*, 848 F Supp 1343, 1347 [WD Mich 1993] ["the first interest holder to record takes priority, unless that individual has notice of a prior unrecorded interest"]). Here, the lease was recorded in 1985, before Madison's mortgage was recorded in 2007. The record reveals that Madison had actual knowledge of both the amended lease and the servicing agreement, both of which were referenced in the Bankruptcy Court's 2006 DIP order.

The Bankruptcy Court's order, authorizing Richmond to enter into the loan agreement with Madison did not, either expressly or by necessary implication, result in subordination of defendants' interests in the lease and related servicing agreement. As set

forth in the motion papers requesting Bankruptcy Court approval pursuant to 1978 Bankruptcy Code (11 USC) § 364, Madison was granted a "superpriority lien" on the shopping center and a collateral assignment and security interest in all "leases, rents, and other income" related to the shopping center (*see* 11 USC § 364[c], [d]). Consistent with the motion papers, in the order, Richmond's unencumbered "Assets" referred to its right to collect rents through MCANY under the terms of the lease. The order provided "adequate protection" to all pre-petition secured lenders, including defendants, whose liens were diminished by the "priming liens" granted to Madison, as set forth in Schedule 1 to the DIP motion. However, neither the order nor the motion papers indicate that the loan documents subordinated defendants' leasehold interest. Further, defendants did not request protection for their leasehold interests since there was no indication that the order would affect them (*see* 11 USC § 363[e], § 364[d]).

The loan documents did not provide for nondisturbance by Madison of MCANY's possession, as required by the lease for effective subordination of the lease to a subsequent mortgage. In sum, Madison did not avail itself of the opportunity to expressly include the lease in the DIP order and loan documents as assets to be subordinated. Thus, at this juncture, to accept plaintiffs' interpretation of the order would grant them greater

interests than those described in the DIP motion, and would deprive defendants of their rights under the lease without their having had an opportunity to request adequate protection from the Bankruptcy Court (*see* 11 USC § 363[e], § 365[h]; *In re Haskell LP*, 321 BR 1, *6 [Bankr D Mass 2005]).

As successors to Richmond's status as landlord under the lease, plaintiffs are bound by the lease's arbitration clause (*see Matter of Lubin & Schlesinger [Scheinberg]*, 234 AD2d 203, 204 [1996], *lv denied* 89 NY2d 814 [1997]). With respect to their claim for injunctive relief, plaintiffs do not demonstrate that an eventual award would be rendered ineffectual without a provisional remedy (CPLR 7502[c]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 31, 2010

CLERK

Friedman, J.P., Sweeny, Nardelli, Freedman, JJ.

2197 Mark Flynn, Index 111631/05
Plaintiff-Respondent,

-against-

Esplanade Gardens, Inc., et al.
Defendants-Appellants-Respondents,

Securitas Security Services USA, Inc.,
Defendant-Respondent-Appellant.

[And A Third-Party Action]

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Gannon, Rosenfarb & Moskowitz, New York (Peter J. Gannon of counsel), for appellants-respondents.

Marin Goodman, LLP, New York (Richard P. Manrin of counsel), for respondent-appellant.

Arnold E. DiJoseph, III, New York for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 28, 2009, which, insofar as appealed from, denied the motion of defendants Esplanade Gardens, Inc. and Prestige Management, Inc. (collectively, Esplanade) for summary judgment dismissing the complaint as against them, and denied so much of the cross motion of defendant Securitas Security Services USA, Inc. for summary judgment dismissing Esplanade's cross claim against it for contractual indemnification, unanimously reversed, on the law, without costs, and the motion and cross motion granted.

On the morning of March 31, 2005, plaintiff heard a knock on

the door of his apartment in Esplanade's building. He looked through the peephole and saw his former girlfriend, Maria Smith, who identified herself. Only a few days before, plaintiff had broken off his year-long relationship with Smith because his fiancée was being released from prison. Smith had not been announced to plaintiff through the intercom system when she entered the building. When plaintiff opened the door, Smith was followed into the apartment by a man plaintiff had not seen through the peephole. The man turned out to be Patrick Mulligan, another boyfriend of Smith's. After an exchange of harsh words, Mulligan allegedly attacked plaintiff, seriously injuring him.

The record contains evidence indicating that a security guard stationed in the building's lobby permitted Smith and Mulligan to enter the building but failed to announce them to plaintiff over the intercom. This was consistent with the practice of the building's security staff over the preceding year, during which Smith, who lived across the street, had been a frequent visitor to plaintiff's apartment while she was his girlfriend. When Smith visited the building, she was always allowed to proceed to plaintiff's apartment without being announced, without objection by plaintiff. Further, there is no evidence that, upon the termination of his relationship with Smith, plaintiff told the security staff to stop allowing her into the building.

In this action, plaintiff sues Esplanade, the owner of the building, for the injuries Mulligan inflicted on him, on the theory that Esplanade's negligence enabled Mulligan to enter the building. Specifically, plaintiff claims that the security guard stationed in the lobby by Securitas, Esplanade's security contractor, should have announced Smith and Mulligan to plaintiff through the intercom before allowing them to proceed to his apartment. To the extent that Smith and Mulligan may have entered the building through one of the unlocked and unguarded side doors, plaintiff contends that Esplanade was negligent in failing to keep these doors locked.

On appeal, Esplanade argues that there was no history of criminal activity in the building that would have rendered an attack of this kind foreseeable. Esplanade failed, however, to raise this issue before the motion court. Accordingly, although there is no evidence of previous crimes in the record, we are required to assume, for purposes of this appeal, that, in light of past experience, residents of plaintiff's building faced a foreseeable risk of harm from criminal acts by intruders, from which Esplanade, as landlord, was required to take minimal precautions to protect them (*see Burgos v Aqueduct Realty Corp.* 92 NY2d 544, 548 [1998]). Nonetheless, it is plain that, on this record, the attack on plaintiff was not proximately caused by any breach of this duty.

As previously indicated, Smith, a person well known to the building's security staff, was a frequent visitor to plaintiff's apartment and, for the previous year, plaintiff had not objected to the security staff's consistent practice of allowing her into the building unannounced. There is no evidence whatsoever that anything should have put the guard on duty on notice that Smith and the man accompanying her were entering the building on the morning in question with the intention of doing plaintiff harm. Because the specifically targeted attack on plaintiff was in no way a predictable result of allowing Smith and her companion into the building, the harm to plaintiff was not proximately caused by Esplanade's negligence, if any (*see Burgos*, 92 NY2d at 550; *Maria T. v New York Holding Co. Assoc.*, 52 AD3d 356, 359-360 [2008], *lv denied* 11 NY3d 708 [2008]). Stated otherwise, the specifically targeted criminal assault perpetrated upon plaintiff by the companion of a visitor he knew -- a visitor to whom he had granted free entrée to the building for the past year -- constituted an unforeseeable, intervening force that severed any causal nexus between Esplanade's alleged negligence and plaintiff's injuries, since it is most unlikely that reasonable security measures would have prevented an attack of this kind

(*see Cynthia B. v 3156 Hull Ave. Equities, Inc.*, 38 AD3d 360 [2007]; *Buckeridge v Broadie*, 5 AD3d 298, 300 [2004]; *Cerda v 2962 Decatur Ave. Owners Corp.*, 306 AD2d 169 [2003]; *Rivera v New York City Hous. Auth.*, 239 AD2d 114 [1997]).

Seeking to avoid the effect of the above-cited case law rejecting claims against landlords based on specifically targeted assaults, plaintiff asserts that the record here raises an issue of fact as to whether Mulligan went to plaintiff's apartment intending to attack him. This suggestion finds no support in the record, in which all of the evidence indicates that the physical conflict between the two men began immediately upon Mulligan's entry into the apartment.[1] However, even if Mulligan had not intended to attack plaintiff from the outset, this would only undercut plaintiff's claim against Esplanade. After all, if Mulligan did not harbor hostile intent against plaintiff when he arrived at the building, it is not clear why plaintiff would have refused to allow him to proceed with Smith to the apartment had the visitors entered through the lobby and been properly announced. In this regard, plaintiff testified that he did not know Mulligan, and had never even seen him, before the day of the

[1]Plaintiff testified that "as soon as" Smith came into the apartment, Mulligan "ran in," after which the two men "started arguing . . . [and] before I knew it, he put his hands on me and we started fighting" in the doorway. Moreover, that Mulligan kept himself out of sight while plaintiff looked at Smith through the peephole strongly indicates that he harbored intent to ambush plaintiff when he opened the door.

attack. Further, if Smith and Mulligan entered the building with innocent intent, the security guard -- who presumably knew Smith from her frequent visits to plaintiff's apartment -- could not be expected to suspect that any foul play was in the offing.

Plaintiff's reliance on two earlier cases in which we denied landlords summary judgment is entirely misplaced. In *Madera v New York City Hous. Auth.* (264 AD2d 579 [1999]), we held that the landlord was not entitled to summary judgment where the plaintiff had been the victim of a push-in robbery and assault by "persons unknown" (*id.* at 579), and an issue of fact existed as to whether an "intervening cause" (*id.* at 580) -- the alleged opening of the apartment door by the plaintiff's father -- severed the causal connection between the landlord's alleged negligence and the assault. In this case, by contrast, the assault was perpetrated by a man who accompanied plaintiff's former girlfriend into the building, and there is no question that plaintiff knowingly opened his apartment door to the latter. Still further afield is *Mason v U.E.S.S. Leasing Corp.* (274 AD2d 79 [2000], *affd* 96 NY2d 875 [2001]), in which we held that the landlord and security contractor were not entitled to summary judgment dismissing a claim based on an attack perpetrated by a man who had a known history of violence on the property. In affirming our *Mason* decision, the Court of Appeals stated:

> "Here, questions of fact remain as to whether defendants negligently failed to exclude Toole [the

> assailant]. The record reveals that Toole, who had relatives residing in the complex, had been involved in several criminal acts in the complex, including robbery, attempted rape and the beating of a security guard; that he had been arrested on the premises; and that defendants kept an arrest photo of him. We cannot conclude as a matter of law that Toole's involvement in criminal activity on the premises was not a significant foreseeable possibility" (96 NY2d at 878).

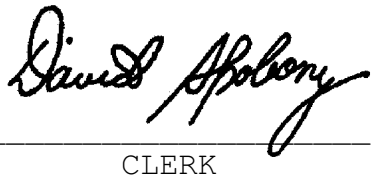
In this case, unlike in *Mason*, there is no evidence that Esplanade or its security staff had any reason to be suspicious of either individual involved in the incident (Smith, a frequent visitor whom plaintiff had welcomed to the building many times, and Mulligan, her companion).

In sum, under the precedents of this Court, it is well settled that a targeted attack on a resident of an apartment building does not give rise to liability on the part of the landlord for a failure to provide security. Plainly, the targeted attack in this case -- evidently involving the settling of a score over an abortive romance -- calls for the application of this rule.

Finally, since the complaint is being dismissed as against Esplanade, we also dismiss Esplanade's cross claim against Securitas.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 31, 2010



CLERK

Tom, J.P., Moskowitz, Renwick, DeGrasse, Manzanet-Daniels, JJ.

2211-
2212 Patrick D. Barrett, etc., et al., Index 112012/04
Plaintiffs-Appellants,

-against-

Kevork Toroyan, et al.,
Defendants-Respondents,

Nabil Shawwa, et al.,
Defendants.

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The Law Offices of David J. Hoffman, New York (David J. Hoffman of counsel), for appellant.

Axinn, Veltrop & Harkrider LLP, Hartford, Ct (Thomas G. Rohback of counsel), for respondents.

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Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O., and a jury), entered September 10, 2008, to the extent appealed from, dismissing plaintiff's cause of action for breach of fiduciary duty, unanimously affirmed, with costs.

Plaintiff shows no reason to disturb the jury's assessment of witness credibility and resolution of conflicting evidence (*Manne v Museum of Modern Art*, 39 AD3d 368 [2007]), or its finding that defendants carried their burden of demonstrating the entire fairness of the transaction underlying plaintiff's breach

of fiduciary duty cause of action (*see Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 570 [1984]; *Barrett v Toroyan*, 45 AD3d 301, 304 [2007]).

There is no dispute that the trial court correctly charged the jury that the burden was on defendants to show that their operation of the subject Delaware limited partnership was entirely fair to plaintiff (*see Cinerama, Inc. v Technicolor, Inc.*, 663 A2d 1156, 1162 [Del. 1995]). Plaintiff asserts, however, that the jury should have been instructed that clear and convincing evidence, as opposed to a fair preponderance of the credible evidence, was necessary to carry that burden. As the question is one of evidence, the law of the forum state should govern (*cf. Clark v Harnischfeger Sales Corp.*, 238 App Div 493, 495 [1933]). Finding no New York case directly on point, we are persuaded by opinions of the Court of Chancery of Delaware that have applied the preponderance of the evidence standard to analogous facts (*see e.g. Carlson v Hallinan*, 925 A2d 506, 530 [Del Ch 2006]; *In re Walt Disney Co. Derivative Litig.*, 907 A2d 693, 757 [Del Ch 2005], *affd* 906 A2d 27 [Del 2006]). In any event, the claimed error was harmless since defendants clearly satisfied even the higher standard of proof urged by plaintiff (*see Stegemeier v Magness*, 748 A2d 408 [Del 2000]).

We have considered plaintiff's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 31, 2010

CLERK

Tom, J.P., McGuire, Moskowitz, Acosta, Freedman, JJ.

2812-
2813 Jennifer Arrieta, et al., Index 8774/01
Plaintiffs-Appellants-Respondents,

Violetta Arrieta, etc., et al.,
Plaintiffs,

-against-

Shams Waterproofing, Inc.,
Defendant-Respondent-Appellant,

Jerome Cluster I, LLC, et al.,
Defendants-Respondents.

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Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for appellants-respondents.

Jeffrey Samel & Partners, New York (David M. Samel of counsel), for respondent-appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Yvonne Gonzalez, J., and a jury), entered September 29, 2008, insofar as appealed from as limited by the briefs, apportioning fault 30% as against defendant-cross-appellant Shams Waterproofing and 35% each as against defendants Jerome Cluster and Jerome Construction, awarding plaintiff Jennifer Arrieta (Jennifer), jointly and severally against defendants, nothing for past pain and suffering and $100,000 for future pain and suffering for a period of one year, and awarding plaintiff Oscar Arrieta (Oscar), jointly and

severally against defendants, nothing for past pain and suffering and $13,600 for future pain and suffering for a period of one year, reversed, on the law, without costs, Shams Waterproofing's liability for noneconomic loss limited to its 30% proportionate share of fault, and the matter remanded for a new trial on the issue of damages.

The infant plaintiffs were struck by a piece of plywood dropped from a third-floor window and sustained various injuries. Jennifer, then aged 10, suffered a displaced fracture of the right femur and was placed in a full leg cast from her upper thigh down to her foot for a period of three months. Oscar suffered a tear of the radial collateral ligament in his right elbow, as well as lacerations to his forearm and elbow, requiring him to wear a brace on his upper arm for eight months.

Jennifer's treating orthopedist opined that she will require substantial future surgery because the fracture caused the growth plate on the right femur to close with the result that her right leg is two inches shorter than her left. The abnormal stresses on her knee, lower back, and hip will require surgical limb-lengthening, a painful process entailing two surgeries over the course of six months followed by extensive physical therapy. Oscar has continuing crepitus in his elbow and has developed arthritis, which will eventually require arthroscopic surgery.

After the court took the jury verdict, plaintiffs' attorney

announced that he had a motion that he was required to make before the jury was discharged. The court conducted a sidebar off the record, after which it discharged the jury. Immediately thereafter, counsel went on the record to state that his "application was to have the jury reconsider the verdict because it is, in my opinion, inconsistent . . . to award future pain and suffering and future medical expense and not award past pain and suffering." Counsel continued, "I believe you indicated that I was not waiving any rights and that you intended to discharge the jury in any event. But I want the record to be clear that I did, in fact, bring this to the court's attention and did make an application that the verdict was inconsistent before the jury was discharged." The court then responded, "Yes, that was stated at sidebar." Defense counsel also confirmed this account of the sidebar. Judgment was ultimately entered on the verdict, and appellants have appealed from the judgment.

A party is required to preserve a claim that a verdict is inconsistent. In order to serve as a predicate for appeal, the issue must be raised before discharge of the jury so that the trial court may take corrective action to cure the inconsistency, including resubmitting the matter to the jury (*Barry v Manglass*, 55 NY2d 803, 806 [1981]). It is clear from the transcript of the proceedings that plaintiffs asserted the inconsistency in a timely fashion. The trial court erred in failing to consider

their application and issue a ruling before discharging the jury. There was no need for counsel to further object when the jury was discharged since the court had already made clear, during the sidebar, that it was discharging the jury in any event.

In view of the awards of future pain and suffering to the infant plaintiffs, we perceive no rational explanation for the failure to award them damages for past pain and suffering. Because we direct a new trial as to damages, we do not reach plaintiffs' claim that the amounts awarded are insufficient.

As to the cross appeal, we note that the liability of defendant Shams Waterproofing for noneconomic loss, as a party responsible for 50% or less of total liability, is expressly limited to its apportioned fault (CPLR 1601).

All concur except McGuire, J. who concurs in a separate memorandum as follows:

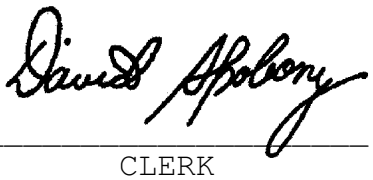
McGUIRE, J. (concurring)

I agree with the majority that a new trial on the issue of damages is required because the verdict was inconsistent. I write separately to address defendant Shams' argument that because plaintiffs' posttrial cross motion to set aside the verdict as inconsistent was untimely, we should reject plaintiffs' claim that the verdict was inconsistent. In my view, the fact that the cross motion was untimely is not relevant on plaintiffs' appeal from the judgment. Although CPLR 4405 provides that a posttrial motion "shall be made . . . within fifteen days after decision, verdict or discharge of the jury," an appellant's failure to abide by this time limitation is of no consequence on an appeal from the judgment where, as here, the appellant has timely appealed pursuant to CPLR 5513. As plaintiffs were not required by law to raise in a posttrial motion their claim that the verdict was inconsistent (CPLR 5501[a][3], 5701[a][1]), it is difficult to understand how they could effectively forfeit their right to raise the claim on appeal by raising it in an untimely posttrial motion. The timeliness of a posttrial motion is, however, both relevant and outcome determinative where the appeal is taken from an order

denying the motion (*see e.g. Rostropovich v Guerrand-Hermes*, 18 AD3d 211, 212 [2005]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 31, 2010



CLERK

Tom, J.P., Friedman, Nardelli, Acosta, Abdus-Salaam, JJ.

2911 Michael Rome, Index 300536/09
Plaintiff-Respondent,

-against-

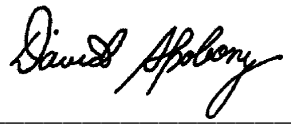
Maryjoe Rome,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Deborah A. Kaplan, J.), entered on or about December 22, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated July 28, 2010,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: AUGUST 31, 2010



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Friedman, J.P., Nardelli, Moskowitz, Freedman, Manzanet-Daniels, JJ.

2955 John Lombardo, Index 110349/06
Plaintiff-Appellant,

-against-

Park Tower Management Ltd.,
Defendant-Respondent.

_____

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for appellant.

Gruvman, Giordano & Glaws, LLP, New York (Paul S. Gruman of counsel), for respondent.

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Order, Supreme Court, New York County (Louis B. York, J.), entered May 7, 2009, which denied plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, modified, on the law, defendant, upon search of the record, granted summary judgment dismissing this claim, and otherwise affirmed, without costs.

Plaintiff was injured when he stepped on a three-step "staircase" in order to descend from the basement floor three feet into a "pit" containing the refrigeration unit he was to work on, and the middle step, which was 18 inches above the floor, broke. The court denied plaintiff's motion, finding an issue of fact as to whether this staircase was the functional equivalent of "other devices" within the meaning of Labor Law § 240(1), as opposed to a permanent structure not designed as a

safety device against elevation-related risks (*see Griffin v New York City Tr. Auth.*, 16 AD3d 202, 203 [2005]), and if the latter, whether the collapse of the step was a foreseeable risk of the task plaintiff was performing (*see Jones v 414 Equities LLC*, 57 AD3d 65, 79-80 [2008]).

We grant summary judgment to defendant on the ground that the three-foot stairway, which had been in place since the late 1990's until plaintiff's accident on October 22, 2003, was neither a safety device nor a temporary stairway to protect a worker from an elevation-related risk within the meaning of the statute. The middle step was not of sufficient height to trigger the protection of § 240(1), nor was plaintiff exposed to the type of extraordinary risk for which the statute was designed (*see Toefer v Long Is. R.R.*, 4 NY3d 399 [2005], holding that a four- to five-foot descent or fall from a flatbed truck was *not* an elevation-related risk that triggers § 240[1] coverage because safety devices of the kind listed in the statute are normally associated with more dangerous activity). (S*ee also Torkel v NYU Hosp. Ctr.*, 63 AD3d 587 [2009]; *DeStefano v Amtad N.Y.*, 269 AD2d 229 [2000] and *DeMayo v 1000 N. of N.Y. Co.*, 246 AD2d 506 [1988], which hold that modest height differentials do not give rise to § 240[1] liability.)

The dissent reads *Runner v New York Stock Exch.*, Inc. (13 NY3d 599 [2009]) too broadly. That case focused on the failure

to use safety devices of the kind enumerated in the statute, namely, a pulley or a hoist, in lowering an 800-pound reel of wire down a flight of stairs. The harm flowed directly from the force of gravity. Here, the harm was caused by the breaking of a step on a stairway that had been in place for many years and not by a gravitational force. The minor elevation did not call for any of the safety devices enumerated in the statute.

All concur except Moskowitz and Manzanet-Daniels, JJ. who dissent in a memorandum by Moskowitz, J. as follows:

MOSKOWITZ J., (dissenting)

The grant of summary judgment to defendant is without basis. Rather, a reversal to grant summary judgment to *plaintiff* is warranted. Therefore, I dissent.

Plaintiff, a metal trade journeyman, was repairing an air conditioning system in the pit area of a building in lower Manhattan. He fell and was injured when the middle step of a three-step wooden staircase broke. There is no dispute that plaintiff was performing repair work falling within the ambit of Labor Law § 240(1).

The majority rules against the plaintiff for three reasons. First, it finds that the staircase was neither a safety device nor a temporary stairway used to protect a worker from an elevation-related risk. Second, the majority holds that plaintiff was not engaged in the type of activity that the statute was designed to prevent because he was walking toward the refrigeration unit. Finally, the majority finds that the middle step, being only 18 inches above the pit, was not sufficiently elevated to trigger the protection of § 240(1).

The majority is simply incorrect to hold that because the staircase had been in place for several years, § 240(1) did not apply to it (*see Jones v 414 Equities LLC*, 57 AD3d 65, 78 [2008] [criticizing as "based on an erroneous premise" the rule that collapse of a permanent structure cannot give rise to statutory

liability]; *see also Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 291 [2008]; *Ciraolo v Melville Court Assoc.*, 221 AD2d 582, 583 [1995] ["that the ladder from which the plaintiff fell was permanently installed, rather than a temporary apparatus, is irrelevant"]).

Equally irrelevant is that plaintiff had not actually arrived at the refrigeration unit when he became injured (*see Oprea v New York City Hous. Auth.*, 226 AD2d 310, 311 [1996] ["that the accident occurred while plaintiff was accessing the worksite as opposed to actually working on the ladder, does not preclude application of the statute"]).

Finally, that plaintiff fell only 18 inches is not relevant. "Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross v Curtis-Palmer Hydro. Elec. Co.*, 81 NY2d 494, 501 [1993]). The question thus is whether the harm flows directly from the application of the force of gravity" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 604 [2009]). What is important is whether the injury was a direct consequence of defendant's failure to provide and place the necessary safety devices the statute mandates under the

circumstances (*see Thompson v St. Charles Condominiums*, 303 AD2d 152, 154 [2003], *lv dismissed* 100 NY2d 556 [2003]). Indeed, in *Runner*, there was liability even though the object causing the injury was at a *lower* elevation than the employee (*see also Luongo v City of New York*, 72 AD3d 609, 610 [2010] ["that the girder, jack and the spacers were not positioned significantly above plaintiff's head is of no moment"]).

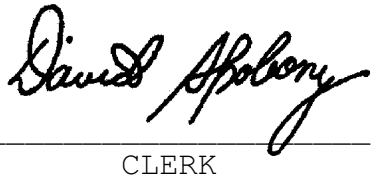
Here, it is undisputed that the harm to plaintiff was the direct consequence of the application of gravity to his body stepping on a weakened stair. Worn out stairs were certainly a risk against which defendant, being in control of the property, should have guarded. That the steps may have been part of the permanent structure rather than a temporary apparatus is irrelevant because it is beyond dispute that the steps provided the most efficient means of access to the pit. Moreover, as shown, the argument that the accident did not occur at the refrigeration unit is wholly without merit.

In *Runner*, the Court of Appeals noted that we have historically read § 240(1) too narrowly: "The breadth of the statute's protection has . . . been construed to be less wide than its text would indicate" (13 NY3d at 603). The majority's

reading flies in the face of this admonition. Accordingly, I would grant summary judgment to plaintiff.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: AUGUST 31, 2010



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