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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. NICHOLAS FIGUEROA PART 46
Justice

STEERING COMMITTEE

vs

PORT AUTHORITY

Vacate

INDEX NO. 600000/1994
MOTION DATE 2/14/06
MOTION SEQ. NO. 19
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

UPON the foregoing papers, it is ordered that this motion

SEE ACCOMPANYING DECISION AND ORDER.

FILED
MAR 02 2007
COUNTY NEW YORK

Dated: February 28, 2007

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

In re WORLD TRADE CENTER BOMBING LITIGATION

Index No. 600000/94

DECISION AND ORDER

Nicholas Figueroa, J.:

Defendant, Port Authority of the State of New York, moves to vacate the jury verdict finding it liable for sixty-eight percent of the 1993 World Trade Center Bombing, and that the bombers were thirty-two percent liable. Alternatively, defendant seeks a re-apportionment of liability or a new trial.

Defendant argues that the verdict must be set aside as a matter of law because the bombing was an unforeseeable event. Moreover, it argues that the verdict was against the weight of the evidence and adversely affected by several factors. Defendant attributes many of these errors to what it terms the court's prejudice against it.

Defendant also asserts the jury instructions were improper. It argues that the court should have instructed the jury that it could find in favor of defendant, if it found that defendant took minimal security measures to avoid the bombing, but that the court erroneously instructed the jury to apply a reasonable care standard.

Defendant argues that the jury instruction on causation "was so contrary to well-settled law on premises liability causation...and so prejudicial to the Port Authority's defense on this essential element..." and that the instruction was the product of the court's bias. This instruction directed the jury as follows:

> The plaintiffs contend that the explosion would not likely have occurred if the precautions they say were warranted had been implemented.
>
> The defendant Port Authority on the other hand contends that the same explosion would have most likely occurred even if all the precautions and recommendations which plaintiffs say were necessary had been in effect or in fact been implemented.
>
> The Port Authority would not be liable if the same exact explosion would have occurred even with the various measures that the plaintiffs say should have been implemented.
>
> However, it is not a defense that an explosion of some kind at some time, at some place within the complex might have occurred even if the security measures which the plaintiffs claim were necessary were in place on February 26, 1993 at 18 minutes after 12.

Defendant contends that this created an impossible burden for defendant to meet on rebuttal; that is, to prove that the bombers would have circumvented the security measures at issue by striking at the exact time and placer and in the same manner as occurred on February 26, 1993.

In arguing that the instruction was erroneous, defendant relies on the Restatement (Second) of Torts that states that the inquiry in a negligence case is not whether the exact harm would have occurred had the defendant not been negligent, but rather whether the harm would have been "the same character and extent" as that which actually occurred" (Restatement (Second) of Torts §432 cont. a (1965)). Continuing its reference to the Restatement, defendant quotes the following: "If without the actor's negligent conduct, the other would have sustained harm, the same in character and extent as that which he receives, the actor's conduct...is not a substantial factor in bringing it about."

Defendant contends that it would have escaped liability by showing that even if the security measures at issue had been implemented, the terrorists would have nevertheless carried out a bombing in the World Trade Center as that which occurred, although not on the exact date, the same

time and the exact location.

Defendant argues that this portion of the charge was particularly erroneous, as this was a common issues trial involving plaintiff's claims for personal injury, wrongful death, and business interruption losses. The charge, according to defendant, deprived it of the opportunity to mount "a defense to causation as against each and every plaintiff."

Defendant argues that while certain plaintiffs would not have suffered physical injuries had the bombing not occurred in the same time, place and manner as actually occurred, the business interruption plaintiffs would have been harmed had the bombing occurred in a different part of the building complex or at another date and time.

According to defendant, "...by providing the jury with the erroneous 'exact time, exact same place, exact same bomb' instruction, the court adopted the causation/injury issue that was not common to all plaintiffs but common only to one set of plaintiffs - - those in the immediate vicinity of the blast." Therefore, the charge deprived defendant of a fair trial by preventing it from presenting the defenses to proximate cause in the common issues trial that it would have been able to present in individual trials. Thus, it argues that it was unable to rebut causation as to each plaintiff's negligence claim.

Defendant alleges that the interrogatories the court submitted to the jury were contained in two significant errors.

The first alleged improper interrogatory asked the jury: "Was defendant, The Port Authority...negligent by not maintaining the World Trade Center's parking garage in a reasonably safe condition on February 26, 1993?"

The second alleged error, according to defendant, was the causation question, "Was the defendant Port Authority's negligence in not maintaining the World Trade Center parking garage in

a reasonably safe condition a substantial factor in permitting the February 26, 1993 bombing to occur?"

Defendant contends that the first interrogatory "virtually amounted to a directed verdict". It argues that because the question was worded in the negative, that is, negligent by not maintaining, it improperly presumed the Port Authority's negligence. Defendant maintains that the court's charge did not cure this error.

In challenging the second interrogatory, defendant argues that the word permitting was improper and that the question should have been whether defendant's negligence was a substantial factor in causing the bombing to occur. Defendant argues that the word "permitted" allowed the jury to find liability by finding that defendant's conduct merely furnished the condition or occasion upon which the injuries were received but did not put in motion the agency by which injuries were inflicted. Continuing, defendant argues that the word permitting, by definition, required the jury to find that as the bombing occurred, defendant permitted it to occur.

Next, defendant argues that the apportionment of sixty-eight percent of fault to it was against the weight of the evidence. Defendant argues that New York courts, in premises liability cases, consistently apportion the major portion of fault to the criminal actor instead of the landlord.

Defendant argues that the bombers executed a careful plan to attack the World Trade Center; however, defendant operated the complex, housed its offices and numerous employees there, and annually spent millions of dollars on safety and security. Therefore, it should be held to, at most, twenty percent of fault.

Defendant argues that the court's evidentiary rulings deprived it of a fair trial. It argues that expert testimony it proffered was improperly excluded, while plaintiff was allowed to present incompetent expert testimony.

Defendant contends that it was prevented from offering evidence concerning the bombers' conduct, objectives, motivation and intent. This evidence, according to defendant, would have allowed the jury to find that the preconceived criminal plot undermined any causal connection between defendant's purported conduct and the bombing. Had the court allowed this evidence, defendant argues, it would have been able to prove that because of the bombers' steadfastness and resourcefulness, the bombing would have occurred even if defendant had guarded the parking lot entrance or completely eliminated public parking. It asserts that even in spite of any stringent security measures it might have implemented, it could have proved for example, that the bombers would have used forged credentials to gain admittance to the parking lot or simply overpowered the guards.

On the other hand, defendant argues, plaintiff was allowed to show that the bombers "were inept bombers who easily would have been prevented and deterred from carrying out their plot, had they encountered the security measures at issue, such as the elimination of below ground public parking.

Defendant argues that the court prevented Oliver Revell from testifying. Revell, the Federal Bureau of Investigation's then second-ranking official, had oversight of the Bureau's counter-terrorism program for eleven years. Defendant alleges that its offer of proof provided a sufficient basis for admitting Revell's testimony.

Revell, during the offer of proof, testified that he consulted the transcripts of the bombers' federal criminal trials, and that experts in his field relied on these transcripts as the most essential source on Islamic jihadist terrorism; he stated that such transcripts and government reports were the kind of sources that terrorism experts routinely consult.

Defendant states that Revell would have testified about Ranzi Yousef's intent in carrying out the bombings. Yousef was one of the leaders of the bombing plot. Defendant challenges the court's ruling precluding Yousef's post-arrest statements regarding his intent in carrying out the bombing, the training that terrorists had received, and that one of the bombers used his job as a chemical engineer to obtain chemicals. Defendant argues that the statements were relevant and their reliability established by facts that had been proven in three federal trials.

Defendant argues that terrorism experts must consult out-of-court materials to form their opinions and that to require terrorism experts to rely solely on first-hand knowledge would effectively bar terrorism experts from testifying in New York.

Next, defendant argues that as an alternative to allowing Revell's testimony, the court should have allowed defendants to elicit testimony from William Gavin, a former senior FBI agent who assisted in taking Yousef's statements when he was flown to the United States in 1993 after his arrest in Pakistan. Gavin would have testified that Yousef's intent in carrying out the bombing was to have one tower fall upon the other and kill 250,000 people and this was the reason why the bomb was placed at the B-2 level.

Defendant argues that Yousef's statements had already been admitted against him at his federal trial after a suppression hearing before Judge Kevin Duffy in New York's Southern District. Defendant argues that Yousef's statement was admissible as a declaration against penal interest.

Defendant also sought to introduce a redacted two page excerpt from the 9/11 Commission Report. This report also mentioned Yousef's post-arrest statement and contained a discussion of the roles of each bombing participant. Defendant argues that the excerpt was admissible under the public record exception to the hearsay rule, and that the report was presumptively reliable. Defendant argues that precluding the report materially prejudiced its ability to mount its defense

concerning causation.

Defendant asserts that plaintiff's only evidence that defendant's conduct was a substantial factor in causing the bombing was the testimony of its expert witness Dennis Dalton. Defendant argues that this testimony was inadmissible.

Dalton testified that the bombing would not have occurred had defendant implemented the security measures at issue and that its failure to close the garage was a substantial factor in causing the destruction that occurred.

Defendant argues that Dalton was not a terrorism expert and that his testimony revealed that he knew virtually nothing about the bombers' capabilities and motivations, and that the court should have stricken Dalton's testimony because of his lack of expertise.

Defendant contends that the court improperly "permitted plaintiff to elicit rank hearsay testimony about the terrorists from fact witnesses." And, "At times, the court itself took the lead in eliciting such hearsay."

Defendant states that the improper testimony included testimony from a fact witness that the bombers were so unintelligent that they sought to recover the deposit on the blown-up rented van. A fact he learned from a newspaper article; that the bombers were not suicidal; that they entered the garage through an unmanned entrance, but that he had no first-hand knowledge of that fact and was only repeating what he had been told.

Similarly, defendant argues, the court erroneously permitted Charles Maikish another fact witness, to testify that the bombers used a yellow van; that the bombers detonated the bomb by lighting a fuse that lasted ten minutes; and that the bombers took a particular route inside the garage. Defendant notes that Maikish lacked personal knowledge of these facts.

Defendant argues that the court erred in denying its request for a mistrial based on what it characterizes as "plaintiff's improper comments during summation." The argument defendant refers to is the plaintiff's attorneys statement, "...I implore you to find at least 51 percent. If the victims in this case are to get full justice, I implore you to give them 51 percent."

Defendant argues that this statement was an "outrageously improper appeal to the jury's sympathy, and to reach a verdict not grounded in fact, but in operation of CPLR Article 16." Article 16 provides for full monetary damages if the jury apportions fifty-one percent or more liability to a defendant, but only a proportionate share if the jury finds fifty percent fault or less.

Defendant next argues that the court's bias caused it to make improper rulings. These improper rulings, according to defendant, include.

1. errors made during jury selection;

2. error in denying defendant's recusal motion;

3. errors in the admission of evidence going to lack of adequate police presence in the sub-grade of the building and the inadequacy of staffing in the Port Authority Police Department's Counter-Terrorism Unit;

4. errors in the admission of a hearsay statement by an unidentified FBI agent to a security guard company employee about the risk of an attack;

5. errors in the exclusion of various federal terrorism reports;

6. errors in the exclusion of testimony by Port Authority witnesses concerning their lack of fear for their safety and that of others while in the parking garage;

7. errors in the exclusion of testimony regarding communication between defendant and various intelligence agencies about security at the World Trade Center;

8. errors in the exclusion of testimony by Dulcibella as to the state of the art with respect to security for high-profile buildings;

9. errors in the exclusion of evidence demonstrating the extent and nature of defendant's security - related expenditures;

10. errors in the exclusion of defense evidence concerning a comparison among other areas of the World Trade Center and the parking garage;

11. error in rejecting a stipulation by the parties that the FBI had not prior warning of the bombing;

12. errors in failing to instruct the jury as to foreseeability and governmental immunity; and,

13. error in providing the jury with misleading and confusing instructions concerning the events of September 11, 2001.

Defendant argues that those errors, individually and cumulatively, warrant a new trial.

For the reasons that follow, defendant's motion is denied.

The court must first address defendant's accusation of bias. The court has already denied defendant's prior recusal motion, based on the identical argument. However, as it is raised again, the court is constrained to address it. The allegation is based on the court's statement, on the record, at a pre-trial conference. Prior to that session, the court, together with one of the plaintiffs' attorneys, one of defendant's attorneys, and a representative of defendant's insurance carrier, spent several weeks settling a significant number of cases in this multi-plaintiff litigation. The court embarked in the settlement process rather late in the litigation and time constraints prevented further pre-trial settlement negotiations.

While the court cannot reveal all the information learned at the conferences, the subject of liability and the apportionment arose on several occasions. The court and the parties engaged in

rather candid discussions of the subject.

The court's statement at issue was an attempt to resolve the liability issue. However, the court was mindful of the fact that a complete settlement of the issue was probably not achievable; nevertheless, the court made an attempt at resolution. As the transcript reveals, the court stated, that it was "not really putting it [a settlement] forth that seriously..."

Continuing, the court asked, "...at that trial, would I be justified in vacating any verdict that completely absolved the Port Authority? I think I would. Therefore, and I would like the Port Authority to hear this out, I think we should start off on a premise that there is some responsibility on the part of the Port Authority which they are not going to be able to escape. Only thing we're going to have to decide is percentages, but I'm going to put that aside."

Later, the court stated its proposal. "There's no doubt, I wouldn't say doubt but it appears to me that the Port Authority cannot escape responsibility for what happened in view of the potential evidence. I'm not prejudging the case, but, as I said before, if the jury comes back with zero responsibility I might be in a position to vacate that so I assume that everyone here will agree with me, and I hope Mr. Hood will, that there is some responsibility on the part of the Port Authority."

Mr. Hood is defendant's attorney who attended the settlement conferences. However, another defense attorney, one of defendant's trial attorneys, responded: "Your honor, we don't agree with that."

The court responded, "Okay, well fine, I don't - - - you don't lose any credit with me by saying that. But I think as a logical proposition that such an outcome might not really be supported by the evidence that I foresee at trial. But, look, if they were to receive a clear bill of health, I have no problem with it."

The court stated that "it might be convenient for both sides, all sides in this case, to reach some sort of agreement without going to trial." Continuing, the court stated, "It might be to everyone's benefit, including the two sides here that are mostly involved, to perhaps reach some sort of agreement on the degree of shared responsibility. You might want to think about that. And I think it would be short of 51 percent, and it would probably on the other side of the scale be somewhere a lot less than that. But if we reach such an agreement we could go right to the damages phase of the trial. I just toss that, I'm really not sure whether it's workable or not. Of course, if anybody disagrees with even the feasibility of that idea then it's out the window."

Plaintiff's attorney disagreed, "With the greatest respect Judge, by our silence, we wouldn't agree that it would be less than 51 percent..." Plaintiff's response demonstrated that it too would sacrifice something in return for a settlement. Plaintiff, because of the operation of CPLR Article 16, would suffer a lesser monetary award than possible, if a jury found that defendant was fifty-one percent or more at fault.

That both sides would surrender something under the court's attempted settlement demonstrates that the court was attempting to effect a compromise and not, as defendant alleges, taking a position that was solely detrimental to defendant.

The court's remark was made at a settlement proceeding. However, unlike most settlement conferences, this one occurred in open court and on the record. This was hardly the setting for the court to have expressed bias against a party.

This court, as others, learns information at various pre-trial proceedings. This court, and all courts, may express its opinion of the advisability of settlement based on what transpires at those proceedings (see *Rodriguez v. City of New York*, 136 Misc.2d 500, citing *United States v. Grinnell*, 384 US 563, 583).

In sum, the court was not biased in favor of either party and, consistent with its proper function, attempted nothing more than to negotiate a compromise on the liability question. Consequently, there was no basis for the court to recuse itself, as defendant contends.

Contrary to defendant's argument, the plaintiff proved a *prima facie* case. The legally sufficient evidence allowed the jury to find liability, based on a fair interpretation of the evidence. The jury was able to find, based on the evidence, that the bombing was foreseeable and preventable. Intelligence, made available to defendant, told it years before the bombing, that the unsecured underground parking lot provided an accessible bombing location.

In 1985, defendant's own Office of Special Planning (OSP) studied the danger of a bombing and prepared a report. The OSP not only anticipated that a bomb laden truck was a likely mechanism for attacking the World Trade Center, but also warned that an explosion in the below ground parking lot would cause the greatest amount of damage. The report concerned a bomb being placed at the B-2 level, the actual location where the bomb was detonated nine years later. The report contained a number of recommendations to prevent this from happening.

The OSP report, "Counter-Terrorists Prospectives: The World Trade Center", characterizes the World Trade Center as "a most attractive target" because of its iconic nature. The report noted that twenty-five bombing incidents took place in and around New York in the preceding five years, including a 1985 bombing in an office building near the World Trade Center, and that defendant was aware that those bombs had been placed in other buildings that year. The report warned that car bombs were becoming weapons of choice and that by using an explosive laden vehicle, the bombers would have ample escape time.

The OSP report singled out the underground parking lot as "a definite security risk." The report found that a two-thousand space underground parking area provided potential bombers with

an opportunity to detonate a bomb that necessarily would affect other vulnerable areas. The report warned that the garage was vulnerable because potential bombers had "unimpeded access" to it. An explosion in the lot would affect the World Trade Center's power, water, heating, and cooling systems.

The OSP report was remarkably predictive of the eventual bombing. It opined that:

> "A time bomb-laden vehicle could be driven into the WTC and parked in the public parking area. The driver could then exit via an elevator into the WTC and proceed with his business unnoticed. At a predetermined time, the bomb could be exploded in the basement..."

The OSP report made several recommendations regarding the public parking area. It recommended eliminating public parking to prevent an explosive-carrying vehicle from entering the complex. Surveillance of the premises would dissuade potential bombers from acquiring a sense that they could operate in complete safety. The OSP report recommended providing manned entrances to the parking area; restricting pedestrian entry into the area by the ramps; subjecting vehicles to random inspections; and providing a police patrol with explosive-detection dogs.

Defendant rejected the OSP recommendations. It felt that eliminating the parking area would inconvenience building tenants and result in lost revenue. It believed that posting guards at the entrances would be ineffective and too expensive. It felt that restricting the movement of pedestrians was impractical because there were other ways of gaining access to the area. Defendant rejected the random vehicle inspections because it believed it could not be done without the existence of probable cause to search.

The conclusion reached in the OSP report was virtually tantamount to making the bombing a foreseeable event. The report did not vacillate concerning the risk of a bombing. Rather, it stated that, "The public parking area in the WTC constitutes a definite security risk." Although defendant

characterizes the risk as "very low", the report eschewed that language.

Significantly, in 1984, defendant learned from a Scotland Yard official that he was professionally "appalled" about the existence of transient public parking directly underneath the towers.

The evidence therefore supports a finding that given the foreseeability of the bombing, defendant was negligent in failing to take precautions, recommended in its own study, that would have prevented the bombers from entering the parking area; and, as a result of this failure, the bombers were enabled to detonate the explosive device. These facts are legally sufficient to establish a *prima facie* case of negligence (see *Cohen v. Hallmark Cards*, 45 NY2d 493; *Miller v. State of New York*, 62 NY2d 506).

Moreover, the court finds that the facts allowed the jury to find in favor of plaintiff based on a fair interpretation of the evidence. The jury was able to find that the bombers were enabled to enter the parking lot because access to it was unrestricted (see *Padilla v. 960 Management, Inc.*, 195 AD2d 333). Notably, this was borne out by one of defendant's employees who testified that on the day after the bombing, members of the OSP stated that if the garage had been closed, the bombing would not have occurred. Thus, evidence from defendant itself formed a factual basis for the verdict. Given the prophetic statements in the OSP report, and defendant's failure to act on its recommendations, it cannot be said that "the evidence so preponderat[ed] in favor of the [defendant] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Grassi v. Ulrich*, 87 NY2d 954, 956, quoting *Lolik v. Big v. Supermarkets*, 86 NY2d 744, 746).

The court's charge and jury verdict sheet were not erroneous.

The court did not err in instructing the jury to determine whether defendant failed to exercise reasonable care; nor did it err by not adopting defendant's proposed minimal care standard. The

charge correctly instructed the jury that it could find in defendant's favor if the "same exact explosion would have occurred even with the various security measures that plaintiff say should have been implemented", but that "it is not a defense that an explosion of some kind, at sometime, at some place within the complex might have occurred."

The jury interrogatory complained of did not ask the jury to use an incorrect, reasonable care, standard and did not suggest that defendant was negligent. Nor did the verdict sheet incorrectly find defendant liable if its negligence permitted the bombing to occur, rather than causing it to occur.

The reasonably prudent person standard is the correct standard in premises liability cases. In fact, defendant's original request to charge adopted this standard; however, on the eve of trial, it adopted a different course, and belatedly requested the minimal care charge. In any event, defendant's asking to be absolved of fault if it took only minimal precautions is contrary to New York law. Notably, New York Pattern Jury Instruction ¶2:90 uses the reasonable, not minimal standard, as the appropriate jury instruction. The instruction asks the jury to determine if the premises were reasonably safe.

There is a single standard of care in New York: a premises owner must act as a reasonably prudent person in maintaining his or her property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk (see *Basso v. Miller*, 40 NY2d 233, 241). The court's charge accurately reflected this standard.

The Court of Appeals, in *Nallan v. Helmsley-Spears*, 50 NY2d 507, 518-520, recognized that a landowner must take reasonable precautionary measures to avoid criminal conduct that will foreseeably harm a person on its premises.

In *Kahane v. Marriott Hotel Corporation*, 249 AD 2d 164, the defendant hotel received an anonymous telephone call from a person asking whether metal detectors would be used on the evening a highly controversial speaker would be appearing, the Appellate Division, First Department, found that a question existed as to whether more than minimal security measures were necessary (*id.* at 164).

Similarly, in the instant case, where the defendant, by its own investigation, knew that a bombing could occur in its landmark building and knew of the steps that were necessary to prevent it, it cannot avoid responsibility by taking only the minimal steps such as a small landlord might be expected to take, such as placing a simple lock on an entrance door.

As plaintiff correctly points out, defendant fails to cite any cases that mandated the minimal measures charge it sought. However, plaintiff cites *Brewster v. Prince Apartments, Inc.*, 264 AD2d 611, 615. Where the First Department rejected the defendant's claim that the court erred in submitting the question to the jury: "Was defendant...negligent in failing to maintain the premises in a reasonably safe condition?" This question was almost identical to the charge and interrogatory in the instant case.

Plaintiff also relies on *Sanchez v. New York City Housing Authority*, 256 AD2d 485. Plaintiff notes that the issues of the charge and verdict sheet are not discussed in the Second Department's decision; however, the defendant in that case raised those issues in its brief. Plaintiff refers to that brief and to the record on appeal.

The defendant in *Sanchez* argued that, "A landowner's duty is to provide 'minimal' security. The lower court did not charge the jury on this applicable standard of care, despite the Housing Authority's request to do so" (*Sanchez v. New York Housing Authority, id.*, Record on Appeal at 2827 and 3170). The defendant also argued that a new trial was necessary because "...the jury was

not informed that, under New York law, premises are deemed reasonably safe if 'minimal' security is provided." (*Sanchez v. New York City Housing Authority, id.*, Defendant-Appellant's Brief, pp. 41-43).

The Second Department mainly discussed the defendant's contentions concerning legal sufficiency and weight of the evidence. However, it rejected defendant's other arguments, concerning the charge and verdict sheet, with the statement, "The defendant's remaining arguments are without merit." The instant defendant's arguments are similarly without merit.

The court did not err in the other jury instruction the defendant challenges; rather, the court correctly instructed the jury that defendant would not be liable if the same explosion would have occurred even if defendant had implemented necessary security provisions; however, it would not be a defense that a different explosion, at another time at some other place within the complex might have occurred.

Defendant asserts that the bombers, being intent on destroying the World Trade Center, would have found another method of accomplishing their goal, in spite of the implementation of the recommended security measures. Defendant argues, by way of illustration, the bombers could have subdued a guard at the parking lot entrance or circumvented searches. Thus, defendant argues, the explosion could have occurred at another time or place; and, certain plaintiffs, those claiming business interruption, would have suffered a loss even if the bombing occurred at another time location in the complex. Defendant argues that because all claims, personal injury and wrongful death and commercial claims were tried in common, the error in the charge was particularly harmful.

Contrary to defendant's argument, the court's charge prevented the jury from speculating that some injury would have occurred to some plaintiff or plaintiffs, even if defendant had adopted appropriate security measures. Such speculation, that the event would nevertheless have happened,

is not permissible (see *Rugg v. State*, 284 App. Div. 179, 182-183). Just as a jury may not infer that failure to place a stop sign would not be a cause of an accident because a driver may not have heeded it (see *Gurevitch v. State of New York*, 284 AD2d 717, 720), it may not speculate that a bomber would have been able to place a large explosive device in an area other than the vulnerable parking garage.

Nor does defendant's reliance on the Restatement of Torts §432 support its argument. The Restatement speaks in terms of harm; however, harm, or damages, was not the issue at this phase of the trial, as it only involved liability. The issue was whether the bombing occurred because of defendant's negligence, not whether harm would have occurred.

The section and comment of the Restatement defendant relies on reads:

> "§432. Negligent Conduct As Necessary Antecedent Of Harm
>
> (1) Except as stated in Subsection (2), the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.
>
> (2) If two forces are actively operating, one because of the actor's negligence, the other not because of an misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.
>
> * * *
>
> Comment on Subsection (1):
>
> a. If, without the actor's negligent conduct, the other would have sustained harm, the same in character and extent as that which he received, the actor's conduct, except in the situation dealt with in Subsection (2), is not even its necessary antecedent, and so is not a substantial factor in bringing it about.
>
> b. The statement in this Subsection is most frequently, although not exclusively, applicable where the actor's tortuous conduct consists in a failure to take some precautions which are required for the protection of another's person or land or chattels. In such case, if the same harm, both in character and extent, would have been sustained even had the actor taken the required precautions, his failure to do so

> is not even a perceptible factor in bringing it about and cannot be a substantial factor in producing it".

As plaintiff correctly argues, if the word bombing is substituted for the word harm in the quoted portions, the charge conveys the sense of the Restatement; that is, that defendant would not be liable if the same act would have occurred, even if defendant had not been negligent.

Nor does the fact that this was a common issues trial make the charge prejudicial. Defendant argues that the charge was prejudicial because some of those killed or injured, or those persons who were business tenants, would have been harmed whenever or wherever a bomb exploded. Thus, defendant argues, it was deprived of the opportunity of mounting a causation defense as to those parties.

The court notes that both plaintiff and defendant, prior to trial, had envisioned a common issues trial. A letter from defendant's attorney, dated March 3, 2005, confirms this. However, it was not until the eve of trial, and during the trial itself that defendant raised the argument that not all plaintiffs were similarly situated.

Defendant's contention that it could not establish a causation defense as to each plaintiff's negligence claim must fail. As plaintiff correctly argues, if the court did not give the charge as given, then those persons who unfortunately happened to be in the World Trade Center at the time of the explosion could never recover, as there would be no liability as to those persons if the blast could have occurred at a different time, or at a place in the World Trade Center where they were not situated.

In any event, as already noted, it would be speculative to inform the jury that the bombing could have occurred at another time or place and the court could not have given a charge based on such utter speculation.

The court did not err in submitting the first interrogatory to the jury. The question submitted was whether defendant was negligent in failing to keep the parking garage in a reasonably safe condition on the date of the bombing. Contrary to defendant's argument, the interrogatory was clear and did not amount to a directed verdict.

Defendant relies on *Brewster v. Prince Apartments, id.*, in support of its argument. The charge in that case read: "Was the defendant, Prince Apartments, Inc., negligent in failing to maintain the premises in a reasonably safe condition?" The First Department held that this instruction was not erroneous, as the trial court instructed the jury that it must first consider whether the premises were safe, and if they found otherwise, there must be a defendant's verdict. This court gave a similar instruction; in fact, it stated a number of times that plaintiff had the burden of proving that the premises were not reasonably safe in addition to proving that defendant was negligent in not keeping the premises in a reasonably safe condition. The court, in language nearly identical to the approved language in *Brewster v. Prince Apartments, id.*, instructed the jury that:

> "In order to recover, the plaintiff must prove.... that the premises were not reasonably safe."
>
> ★ ★ ★

The court instructed the jury on several occasions on the elements necessary to establish liability and instructed the jury on the contentions of both parties on the question.

Because the charge "emphasized that the jury must make the threshold determination of whether the premises were reasonably safe...", it was proper (*Brewster v. Prince Apartments, Inc., id.* at 616).

The second interrogatory defendant challenges concerned the question:

> "Was the defendant Port Authority's negligence in not maintaining the World Trade Center parking garage in a reasonably safe condition a substantial factor in permitting the February 26, 1993 bombing to

occur?"

This instruction, contrary to defendant's argument, did not cast it as an insurer of plaintiff's safety and did not go contrary to the rule that there is no liability when a defendant's act merely furnishes the condition or occasion on which a plaintiff's injuries were sustained, but did not put in motion the agency by which the injuries were inflicted (see *Rivera v. City of New York*, 11 NY2d 856).

The verdict sheet did not lessen plaintiff's burden of proving causation. In fact the court, on a number of occasions throughout the charge, instructed the jury that it must find that defendant's negligence was a cause of the explosion.

Moreover, the instruction was proper in that it informed the jury that defendant did not have to be an active tortfeasor; this is, that it did not have to actually place and detonate the bomb for it to be liable. This scenario would have been inconsistent with the actual facts of the case and plaintiff's theory of liability: that defendant allowed conditions to exist that permitted the bombers to enter the parking lot and detonate the device. The charge prevented the jury from believing that liability could only be predicated on a finding that defendant actually placed the bomb.

The instruction did not tell the jury that it could find defendant liable merely by determining that defendant furnished the condition or location of the bombing. Rather, the interrogatory told the jury that it could find liability only if the defendant's negligence was a substantial factor in permitting the bombing.

The jury's apportionment of fault was based on a fair interpretation of the evidence.

Defendant contends that as the attack was carefully planned and executed as part of a jihad against the United States, the bombers, not defendant, shall bear a majority of the fault. Defendant argues that the bombers were eighty-percent at fault. Defendant relies on two cases; *Roseboro v.*

New York City Transit Authority, 10 AD3d 524 and *Stevens v. New York City Transit Authority*, 19 AD3d 524.

In *Roseboro v. Transit Authority, id.*, the subway passenger was beaten, causing him to fall from a subway platform into the path of an oncoming train. Liability against the defendant was predicated on its token clerk being asleep at his post and thus being unable to observe the event on his surveillance monitor. The First Department ordered a new trial on liability unless plaintiff stipulated to a twenty percent allocation of fault to the defendant and eighty percent to the unknown assailants, as "defendant's share of responsibility could not approach the degree of culpability of decedent's attackers."

In *Stevens v. Transit Authority, id.*, an assailant pushed plaintiff onto the subway tracks where he was struck by defendant's train. The evidence established the train was traveling thirty-six miles an hour, but if it had been traveling at twenty-five miles an hour, it could have stopped without hitting the plaintiff. The Appellant Division ordered a new trial, unless plaintiff stipulated to an apportionment on liability of twenty percent to the defendant and eighty percent to the assailant. The court stated that the train operator's negligence "cannot approach the culpability of the perpetrator." (*id.* at 585).

Defendant asserts that the First and Second Departments have restricted a defendant's liability to twenty-percent in cases in which criminal conduct was a cause of the injury. However, the Third Department found a landowner fifty percent at fault for failing to evict a tenant with a criminal past who assaulted a fellow tenant (*Cabrera v. Hirth*, 8 AD3d 196). This case demonstrates that there is no absolute cap of twenty percent in cases involving criminal behavior.

Moreover, the instant case is distinguishable from *Roseboro, id.* and *Stevens, id. Roseboro* involved a sleeping platform attendant and the accident in *Stevens* was caused, in part, by a train

operator who operated his vehicle eleven miles over a safer speed. However, the jury in the instant case was able to find, based on the facts, that defendant's culpability was greater than the bombers' fault.

The evidence established that defendant had knowledge of the danger of a bomb being placed in the public parking area some nine years before the explosion. Defendant had knowledge of the area's vulnerability and knew which remedial steps it could reasonably take to prevent the bombing. The evidence before the jury was that despite defendant's knowledge, it chose not to act.

Given the facts, the jury could find that no matter how heinous the bombers' act, it was defendant's voluntary choices that allowed the bombing to occur. The jury could find that defendant's deliberate decision to disregard the known threat as the major factor in the event's occurrence.

Defendant's conduct cannot be equated with the act of a subway clerk falling asleep or a train operator traveling at an inappropriate speed. Neither of the latter actions were the purposeful disregard of a danger, as in the instant case.

Apportionment of fault is a jury question. The court, given the facts in this case, declines to alter that apportionment.

The court did not improperly preclude defendant from presenting testimony concerning terrorism. The only testimony the court precluded was inadmissible testimony. Contrary to defendant's argument, the court did not improperly preclude testimony by two of defendant's witnesses, Gavin and Revell. What the court in fact did was simply to bar unreliable hearsay and cumulative testimony.

Defendants assert that the testimony they sought to elicit was evidence that the bombers were so intent on destroying the World Trade Center, and so sophisticated, that they could have

accomplished their goal, regardless of any preventive security measures.

Accordingly, defendant was permitted to provide testimony about the bombers' intent and capability. David Cid and Albert Ducibella, two terrorism experts, provided such information to the jury.

Cid testified that "...the determined terrorist is motivated by ideology or religious fanaticism or fundamentalism, taken to the extreme... And normal deterrent measures aren't effective against them."

When defense counsel asked Cid if the security measures recommended in the OSP report would have prevented the bombing, he responded that:

> "The WTC was the crown jewel of the terrorist movement...I'm talking about Al-Queda and its affiliates, Radical Islamic Fundamentalists. They are very adept at deception or simply using force to access to a target. For instance, if there are 400 deliveries a day, it wouldn't be difficult to paint 1-800 Flowers on the side of a truck, produce an artificial bill of lading - - they are very good at document forging - - and drive in. Should there be some altercations with the guard, they, in my view, would have no hesitation to kill the guard and bring the truck and leave it there."

When Cid was asked whether the use of forged documents and the other ploys he described would have been a method of effecting the bombing, even if public parking had been eliminated, he responded, "Ycah. In my view that's correct, because the deliveries continued."

When defendant's attorney asked Cid whether "...his testimony concerning the motives, characteristics, means and methods of Islamic Jihadist terrorists...[applied] to that group of terrorists in 1993 and prior to that, prior to [the] February 26, '93 bombing of the WTC?", he responded, "Yes it did."

Cid opined that:

> "In my view, the terrorists who carried out this attack, and the

> terrorists like them, are motivated by religious zeal. They are determined. Capture or death is not a significant deterrent to them, although they're not all suicides, but certainly they're willing to accept this as part of their Jihad, or their devotion to their god; and they're creative, innovative and aggressive; and I believe that if they wanted to get in the garage, irrespective of security measures that were in place, I believe they would have found a way in."

Cid gave further testimony concerning the bombers' determination and skills at avoiding security measures. He stated that they would not have chosen an alternative target if the recommended security measures had been effected.

Albert Dulcibella gave testimony similar to Cid's. He stated that the recommended security measures would have been "inconsequential" in deterring the attack. Further testimony from another defense witness, Edward O'Sullivan, was that security measures would not have deterred the bombers. Deposition testimony from two others, read to the jury, stated that security precautions, including random inspections and manned entrances, would likewise not have deterred the attack.

The excluded evidence that defendant argues should have been admitted was inadmissible hearsay; it was based on unreliable out-of-court materials. The testimony defendant sought to introduce concerned Ramzi Yousef's use of false identities to enter the United States; a description of how he arrived here; details about his co-conspirators; and, Yousef's state of mind, including an obsession with destroying the World Trade Center and his intention to kill 250,000 people.

Defendant sought to offer this testimony through Revell, but as shown during his *voir dire*, did not have knowledge of the evidence at trial. He was to have based his testimony on magazine articles, reports, books, and excerpts from criminal trials, including Yousef's post-arrest statement.

Because Revel did not have knowledge of the facts in evidence, defendant's reliance on *Hambsch v. New York City Transit Authority*, 63 NY2d 723, is misplaced. In that case the court stated that there were limited exceptions to the rule barring an expert's testimony when the expert

sought to testify in the form of an opinion to a supposed fact of which he or she lacked personal knowledge. Quoting *People v. Sugden*, 35 NY2d 453, the court stated, "...we recognize two limited exceptions to this rule and held that an expert may rely on out-of-court material if 'it is of a kind accepted in the profession as reliable in forming a professional opinion' or if it 'comes from a witness subject to full cross examination on the trial'" (*Hambsch v. New York City Transit Authority*, *id.* at 726). Defendant relies on the former, but not the latter, exception.

In the instant case, defendant failed to show that the outside materials Revell relied on were reliable. There was no proof of the reliability of the reports or books or magazine articles Revell sought to rely on. In *People v. Wernick*, 89 NY2d 114, the court held that the trial court correctly precluded expert testimony about a phenomenon called neo-natal syndrome, as the testimony would have "parade[d] before the jury non-testifying experts' publications about a theoretical profile, without a reliability foundation being satisfied at the threshold." (*id.* at 117, 118). The conclusory allegation of reliability made in the instant case did not satisfy this threshold requirement.

The use of opinions in publications, other than for impeachment purposes, is improper (see *Lipschitz v. Stein*, 10 AD3d 634). Revell's proposed reliance on newspaper accounts and magazine articles, whose authors were not subject to cross-examination, would have been unreliable hearsay.

Nor was Revell's intended reliance on reports of federal criminal trials proper. Revell provided no assurance that he read the transcripts of the trials in entirety. One of these trials alone, in which there were over two hundred witnesses and one thousand exhibits, lasted over six months. The court can not assume, based on the available facts, that Revell was entirely familiar with the trial proceedings or the motions he claimed he would rely on. Similarly, William Gavin's intended use of Yousef's hearsay statements was also improper. These post-arrest statements were not admissible as a declaration against penal interest. In order to qualify under that exception, the statement had

to have been made by a declarant who is unavailable; the declarant had to have been aware that the statement was against his or her penal interest; the declarant had to have such knowledge of the facts recited in his or her declaration as would be required to permit his or her testimony; and, there must be sufficient indicia of the declarant's trustworthiness to insure its reliability (see *People v. Shortridge*, 65 NY2d 309, 312).

While Plaintiff's argument that defendant had not shown that Yousef was unavailable is without merit, as this court has no power to compel the attendance of a federal prisoner, particularly one in an extraordinarily restricted facility, plaintiff correctly argues that Yousef's statement does not satisfy the reliability test.

As the court in *People v. Shortridge, id.* at 313, noted, the declarant's motivation in making the statement is a factor in its admissibility. "Important also is the declarant's personality - e.g. whether he suffers psychological or emotional instability or whether he was a chronic or pathological liar."

Defendant itself describes Yousef as an accomplished deceiver. The danger inherent in admitting the statement into evidence is that it is one that could have been made as a boast. The statement was unreliable because of the danger that it was the product of "sensation-seeking or some other aberrant condition or motive." (*People v. Maerling*, 46 NY2d 299). Given its inflammatory nature and plaintiff's inability to examine the declarant, its exclusion was proper.

Plaintiff correctly argues that even if the out-of-court material Revell sought to utilize were reliable, it was nevertheless inadmissible, as it would have been improperly used as a conduit for hearsay statements (see *Schwartz v. Gerson*, 246 AD2d 2223). The jury may not consider this inadmissible material, particularly material that expresses the opinions of persons not present in court and for which the principal basis for the opinion is "not merely a link in the chain of data upon

which that witness relied" (*Sigue v. Chemical Bank*, 284 AD2d 246, quoting *Borden v. Brady*, 92 AD2d 983, 984).

The court correctly excluded a portion of the 9/11 Commission Report, as it was not, contrary to defendant's argument, admissible under the common-law public document exception to the rule (see *Bogdan v. Peekskill Community Hospital*, 168 Misc.2d 856). Defendant argues that the excerpt would have contained Yousef's statement, as well as a discussion of the roles of each bombing participant.

As discussed above, Yousef's post-arrest statement is inadmissible. The statement is not admissible simply because it is contained in the report. Nor has defendant demonstrated that the report excerpt contained non-prejudicial, factually relevant material. A document may be admitted under the public document only for its factual assertions, not conclusions (*Bogdan v. Peekskill Community Hospital, id.* at 859). Moreover, as the prejudicial nature of the material outweighed any probative value, it was within the court's discretion to exclude it (*id.* at 860, 861).

The court did not err in permitting testimony by Dennis Dalton, one of plaintiff's expert witnesses. Defendant argues that Dalton was not a terrorism expert and that his testimony lacked a factual basis.

Dalton did not testify as a terrorism expert; rather, he testified as a security expert. His lack of knowledge concerning terrorists' motivations and capabilities did not, as defendant, asserts, provide a basis for striking his testimony.

Dalton based his testimony on his expertise in premises security, particularly parking lot security. Moreover, he based his testimony on the evidence in the case. He knew that defendant delayed implementing security procedures and that this did not amount "to good building security." Dalton knew that the parking garage remained open and that closing it would have prevented the

bombing, as "no one would have been able to drive into it." This testimony did not require knowledge of terrorists' capabilities and motivations, as it was based on the physical impossibility of accessing an area that had been closed. This testimony merely required security expertise, not knowledge of terrorist activities.

Because Dalton's testimony was based on facts in the record and on his security expertise, defendant's reliance on *Timmins v. Tishman Construction Company*, 9 AD3d 62 is misplaced. The alleged negligence in that case was the defendant's creation of a hazardous condition by improperly modifying a gate. The expert had no expertise regarding the installation, maintenance or repair of gates of any kind. Moreover, the expert based his testimony on speculation, not the facts in the record.

Defendant has not challenged Dalton's credentials as a security expert. Nor does it dispute the significant factual basis underlying Dalton's testimony, the critical fact that the garage remained open. Therefore, *Timmins v. Tishman Construction Corp., id.*, does not support defendant's argument.

Nor did the court err in permitting testimony by Sullivan and Maikish.

Defendant argues that the court should not have allowed Sullivan's testimony that the bombers were so stupid that they attempted to recover the van's rental deposit; that the bombers were not suicidal; and, that they entered the garage through an unmanned entrance.

There is no question that the bombers were not suicidal. The defense itself informed the jury that they were alive and in prison. There was also ample evidence that the garage entry point was unmanned. Nor could the jury's knowledge of the attempt to recover the deposit have prejudiced defendant.

Similarly, the court did not err in allowing Maikish to testify that the bombers drove a yellow van; that they used a ten minute fuse to ignite the bomb; and, that they drove a particular route within the parking lot.

Whether the van was yellow or any other color could not have had any prejudicial effect on the jurors. The fact that the van was placed on the B-2 level of the area was confirmed by the unrebutted testimony of Jan Gilhooly, a Secret Service agent who parked there. The fact that there was a delay between lighting the fuse and the explosion is readily discernable from the fact that the bombers had ample time to escape.

Neither Dalton's nor Maikish's testimony could have had a prejudicial effect on the jury. Their testimony does not provide a basis for setting aside the verdict.

Plaintiff's attorney did not make improper comments during his summation. In fact, the court sustained defendant's objection when it felt the summation went beyond proper advocacy. When plaintiff's counsel argued, "If the victim's in this case are going to get full justice, I implore you to give them 51 percent." Defendant's attorney objected and the court sustained the objection, stating, "Sustained as to that argument as to what victims will get. 51 percent. You may argue 51 percent without its ramifications."

Thus, the court's intervention prevented the jury from basing its apportionment on the ultimate effect of that apportionment. The jury had no way of knowing that a fifty-one percent apportionment, as opposed to some other apportionment, would have a legal affect because of the technical operation of Article 16. Therefore, defendant has failed to demonstrate that plaintiff's summation deprived it of a fair trial.

The court did not make rulings or conduct itself based on what defendant alleges was its bias.

Defendant contends that the court made inappropriate comments to defendant's counsel. It refers to an instance where the transcript reveals that all the court said to the defense attorney was he was going into an irrelevant line of questioning. The court told the attorney that it could elaborate on its remark at the side bar, but did not want to do so in front of the jury. Defendant has not shown that this remark could have been the product of bias.

Defendant has not pointed to any improper questions by the court. The court asked questions; however, it did so in order to clarify testimony, as the court is entitled to do (see *De Angelis v. New York University Hospital*, 15 AD3d 185, 186).

Although defendant relies on *Biener v. City of New York*, 47 AD2D 520 and *Habenicht v. R.K.O. Theatres, Inc.*, 23 AD2d 378, it fails to allege acts by this court that even approach the conduct found prejudicial in those cases. The court, unlike the courts in those cases, did not express an opinion on the merits of the defense and did not improperly interfere with the defense.

Nor did the court permit improper conduct by plaintiff's attorney. Defendant cites only to the following: an instance where the court overruled the objection that a single question to a witness was irrelevant; overruled an objection to a question of whether a witness had a chauffeur on some days; permitted testimony that it did not object to; permitted a question about whether a defense witness had been on defendant's legal staff; permitted a question about whether the witness heard there were no security guards in the sub-level areas; sustained defendant's objection to plaintiff's question about a lawsuit defendant commenced.

Thus defendant has not shown that plaintiff's attorney engaged in improper conduct. Having failed to show this, it has not demonstrated that the court tolerated improper conduct.

The court did not make any errors during jury selection.

The court excused a Ms. Leung from the jury after she admitted that her decision would be affected by the fact that if the trial proceeded to the damages phase, there would be monetary awards. Leung stated that, "...I think it really burns me when the jury awards millions of dollars even though it is under appeal and everything else. It is wasting people's time." Having expressed that opinion, Leung demonstrated an inability to be impartial. This opinion on an issue she would have to decide made her an unsuitable juror. Lynch did not even state that he could be impartial, despite his pre-conceived evaluation. When he stated, "It [the bombing] could not be prevented" the court asked him, "Is that your opinion?" Lynch responded, "Yes." Given Lynch's unequivocal pre-disposition, the court had a duty to exclude him.

Garcia, whom defendant challenged, was capable of serving as a juror. Although he expressed a distrust of the federal government and felt inclined to distrust government witnesses, he did not express an opinion on the ultimate issue in the case. Moreover, he told the court that he could be fair in evaluating testimony by law enforcement personnel and told the court that he was abandoning his statements on his juror questionnaire in which he indicated some bias towards government witnesses.

The court did not allow inadmissible evidence regarding police presence at the World Trade Center or the level of staffing in defendant's Counter-Terrorism Unit.

Defendant's attorney, in his opening, argued that defendant maintained a police precinct in the World Trade Center and that the facility had a force of forty patrolmen and its own jail. Continuing, the attorney alleged that the precinct was located adjacent to the garage, and that its officers patrolled the World Trade Center, including the garage area.

Responding, plaintiff did nothing more than demonstrate that only one officer was assigned to patrol the multi-level garage. Moreover, plaintiff did not attempt to show that the lack of police

presence was a basis for liability; plaintiff did not attempt to prove that a greater police presence would have prevented the bombing. Similarly, plaintiff did not attempt to show that a greater number of personnel in defendant's Counter-Terrorism Unit would have prevented the bombing. Rather, the evidence allowed the jury to evaluate how much weight defendant gave to the OSP report and its security recommendations.

The court did not err by allowing testimony about statements from the FBI to a private security firm defendant employed, or by admitting statements by former OSP members about their reaction to the bombing. The deposition testimony of the security firm's president that was read to the jury, in substance was that he had spoken to the FBI and expressed his concern that a bomber could enter the complex. He testified that "...we brought in the FBI and they trained our people as to what the straw man would look like." He testified that defendant gave him permission to contact the FBI.

The deposition testimony defendant objects to is the answer to the question it asked at the deposition:

> "Q: Let me ask you another way. Did the FBI express any opinion as to what the likelihood of where the areas of the terrorist attacks are likely to be with respect to the World Trade Center?
>
> A: They said the World Trade Center was a likely target. Okay. That is what they said. They may have said where in particular, but I don't remember. I don't remember."

This testimony was not hearsay; rather, it was admissible as a statement concerning the information the security firm obtained from the FBI. Moreover, the very same information, that the World Trade Center was a target had been elicited by other testimony during the trial. The OSP report in evidence characterized the complex as being "...a most attractive target."

The testimony concerning statements by former OSP personnel was, "Isn't it true that each and every member of the OSP said if we closed the garage this wouldn't have happened?" Defendant objected to this testimony as being irrelevant. Subsequently, when defendant made the belated objection that the statements were hearsay, the court struck the testimony. Defendant cannot assert that the court erred in overruling an objection made on incorrect grounds. It cannot complain that the court struck the testimony, when a proper objection was made.

The court did not err in excluding several federal government reports. The reports contained information concerning the number and types of terrorist attacks in the United States in the 1980's and 1990's. One of defendant's experts, explaining a chart he displayed to the jury, testified about the level of terrorism, as described in the reports. Therefore, while the actual reports did not go into evidence, the jury was given the information contained in them.

The court correctly excluded testimony by defense witnesses concerning their lack of fear while working in the World Trade Center. Defendant contends that the testimony was necessary to rebut testimony from two witness called by plaintiff who expressed their safety concerns. However, defendant had not objected to this testimony. Moreover, the jury heard testimony from defendant's former officials about their lack of concern. Among them, Stephen Berger, defendant's former Executive Director, testified that his wife and young children would visit him at the World Trade Center. Likewise, Joseph Martella, a former Port Authority Police Captain, testified that he had no reason to believe that a bombing would occur and that he parked in the sub-grade lot. He also testified that his wife, who also worked at the complex, accompanied him to work.

No further testimony about lack of fear was necessary for defendant to advance its contention that personnel at the complex did not fear an attack. Any additional evidence would have been cumulative. Defendant has not demonstrated that excluding such evidence was prejudicial.

The court did not improperly exclude testimony about communications between defendant and various intelligence agencies. However, the court's own questions to a defense witness elicited the response that no outside agency advised defendant to close the garage; although, defendant's own unit, the OSP, made that recommendation. Thus, the jury heard testimony that outside agencies did not recommend the garage closing. Defendant was not harmed by an inability to present duplicative testimony.

The court did not err in excluding testimony and evidence of the state of the art for security in high-profile buildings. The evidence defendant sought to introduce did not relate to commercial buildings containing underground garages. Rather, it sought to introduce evidence of security measures in government buildings. This evidence was irrelevant and was correctly excluded.

Defendant has not demonstrated that the court erroneously excluded evidence of defendant's security-related expenditures. The transcript references defendant cites in support of this contention indicate no such exclusion.

The court did not improperly exclude evidence regarding the relative safety risks of the parking garage compared to other World Trade Center areas. Again, the transcript references defendant submits do not show any such evidence being excluded. In fact, the last transcript reference (page 1279), shows that the court allowed the witness to answer, on cross examination by the defense, that pipe bombings in the World Trade Center's vicinity caused him to have "concern" about the other areas in the World Trade Center defendant alludes to.

The court did not err in rejecting a proposed stipulation. The court could not accept an inaccurate stipulation. The proposed stipulation stated that the FBI had no prior warning or knowledge of the February 26, 1993 bombing. The court wanted the language modified so that the stipulation contained the sentence, "Although the FBI gave warning of a prospective terrorist incident in January, 1993."

The proposed language reflected an accurate description of the FBI's and defendant's level of knowledge in 1993. Defendant rejected the language and cannot now complain that the court's desire to give the jury accurate information is a ground for a new trial.

The court did not err in its charge on foreseeability and did not fail to properly instruct the jury on governmental immunity. Defendant fails to make any specific allegations of error, but merely lists transcript pages in support of its arguments.

The court assumes, from the transcript pages defendant cites, that defendant contends that the court did not charge that foreseeability could only have been based upon prior similar criminal acts at the World Trade Center or its immediate vicinity. However, Justice Sklar had previously rejected that contention and the Appellate Division affirmed his decision (*Matter of World Trade Center Bombing Litigation, id.*, 3 Misc. 2d at 469; aff'd for the reasons stated by Sklar, J., 13 AD3d 66). Justice Sklar wrote, "Contrary to the Port Authority's apparent argument, a landlord does not need to have a past experience with the exact criminal activity, in the same place, and of the same type, before liability can be imposed for failing to take reasonable precaution to discover, warn, or protect...The Port Authority's claim that this bombing was unforeseeable as a matter of law strains credulity... The Port Authority clearly perceived a risk since it created the OSP, and sought a report from it, and other outside consultants, regarding a terrorist attack on the World Trade Center, and seeking recommendation for security measures to protect against that risk."

The court's charge on foreseeability was correct, as it was consistent with the prior rulings on foreseeability in this case.

Defendant also fails to specify how the court erred on the governmental immunity question. Its transcript references, however, indicate that defendant sought a charge that if it provided a police patrol for the garage, it would be free of liability. Defendant's contention is without merit. The

court did not instruct the jury that they could find liability on the basis of inadequate police protection. Therefore, there was no error in the charge.

Finally, the court did not give a misleading or confusing instruction concerning the events of September 11, 2001. The court instructed the jury that, "During your deliberations, you are not to mention any other event that happened years later, because that also has nothing to do with the case." This instruction was proper. The only question the jury was to determine was defendant's culpability for the 1993 bombing. Any subsequent events, including the September11, 2001 attack, were not before the jury.

Accordingly, it is

ORDERED that the defendant's motion is denied.

This constitutes the decision and order of the court.

Dated: February 28, 2007

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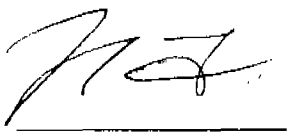

J.S.C.