At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on March 31, 2016.

PRESENT:
HON. DAWN JIMENEZ-SALTA,
Justice.

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ALEXANDER TIRPACK, Index No: 13824/12

Plaintiff **DECISION AND ORDER**

- against -

125 NORTH 10, LLC, ***Defendant.***

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Recitation, as required by *CPLR 2219(a)*, of the papers considered in the review of:
1) Defendant 125 North 10, LLC's ("125 North LLC) Notice of Motion to Set Aside the Jury Verdict with Memorandum of Law in Support and Supplemental Memorandum of Law, dated January 14, 2016;
2) Plaintiff Alexander Tirpack's ("Tirpack") Affirmation in Opposition to Defendant 125 North LLC's Motion to Set Aside the Jury Verdict, dated February 5, 2016;
3) Defendant 125 North LLC's Reply Memorandum of Law in Support of its Motion to Set Aside the Jury Verdict, dated February 19, 2016.

	Papers Numbered
Order to Show Cause with Affidavits/ Notice of Motion, Affidavits, Memorandum of Law, Supplemental Memorandum of Law	Defendant 1 [Exhs. A-J]
Notice of Cross Motion and Affidavits Annexed.....	
Answering Affidavits	Plaintiff 2
Replying Affidavits and Memorandum of Law.....	Defendant 3 [Exhs. K-L]
Supplemental Affidavits	
Exhibits	
Others	

Upon the foregoing papers, the Decision/Order on this Motion is as follows:

Defendant 125 North 10 LLC's motion to set aside the jury verdict is denied in its entirety [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

BACKGROUND, JURY TRIAL TESTIMONY AND ARGUMENTS

This personal injury action is brought by Plaintiff Alexander Tirpack ("Tirpack") to recover for injuries which he allegedly sustained on September 25, 2010 at approximately 4:00 a.m. as a result of his fall from the roof of the seven-story residential condominium building ("building") at 125 North 10th Street, Brooklyn. Defendant 125 North 10, LLC (125 North LLC) is the developer/sponsor of the

building [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

This Court heard testimony at the jury trial regarding the liability phase of this matter from mid-November 2015 to mid-December 2015 [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Plaintiff Tirpack testified that he was a guest at an informal rooftop gathering at 125 North 10th Street, Brooklyn, New York. The event was hosted by Jason Fixler ("Fixler") in a cabana which Mr. Fixler owned. Mr. Fixler also owned an apartment in the condominium building. Plaintiff testified that he fell into a narrow space between Defendant 125 North LLC's seven-story residential condominium building and the adjacent building after he climbed on top of the 12-inch wide ledge of the 42-inch high parapet wall of Defendant's building. His intent was to urinate into the "seam" separating Defendant's building from the adjacent building. The portion of the wall from which Plaintiff fell was located at the end of the corridor between two rows of cabanas. At the other end was the door to the stairway and the elevator leading to the lobby where there was a public bathroom [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Plaintiff testified that he consumed several beers at the gathering. He also smoked marijuana prior to the incident. At around midnight and prior to Plaintiff's arrival at the rooftop gathering, Plaintiff was at his apartment with two friends, Tyler Klose and Alycia Messina, where he had consumed beer and a whisky drink. He had also ingested what he believed to be cocaine. As a result, he was severely intoxicated by the time of the incident. An hour later after the incident, he had a blood alcohol level of .227%, approximately three times the legal limit for driving [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

When he initially requested to use the bathroom while at the rooftop gathering, Plaintiff testified that Mr. Fixler pointed to an empty Gatorade bottle. Mr. Fixler directed Plaintiff to go down the corridor between the cabanas, apparently suggesting that he urinate into the bottle. Because Plaintiff did not want to do so, he decided to "hold it", sitting back down for another ten minutes or so. At that point his need to urinate was "urgent", but Mr. Fixler once again denied him the use of the bathroom in his apartment. Neglecting to take the empty bottle with him, Plaintiff walked down the corridor. He decided to "hop up on the ledge", hoping that there was a "seam" between the ledge and the adjacent building into which he could urinate. Plaintiff thought that climbing on top of the 12-inch wide ledge of the 42-inch high parapet wall of the Defendant's building and urinating off the side of the building was the better of the options available to him at that time [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Once on top of the wall, Plaintiff testified that he did not look down. After he started to unzip his pants, he fell into the approximately 2-foot gap between the buildings [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

On cross-examination, Plaintiff testified that he knew that other guests at the gathering were going "somewhere" to use the bathroom. However, he did not inquire of them where the available bathroom was located. He testified that he did not know whether the empty Gatorade bottle to which Mr. Fixler pointed was large enough. He testified that there were several empty beer bottles which he could have utilized. He briefly considered urinating against the wall but refrained because he did not

want to soil his shoes and the floor of the roof [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Plaintiff's and Defendant's counsel attended a conference with this Court to discuss the Pattern Jury Instructions ("PJI's") as well as the proposed Jury Verdict Sheet. Based upon both counsels' suggestions, the Jury Verdict sheet was drafted and revised. As a result, the first Jury Verdict Sheet on liability had questions of negligence based upon the building's lack of a bathroom on the roof and absence of a fence on the roof where the cabanas are located. After a further review of the Jury Verdict Sheet, both the counsels approved it. After charging the jury, this Court gave the initial Jury Verdict Sheet to the jury [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

The jury responded to Question 1 by rejecting the claim that Defendant was negligent in not constructing a bathroom on the roof. In response to Questions 3 and 4, the jury found that Defendant was negligent in not constructing the roof with a 10-foot tall fence in the years between its purchase of the subject property and the date of the accident. However, it found that Defendant's negligence was not a proximate cause of the occurrence. The initial Jury Verdict Sheet did not instruct the jury what to do in the event of this particular permutation created by responses to Questions 1 through 4 – i.e. what to do if it found no negligence in response to Question 1, thus not answering Question 2 but found negligence but no proximate cause in response to Questions 3 and 4. The jury continued to answer the remaining questions on the Jury Verdict Sheet. As a result, it found that Plaintiff was negligent but that his negligence was not a proximate cause of the occurrence. Nonetheless the jury apportioned "fault" at 60% for Defendant and 40% for Plaintiff [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

The Court reviewed the initial Jury Verdict Sheet prior to publishing the verdict. It advised both counsel that there was an inconsistent verdict and returned the jury to the Courtroom where it advised it that there was an inconsistent verdict. The Court did not release the jury but rather directed it to return to the deliberation room.

Following extensive colloquy and argument by both counsel, this Court revised the Jury Verdict Sheet. Plaintiff's counsel requested that the jury be re-instructed on proximate cause. The Court re-instructed the jury on the issue of proximate cause, gave it the revised Jury Verdict Sheet, and directed the jury to begin deliberations over again [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

After brief deliberations, the jury once again found that Defendant was negligent in not constructing a 10-foot tall fence and that Plaintiff was also negligent. However, the second time, the jury found that the negligence of each was a proximate cause of the occurrence. Again, the jury apportioned 60% fault for Defendant and 40% fault for Plaintiff [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Following lengthy oral motions to set aside the verdict, this Court directed the parties to file formal motions [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

In its motion to set aside the jury verdict, Defendant 125 North LLC argues that the verdict finding that Defendant was negligent should be set aside and judgment entered as a matter of law in its favor. In the alternative, it requests a new trial. Defendant stresses that the jury imposed on it, the developer/sponsor of a residential condominium building, a duty of care far in excess of that recognized in the industry by the architects and engineers who design residential buildings such as 125 North 10th

Street. It contends that it was established at trial that the standard of care in the industry is not to construct residential buildings with 10-foot tall perimeter fences when the intended use of the rooftop is "passive" recreation such as lounging, sunbathing or private social gatherings in enclosed rooftop cabanas [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Defendant 125 North LLC maintains that two different architectural firms (Robert Scarano and Anthony Cucich) and three separate engineering firms were involved in the design and preparation of the building's plans. None of the professionals interpreted the *New York City Building Code* or the prevailing standard of care as requiring a 10-foot perimeter fence on the roof of a residential building when the roof is only used for "passive type" of recreational activities. Defendant notes that its "expediter", Melrose Consulting, Inc. was responsible for the necessary paperwork in order for the building to pass inspections by the Building Department. It too did not perceive the absence of a fence as a design flaw [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Defendant argues that the verdict imposes a greater duty of care than the New York City Department of Building requirements. It points out that the building was inspected 14 times by the Buildings Department during its construction, including the roof. However, it was never found to be in violation because of the absence of a 10-foot tall perimeter fence on the roof used for recreational purposes pursuant to *New York City Building Code Section 27-334*. Since the Buildings Department issued a Certificate of Occupancy authorizing the use of the roof as "private and public recreation spaces", Defendant contends that *New York City Building Code Section 27-334* is not applicable because the roof was used for "passive" recreational purposes [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Defendant 125 North LLC refers to the testimony of its expert witness, James P. Colgate, Esq., an architect and attorney. As a former employee of the Buildings Department, Mr. Colgate testified that he had extensive experience with interpreting the *Building Code* because he was charged with that duty. As a result, his opinion was that *New York City Building Code Section 27-334* does not require a 10-foot tall perimeter fence where a residential building is used for passive recreational activities such as lounging or sun-bathing. Defendant questions Plaintiff's expert, Harry Meltzer's testimony that such a fence was required. Defendant claims that Mr. Meltzer's opinion was unsupported by any reference to industry standards or practices apart from his own interpretation of *Section 27-334* or examples of residential buildings equipped with such fences [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Defendant counters that it was entitled to rely upon the expertise of the architects and engineers who designed the building. It should also be able to rely on the approval by the Buildings Department. It argues that the contractor who constructed the premises should not be held liable for failure to install a 10-foot tall wire perimeter fence which was not called for by the plans and specifications provided by the architects and engineers. It refers to the actual practices of the Buildings Department about which Mr. Colgate testified. It argues that no violations were ever issued about the absence of a fence. Thus, it contends that Plaintiff's expert Mr. Meltzer's opinions are insufficient to establish that the plans and specifications were so apparently defective that an ordinary builder of ordinary prudence would be put on notice that the work was dangerous and likely to cause injury. See *Gee v. City of New York*, 304

AD2d 615 (2nd Dept., 2003) [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

As the condominium/sponsor of the building, Defendant maintains that it may not be held liable for the absence of a 10-foot tall wire perimeter fence when the architects and engineers did not include it in their plans and specifications. It argues that the Buildings Department issued a Certificate of Occupancy which did not mandate it. Neither the architects, engineers nor the Buildings Department employees interpreted *Section 27-334* as requiring a 10-foot tall perimeter fence. Defendant points out that although *Section 27-334* does not explicitly distinguish between "active' and "passive" recreational purposes, it is implicit in the regulation. Thus, it is consistent with Defendant's expert, Mr. Colgate's testimony about how the regulation is interpreted by the Buildings Department [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Defendant argues that the proof at trial failed to establish that it violated the standard of care. In the alternative, the verdict finding it negligent is against the weight of the evidence. Again, it questions Plaintiff's expert Mr. Meltzer's testimony about the necessity of 10-foot tall perimeter fence on the roof, referring to Defendant's expert, Mr. Colgate's testimony about the interpretation of *Building Code Section 27-334*. It maintains that Mr. Meltzer's testimony is predicated on speculation and neither based on facts in the record nor known personally to him. See *Hambsh v. New York Transit Authority,* 63 NY2d 723 (1984); *Cassano v. Hagstrom,* 5 NY2d 643 (1959); *Lee v. Shields,* 188 AD2d 637 (2nd Dept., 1982). It contends that if this Court does not direct entry of judgment in its favor as a matter of law, a new trial should be ordered on the issue of whether Defendant was negligent in not constructing a 10-foot tall perimeter fence on the roof [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Defendant 125 North LLC claims that the evidence failed to establish proximate cause regarding Defendant's alleged negligence. It argues that the absence of a 10-foot tall fence was not the cause of Plaintiff's unforeseeable act of climbing onto the 42-inch high parapet ledge of a seven story building to urinate when he was severely intoxicated. Because he voluntarily placed himself in a position of danger, he showed a reckless disregard for his safety. See *Derderian v. Felix Contracting Corporation,* 51 NY2d 308 (1980); *Powers v. 31 E. 31 LLC,* 123 AD3d 421 (1st Dept., 2014). Because it was not foreseeable that Plaintiff would act in a reckless and extraordinary manner, Defendant argues that Plaintiff failed to establish proximate cause regarding Defendant's negligence [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Defendant contests the jury's apportionment of only 40% of fault to Plaintiff because it argues that it is against the weight of the evidence. It reiterates that the absence of a 10-foot tall perimeter fence did not compel Plaintiff to climb onto the 12-inch wide parapet wall ledge in order to urinate when he was severely intoxicated. Instead his fall is the direct result of his own reckless and ill-advised conduct. Thus, his share of the fault exceeded the 40% apportionment by the jury. See *Soto v. New York City Transit Authority,* 6 NY3d 487 (2006); *Watantbe v. Sherpa,* 44 AD3d 519 (1st Dept., 2007); *Stevens v. New York City Transit Authority,* 19 AD3d 583 (2nd Dept., 2005) [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Pursuant to *CPLR Article 16,* Defendant maintains that the jury should have been instructed to apportion liability to the architects, engineers as well as Jason Fixler. It cites the testimonies of both Plaintiff's and Defendants' experts about the responsibility of the architects and engineers in drawing up plans for the building. It posits that if Defendant as the developer/sponsor was negligent, so too should be the architects and engineers who prepared the plans and specifications of the building. See *Cubito v.*

Kreisberg, 69 AD2d 738 (2nd Dept., 1979), aff'd 51 NY2d 900 (1980). It notes that the Appellate Division reversed an order which granted Mr. Fixler's motion to dismiss for failure to state a cause of action pursuant to *CPLR 3211(a)(7)* and denied Plaintiff's cross-motion to amend the Complaint. The Appellate Division found in *Tirpack v. Fixler,* 130 AD3d 917 (2nd Dept., 2015) that there was a cognizable action against Mr. Fixler because Plaintiff adequately alleged that Mr. Fixler assumed a duty of care to him but violated it, proximately causing his injuries. As a result, Defendant 125 North LLC claims that the jury should have been instructed to apportion liability to Mr. Fixler as well as the architects and engineers pursuant to *CPLR Article 16* because: 1) Mr. Fixler did not permit Plaintiff to use the bathroom in his apartment; 2) Mr. Fixler allegedly failed to inform him about the public bathroom in the lobby; and 3) he pointed Plaintiff to go down the corridor with the empty bottle [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Defendant 125 LLC argues that this Court should have allowed the videotaped deposition testimonies of Tyler Klose and Alycia Messina into evidence. Prior to the commencement of this trial on or about November 19, 2015, Defendant claims that Tyler Klose and Alycia Messina, the two friends who accompanied Plaintiff to the rooftop gathering voluntarily agreed to appear and testify as fact witnesses although they are New Jersey residents. Defense counsel disclosed their names on or about October 8, 2015, providing them with New York trial subpoenas to excuse their absences from school or work. According to Defendant, they changed their minds, allegedly because of conversations with Plaintiff's brother, indicating that they would not honor the New York subpoenas. As a result, Defendant's counsel conducted the non-party depositions of the witnesses in New Jersey on December 7, 2015. Defendant argues that it served New York and New Jersey subpoenas on the witnesses allegedly pursuant to *New Jersey Court Rule 4:11-4.* According to Defendant, both witnesses testified about the issue of whether Plaintiff was told or aware of the public restroom location in the building lobby [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

After a hearing, Defendant argues that this Court determined that Defendant did not technically comply with the procedural requirements of *New Jersey Rule 4:11-4*[1]. Thus, the deposition testimonies were precluded. Defendant argues that preclusion should not have been allowed because there was no prejudice to Plaintiff since his counsel was present, had full opportunity to question the witnesses and did so. Because of the witnesses' change of heart in testifying, Defendant claims that their testimonies' admissibility should not have been governed by the discovery statutes of either New York or New Jersey. Instead because of their unavailability, it argues that the videotaped testimonies should have been allowed. See *Bichler v. Eli Lilly & Co.,* 50 AD2d 90 (1st Dept., 1975); *Gabriel v. Johnson's L.P. Gas Service Inc.,* 98 AD3d 168 (4th Dept., 2012); *CPLR Section 3102(d); CPLR 3117(a)(3)(ii); CPLR 3117(a)(3)(v)* [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Based upon the testimony of Defendant's expert toxicologist, Dr. Lewis Nelson, Defendant 125 LLC maintains that the jury should have been instructed about assumption of risk. Dr. Nelson testified that Plaintiff sacrificed his judgment based upon his voluntary ingestion of alcohol. This Court declined to give the charge on the ground that assumption of risk is only available in cases involving recreational activities. See *Truvia v. Lake George Central School District,* 14 NY3d 392 (2010). Defendant argues that there are strong policy considerations to support the conclusion that it should have no duty to protect Plaintiff. In particular, it should not be made an insurer of the safety of the intoxicated Plaintiff who

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[1] This Court notes that it determined that Defendant did not comply with New York State law also.

voluntarily ingested alcohol and recklessly placed himself in a position of danger by climbing atop the 42-inch high and 12-inch wide ledge of the parapet wall in order to urinate. Thus, Defendant claims that it has no duty to protect such a person from the consequences of his own reckless actions and irresponsible decision-making. As a result, the charge of assumption of risk should have been permitted. It is further proof that a new trial should be ordered if this Court does not direct entry of judgment in its favor [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Defendant 125 LLC reiterates that this Court should have entered judgment in its favor predicated upon the jury's initial finding that its negligence was not a proximate cause of the occurrence. It respectfully points to its prior arguments and previous submission of Memoranda of Law, placed on the record during oral argument at the trial [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

In his Affirmation in Opposition, dated February 5, 2016, Plaintiff addresses Defendant's allegations about his failure to prove his prima facie case and any purported evidentiary error. Plaintiff underscores that a property owner cannot escape liability for dangerous conditions that exist on the owner's land by blaming contractors, agents or other third parties. Pursuant to *Section 78* of the *Multiple Dwelling Law* in addition to the *New York City Building Code Section 28-301.1,* Plaintiff points out that owners are under the non-delegable duty to keep all public portions of buildings, including the roof, in good repair. Plaintiff highlights that *New York City Building Code Section 27-334* mandates that wire fencing at least 10-foot tall shall be constructed when roofs are used for recreational purposes [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Contesting Defendant's argument about any purported consideration of the exclusion of the 10-foot tall fencing in its Certificate of Occupancy, Plaintiff points out that Defendants' condominium building has 86 units. Consequently, since it is a multiple dwelling, the *1968 Building Code* is in effect. Because the *Building Code* classifies the roof as "private and public outdoor recreational space", he argues that a fall from a defective roof sets forth a cognizable negligence claim even in the absence of applicable regulations. See *Powers v. 31 E. 31 Street,* 24 NY2d 84, on remand 123 AD3d 421 (1st Dept., 2015); *Lesocovich v. 180 Madison,* 81 NY2d 982 (1993); *Kellman v. 45 Tiemann Assoc.,* 87 NY2d 871 (1995) [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Plaintiff disputes that Plaintiff's reckless actions were a superseding cause of action. See *Soto v. TA,* 6 NY3d 487 (2006); *Derderian v. Felix Construction,* 51 NY2d 308 (1980). He posits that the "Legislature" perceived the very risk that someone would fall over the edge of the roof because of a lack of or inadequate perimeter fencing when it enacted the code section. See *New York City Building Code Section 27-334.* Because the regulation is entitled "Protective guards", he argues that the "Legislature" imposed a 10-foot tall fencing obligation on owners of buildings precisely to prevent recreational spaces on roofs from becoming sites where accidental falls could take place. He contends that most roofs are not designed to be used for parties or social events and not occupied at all. Thus, the "Legislature" correctly imposed a 10-foot tall fencing requirement on owners and possessors of property where the roof in question was designated and used as recreational place because it would be regularly used by a number of people. See *Gomez v. Hicks,* 33 AD3d 856 (2nd Dept., 2006). Consequently, he maintains that intoxication per se cannot constitute a superseding cause in a case of this sort. See *Butler v. Sietelman,* 90 NY2d 987 (1997); *Canela v. Audonbon Gardens Realty,* 304 AD2d 702 (2nd Dept., 2003), leave denied 2 NY3d 759 (2004); *Torielli v. NYC,* 176 AD2d 119 (1st Dept., 1991), leave denied 79

NY2d 754 (1992) [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Plaintiff highlights that causation is generally resolved by the finder of fact. See *Derderian v. Felix Constructing, supra.* He argues that there can be no finding of a superseding cause unless that act allegedly severs the causal nexus which is unforeseeable by the defendant. See *Giuffrida v. Citibank,* 100 NY2d 72 (2003); *Mason v. UESS Leasing,* 96 NY2d 875 (2001); *Gordon v. Eastern Roadway,* 82 NY2d 555 (1993). He contends that the need for the 10-foot tall perimeter fence proves the foreseeability of the fall. Since a negligent act sets into motion a series of events which lead to injury, the issue of proximate cause is one for the jury. See *Perez v. NYCHA,* 212 AD2d 379 (1st Dept., 1995); *Faber v. NYCHA,* 202 AD2d 269 (1st Dept., 1995); *McMorrow v. Trimper,* 149 AD2d 971 (4th Dept., 1989), aff'd 74 NY2d 830 (1989); *Hoenig v. Park Royal,* 249 AD2d 57 (1st Dept., 1998), lv denied 98 NY2d 811 (1998), lat app 260 AD2d 250 (1st Dept., 1990), lat app 284 AD2d 225 (1st Dept., 2001) [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Because of the possibility of more than one proximate cause of an accident, Plaintiff argues that proximate cause is established when defendant's actions set in motion a series of events. Thus, it is outcome determinative. See *Argentina v. Emory World Wide,* 93 NY2d 554; *Forte v. Albany,* 279 NY 416 (1939). Plaintiff asserts that he does not need to demonstrate the foreseeability of the precise manner in which the accident occurred or the precise type of harm produced in order to establish the cognizability of tort claims generally. See *Dumbaze v. Chwatt,* 7 AD3d 563 (2nd Dept., 2004); *Spathos v. Gramatan Managment,* 2 AD3d 833 (2nd Dept., 2003). He argues that when the cause of the accident is within the class of foreseeable hazards that duty exists to prevent, defendant may be held liable although the harm may have occurred in an unexpected way. See *DiPonzio v. Riordan,* 89 NY2d 578 (1992); *Ard v. Thompson & Johnson,* 128 AD3d 1490 (4th Dept., 2015). Because the 10-foot tall perimeter fence was mandated in order to prevent accidental falls from roofs used for recreational purposes, he argues that Defendant's superseding cause and unforeseeability arguments fail [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Plaintiff submits that it was not error when this Court re-instructed the jury after it rendered an inconsistent verdict. He points out that not only is a jury free to alter its original verdict in order to conform to its real intentions but it is also not bound by the form of its original verdict. See *Ryan v. Orange County Fair Speedway,* 227 AD2d 609 (2nd Dept., 1996). Plaintiff argues that it is improper to continue this line of argument because this Court has already addressed every argument offered in Defendant's Memorandum of Law more than once. Nonetheless Plaintiff maintains that because the duty of care on which the verdict was predicated does not exceed that which is permitted under the law, the verdict should not be overturned. See *New York City Building Code Section 27-334* [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Pursuant to *CPLR Section 4404(a),* Plaintiff maintains that when a court considers a motion to set aside a jury verdict, it must evaluate the evidence in the light most favorable to the non-movant. It must afford that party every favorable inference that may be drawn from the facts. See *Szcerbiak v. Pilat,* 90 NY2d 553 (1997); *Capwell v. Muslim,* 80 AD3d 722 (2nd Dept., 2011); *Lolik v. Big V Supermarkets,* 86 NY2d 744 (1995). Plaintiff argues that it is the jury which makes determinations about credibility since it saw and heard the witnesses. Consequently, its determinations should be accorded great deference. See *Verizon NY v. Orange & Rockland Utilities,* 100 AD3d 983 (2nd Dept., 2012); *Salony v. Mastellone,* 72 AD3d 1060 (2nd Dept., 2010); *Exarhoules v. Green 317 Mad,.,* 46 AD3d 854 (2nd Dept., 2007). When a verdict can be reconciled with a reasonable view of the evidence, Plaintiff

contends that the successful party is entitled to the presumption that the jury adopted that view. See *Kearney v. Papish,* 136 AD3d 690 (2nd Dept., 2016); *Cinao v. Reers,* 109 AD3d 781 (2nd Dept., 2013); *Handwerker v. Dominick L. Cervi Inc.,* 57 AD3d 615 (2nd Dept., 2008) [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Plaintiff maintains that the jury verdict at bar should not be set aside. Citing *Cirino v. Greek Orthodox Community,* 193 AD2d 576 (2nd Dept., 1993), Plaintiff notes that the Appellate Division held that a Certificate of Occupancy does not preclude a finding of negligence based upon a violation of the *Building Code.* He points out that a party may not adopt a policy of noncompliance with a legally mandated duty when regulations authorize it. See *Zipkin v. NYC,* 196 AD2d 865 (2nd Dept., 1993). Plaintiff notes that Defendant's building's applicable Certificate of Occupancy shows that the entire roof is zoned for recreational purposes and interconnected with no separation between cabanas and hallways. Thus, it is similar to *Lesocovich v. 180 Madison, supra* where the Court of Appeals made clear that entertainment means the same as recreation. Therefore, Plaintiff argues that the entire roof must have a 10-foot tall perimeter fence [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Plaintiff underscores the necessity for the 10-foot tall fence based upon the testimony of his expert, Mr. Meltzer. Mr. Meltzer noted that the fencing requirement was designed for public safety, making no distinction between active and passive uses. Moreover, the cost of the fencing would be but a small addition to the cost of the building. Plaintiff points out that Defendant's expert, Mr. Colgate admitted that *Building Code Section 27-334* states that where roofs are used for recreational purposes, wire fencing at least 10-foot tall shall be constructed. Mr. Colgate noted that "shall" is a "mandate" or "mandatory" but not "optional". Thus, Plaintiff notes that the *Building Code* does not include the term "passive recreational purposes" anywhere. He questions Defendant's arguments about the architects and engineers' responsibility. He points out that because he is not in privity with them, he has no cause of action. See *Espinal v. Melville Snow Construction,* 98 NY2d (2002); *Church v. Callinan Industries,* 99 NY2d 104 (2002); *492 Kings Realty v. 506 Kings LLC,* 105 AD3d 991 (2nd Dept., 2013); *Regatta Condo v. Mamoroneck,* 303 AD2d 740 (2nd Dept., 2003) [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Plaintiff maintains that Defendant's proximate cause argument is not on point and contrary to the rulings in *Soto v. NYCTA, supra* as well as *Powers v. 31 E. 31 Street, supra.* He points out that determinations about apportionment of liability is almost always a question of fact which is a jury function. See *Wartels v. County Asphalt,* 29 NY2d 372 (1972); *Nallan v. Helmsley-Spear,* 50 NY2d 507 (1980); *Chiodi v. Soliman,* 174 AD2d 329 (1st Dept., 1991); *Perla v. NY Daily News,* 123 AD2d 349 (2nd Dept., 1996). Consequently, he contends that the apportionment is not against the weight of evidence or improper because Defendant has offered no basis to set aside the jury's determination concerning apportionment of fault. See *Williams v. NYC,* 71 AD3d 1135 (2nd Dept., 2010); *Seaman v. Babylon,* 231 AD2d 704 (1995); *Alexander v. NYC,* 59 AD3d 650 (2nd Dept., 2009); *Lopez v. Hage,* 127 AD3d 824 (2nd Dept., 824) [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Plaintiff objects to any possible inclusion of the architects, engineers and Mr. Fixler on the Jury Verdict Sheet regarding apportionment. He states that it was a complete surprise since the issue was not mentioned during jury selection. He notes that Defendant did not timely give notice of its intent to place Mr. Fixler on the Jury Verdict Sheet. Thus, bringing the issue up for the first time during the charge conference was plainly improper. Moreover, not only was Mr. Fixler not represented by counsel at the trial because the claims against him were severed but there was also no defined testimony about it. In

particular, there was no testimony about his culpability other than Plaintiff's generic testimony about why he attempted to urinate from the parapet wall. Plaintiff contends that adding Mr. Fixler to the Jury Verdict Sheet would have confused the jury. Thus, he maintains that this Court correctly exercised its discretion in denying Defendant's request to include Mr. Fixler on the Jury Verdict Sheet. See *Feldsberg v. Nitschke,* 49 NY2d 636 (1980) [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Plaintiff further argues that there can be no *Article 16* apportionment as to the architects and engineers when the party is not liable for the tort for which it is alleged to be a joint tortfeasor. See *Johnson v. Peloro,* 62 AD3d 955 (2nd Dept., 2009); *Faragiana v. Concord,* 96 NY2d 776 (2001); *CPLR Section 1602(2)(iv).* Consequently, he asserts that listing a non-culpable defendant on a verdict sheet is improper. See *Cubito v. Kreisberg,* 69 AD2d 738 (2nd Dept., 1979) [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Plaintiff argues that this Court was correct in not allowing the deposition testimonies of Tyler Close and Alycia Messina. He points out that a party who fails to secure testimony or evidence during discovery may not resort to a trial subpoena to obtain materials which could have been obtained in pre-trial disclosure. See *Mastel & Co. V. Smyth Masterson,* 215 AD2d 329 (1st Dept., 1995). He asserts that a subpoena cannot be used as a substitute for discovery to ascertain the existence of evidence. See *Matter of Terry D.,* 81 NY2d 1042 (1993). Pursuant to *22 NYCRR Section 202.21,* he contends that discovery is precluded after the Note of Issue is filed, absent unusual circumstances, including the deposition of a witness who could have been deposed during discovery. See *Ehrhart v. Nassau County,* 106 AD2d 488 (2nd Dept., 1984). He argues that there were no unusual circumstances in the present case. See *Singh v. Finnernan,* 100 AD3d 735 (2nd Dept., 2012); *Tirado v. Miller,* 75 AD3d 153 (2nd Dept., 2010); *Audiovox v. Benyamini,* 265 AD2d 135 (2nd Dept., 2001) [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Plaintiff points out that if it were error in failing to admit the testimony, it was harmless because an error in a trial or ruling that does not change the outcome of a case cannot serve as a basis for reversal of a judgment or order. See *Hayden v. Sieni,* 196 AD2d 573 (2nd Dept., 1993). Because it would not have had a substantial influence on the outcome of the case, Plaintiff argues that any error in not admitting it could not have changed the verdict. See *Barone v. City of Mount Vernon,* 170 AD2d 557 (2nd Dept., 1991); *Mohamed v. TA,* 80 AD3d 677 (2nd Dept., 2011) [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Plaintiff objects to Defendant's public policy argument regarding an assumption of risk claim. He notes that Defendant failed to cite any case for the proposition that the degree and extent of Plaintiff's culpability can justify application of primary assumption of risk doctrine to one who is injured in a non-sporting event. See *Trupia v. Lake George, supra* [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

After extensive colloquy, Plaintiff contends that this Court denied Defendant's motion to enter judgment in its favor after the jury returned its initial verdict, which was inconsistent on its face. Thus, he argues that this Court's decision was correct on the law, correct on the facts and supported by Second Department precedent. Since Defendant has failed to show that this Court was incorrect when it re-instructed the jury after the jury issued an inconsistent initial verdict, Plaintiff maintains that Defendant's

request to revisit the issue should be denied [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

In its Reply Memorandum of Law, dated February 19, 2016, Defendant 125 LLC reiterates its arguments that the verdict should be set aside and judgment as a matter of law entered in its favor; that in the alternate, there should be a new trial; that the verdict is unsupported by and against the evidence; that it was entitled to an *Article 16* apportionment with respect to the architects, engineers and Mr. Fixler; and that the depositions of Tyler Klose and Alycia Messina should have been admitted [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Defendant 125 LLC points out that *New York City Building Code Section 27-334* is not a creation of the "Legislature" but instead the New York City Department of Buildings. It notes that the law is well established that the violation of a regulation, such as a provision of the *Building Code,* is at most some evidence of negligence but does not constitute negligence per se. See *Elliott v. City of New York,* 95 NY2d 730 (2001); *Conte v. Large Scale Development Corp.,* 10 NY2d 20 (1961). Because such a minimal, technical violation does not support a finding of negligence, it argues that Defendant was not negligent[2] [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Although Mr. Fixler was not represented by counsel at trial, Defendant 125 LLC argues that it did not preclude an *Article 16* apportionment because *Article 16* permits an apportionment against a non-party, provided that the non-party was subject to personal jurisdiction[3]. Thus, it argues that any apportionment of fault against Mr. Fixler would not be binding on him in a subsequent trial since he did not participate or have an opportunity to cross-examine witnesses. It maintains that an apportionment bringing the Defendant's apportioned share of the liability to 50% or less would simply limit Defendant's responsibility for non-economic loss to its proportionate share of the liability [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

COURT'S RULINGS

This Court denies Defendant 125 LLC' motion to set aside the verdict in its entirety. It denies its motion for a new trial on the issue of liability regarding the absence of a 10-foot high fence on the roof [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

When considering a motion to set aside a jury verdict pursuant to *CPLR Section 4404(a),* this Court must evaluate the evidence in the light most favorable to the non-movant. It must afford that party every favorable inference that may be drawn from the facts. See *Szczerbiak v. Pilat, supra; Capwell v. Muslim, supra; Lolik v. Big V Supermarkets, supra.* Since the jury makes its determinations regarding the credibility of the witnesses based upon its observations, the jury's determinations are accorded great deference. See *Verizon NY v. Orange and Rockland Utilities, supra; Salony v. Mastellone, supra;*

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[2] This Court notes that the jury felt otherwise [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

[3] This Court notes that Defendant does not cite any case law to substantiate its arguments.

Exarhoules v. Green 317 Mad., supra [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

After due consideration, this Court declines to overturn the jury's determination in this case. Because Defendant's condominium building with 86 unit is a multiple dwelling, it is regulated by the *1968 Building Code.* The *Building Code* classifies the roof as "private and public recreational space". *New York City Building Code Section 27-334* mandates that wire fencing at least 10-foot tall "shall" be constructed when roofs are used for recreational purposes. In fact, Defendant's own expert, Mr. Colgate, an attorney and architect admitted that it was "mandatory" but not "optional". This Court notes that the code is silent regarding any distinction between "active' and "passive" recreational activities. While the violation of a regulation, such as a provision of the *Building Code* is not negligence per se, this Court observes that it is indeed some evidence of negligence. See *Elliott v. City of New York, supra; Conte v. Large Scale Development Corp., supra.* Consequently, there was a valid line of reasoning for the jury to reach its initial as well as revised verdicts, finding Defendant negligent in not providing the 10-foot tall fencing. See *CPLR 4404; Dumbadze v. Chwatt, supra; Derdirian v. Felix Contr. Corp., supra; Cohen v. Hallmark Cards,* 45 NY2d 493; *Lolik v. Big V Supermarkets, supra; Cinao v. Reers, supra; Verizon v. Orange & Rockland Utilities, supra* [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Causation is generally resolved by the finder of fact. See *Derderian v. Felix Construction, supra.* There can be no finding of a superseding cause unless that act allegedly severs the causal nexus which is unforeseeable by the defendant. See *Giufrrida v. Citibank, supra; Mason v. UESS Leasing, supra; Gordon v. Eastern Roadway, supra.* Since a negligent act sets into motion a series of events which lead to the injury, the issue of proximate cause is one for the jury. See *Perez v. NYCHA, supra; Faber v. NYCHA, supra; Shutak v. Handler, supra; McMorrow v. Trimper, supra; Hoenig v. Park Royal, supra.* When a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view. See *Kearney v. Papish, supra; Cinao v. Reers, supra; Handwerker v. Dominick L. Cervi, Inc., supra* [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L]

Defendant strenuously argues that Plaintiff's reckless actions in climbing onto the parapet wall to urinate when he was severely intoxicated were a superseding cause. However, the *New York City Building Code Section 27-334* mandates fencing on roofs of buildings where there are recreational activities. Consequently, the jury's finding of Defendant's negligence as a proximate cause of Plaintiff's accident is supported despite the harm occurring in an unexpected way. See *Argentina v. Emory World Wide, supra; Forte v. Albany, supra; Dumbaze v. Chwatt, supra; Spathos v. Gramatan Management, supra; DiPonzio v. Riordan, supra* [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Defendant's arguments regarding its reliance on the building's Certificate of Occupancy and as well as on the building architects' and engineers' preparation of the building plans are unavailing. See *Gkanios v. Greek Orthodox Church, supra; Zipkin v. NYC, supra; Lescovich v. 180 Madison, supra.* Since both Plaintiff's and Defendant's experts acknowledged that it was "mandatory" to have the 10-foot tall fencing on the roof, Defendant had an obligation to comply with *New York City Building Code Section 27-334* [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Also unpersuasive are Defendant's arguments about the inclusion of the building architects, engineers as well as Jason Fixler on the Jury Verdict Sheet pursuant to *CPLR Article 16* in regard to apportionment for liability. Mr. Fixler was severed from this lawsuit and will appear in a separate proceeding regarding the accident under the same index number. Thus, in the present proceeding, he is not

a party and was without counsel. Because there is still outstanding discovery, he has not yet testified in any discovery proceeding in his separate case. Because the legal theory for him was that he breached a duty to Plaintiff, Mr. Fixler had nothing to do with the building design and/or Defendant 125 LLC's nondelegable duty. Therefore, it would have been too confusing for the jury without full testimony by him regarding his actions on the night of the gathering and why he declined to let Mr. Fixler use the bathroom in his apartment. See *Feldberg v. Nitschke, supra*. Defendant argues that because there was jurisdiction over Mr. Fixler, he could be listed on the Jury Verdict Sheet. However, this Court duly pointed out its concern about any possible finding of fact against him in some percentage when he was not represented by counsel at the trial. Despite this Court's concern about which Defendant 125 was fully aware, it failed to cite any cases for the proposition that someone without counsel in a proceeding can be apportioned liability when he had no chance to defend himself [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

This Court finds that there can be no *Article 16* apportionment as to the architects and engineers when the party is not liable for the tort for which it is alleged to be a joint tortfeasor. See *Johnson v. Peloro, supra; Faragiana v. Concord, supra; CPLR Section 1602(2)(iv); Carmona v. Mathison, supra; Cubito v. Kresiberg*. As Plaintiff pointed out, he is not in privity with the architects and engineers. Moreover, Plaintiff is not an intended or incidental third party beneficiary as a result of the actions by the architects and engineers. See *Espinal v. Melville Snow Construction, supra; Church v. Callinan Industries, supra; 492 Kings Realty v. 506 Kings LLC, supra; Regatta v. Mamoroneck, supra; Lake Placid Club Attached Lodges v. Elizabethtown Builders, Inc.*, 131 AD2d 159, 521 NYS2d 165 (3rd Dept., 1987); *Leonard v. Gateway II, LLC*, 68 AD 408 (1st Dept., 2009); *Fourth Ocean Putnam Corp., v. Interstate Wrecking Co.*, 66 NY2d 38 (1985). See also *Board of Managers of 125 North 10th Condominium v. 125 North 10, LLC*, 42 Misc.3d 1214(A), Unreported Decision, Supreme Court, Kings County (January 6, 2014); *Board of Managers of 125 North 10th Condominium v. 125 North 10, LLC*, 45 Misc.3d 1215(A), Unreported Decision, Supreme Court, Kings County (November 7, 2014); *Board of Managers of 125 North Condominium v. 125 North 10, LLC*, 50 Misc.3d 1208(A), Unreported Decision, Supreme Court, Kings County (January 11, 2016) [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

As far as the apportionment of 60% liability for Defendant and 40% for Plaintiff, this Court notes that the jury arrived at those same figures both times. When a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted the view. See *Kearney v. Papish, supra; Cinao v. Reers, supra; Handwerker v. Dominick L. Cervi Inc., supra*. After all, it is the jury which makes its determination based upon the credibility of the witnesses, and its findings are given great deference. See *Verizon NY v. Orange & Rockland Utilities, supra; Salony v. Mastellone, supra* [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

This Court adheres to its decisions to re-instruct the jury on proximate cause and to subsequently revise the Jury Verdict Sheet. Plaintiff's counsel specifically requested on the record that the jury be re-instructed on proximate cause. This Court permitted counsel to research the issue and entertained arguments from both sides [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

As the Appellate Division has noted, judicial intervention into a special verdict is authorized when there is substantial confusion in reaching a verdict. See *Booth v. JCPenney Company*, 169 AD2d 663, 565 NYS2d 77 (1st Dept., 1991). Thus, the trial court has discretion to require the jury to reconsider the verdict, order a new trial or enter judgment pursuant to the jury's answers. See *CPLR 4111[c]; Mayer v. Goldberg*, 241 AD2d 309, 659 NYS2d 877 (1st Dept., 1997). When the trial court believes that there might be some defect requiring clarification of the jury verdict, it is the better practice to question the jury immediately, or,

if not possible, direct the jurors to return the following morning, giving appropriate instructions before discharging them. See *Pavlou v. City of New York*, 21 AD3d 74, 797 NYS2d 478 (1st Dept., 2005) [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

The Second Department ruled in *Roberts v. County of Westchester*, 278 AD2d 216, 717 NYS2d 276 (2nd Dept., 2000) that the court committed error when it denied plaintiff's request to re-instruct the jury on substantial factor after it rendered an internally inconsistent verdict because the jury was confused. The Second Department held that when a court may have a jury reconsider the verdict, before such reconsideration, a court should re-instruct the jury to help resolve any confusion. As the Second Department found in *Cortes v. Edoo*, 228 AD2d 463, 644 NYS2d 289 (2nd Dept., 1996), when there is an inconsistent jury verdict finding the defendant's negligence was not the proximate cause of the accident but that she was two percent at fault, the trial court committed error when it required the jury to reconsider its verdict without re-instructing the jury on the issue of proximate cause. The Appellate Division noted in *Trotter v. Johnson*, 210 AD2d 946, 621 NYS2d 761 (4th Dept., 1994) that the trial court committed error when it denied plaintiff's counsel's request to re-instruct the jury on proximate cause after the jury rendered an internally inconsistent verdict because there was juror confusion.

Pursuant to case law, this Court was required to re-instruct the jury on proximate cause since there was obvious confusion on the verdict sheet and subsequently revise the Jury Verdict Sheet. See *Booth v. JCPenney Company, supra; CPLR 4111[c]; Mayer v. Golderberg, supra; Pavlou v. City of New York, supra; Roberts v. County of Westchester, supra; Cortes v. Edoo, supra; Trotter v. Johnson, supra* [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

In addition, not only is a jury free to alter its original verdict in order to conform to its real intentions but it is also not bound by the form of the original verdict. See *Ryan v. Orange County Speedway, supra.* Since the jury twice apportioned 60% liability for Defendant and 40% liability for Plaintiff, it conformed to its real intentions. Moreover, determinations about apportionment of liability is almost always a question of fact which is a jury function. See *Wartels v. County Asphalt, supra; Nallan v. Helmsley-Spears, supra; Chiodi v. Soliman, supra.* Since the apportionment is not against the weight of evidence or improper, Defendant has offered no basis to set aside the jury's determination concerning apportionment of fault. See *Williams v. NYC, supra; Seaman v. Babylon, supra; Alexander v. NYC, supra; Lopez v. Hage, supra* [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

This Court adheres to its ruling disallowing the testimonies of Tyler Close and Alycia Messina because Defendant did not comply with the proper procedure for filing a foreign subpoena pursuant to New York State and New Jersey law. After extensive argument by counsel, this Court pointed out that in order to serve a New Jersey subpoena pursuant to *New Jersey Rule 4:11(b)*, the New Jersey statute requires that a New York subpoena also be served with the New Jersey subpoena. *New Jersey Rule 4:11(b)* pertains to testimony for use in a foreign state and submission of a foreign subpoena. The New Jersey statute indicates that whenever a deposition of a person is to be taken in New Jersey, pursuant to the laws of a foreign state such as New York, for use in connection with the proceedings in New York, an out-of-state attorney or party may submit a foreign subpoena along with a New Jersey subpoena from an attorney authorized to practice law in New Jersey or to the clerk of the Court in the county in which discovery sought is to be conducted in New Jersey [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

The foreign subpoena in New York must include the required phrase below the case number for the issuance of a New Jersey subpoena under the *New Jersey Rule 4:11-4(b)* and shall be filed in accordance

with *New Jersey Rule 1:5-6(b).* Pursuant to the New Jersey statute, a subpoena must state the name of the New Jersey court issuing it and comply with the requirements of *New Jersey R4:14-7* and incorporate the terms and conditions used in the foreign subpoena in New York to the extent those terms and conditions do not conflict with *New Jersey R:4:14-7.* The subpoena must contain the caption and case number of the foreign case in New York to which it relates, identifying the foreign jurisdiction and the court where the case is pending [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

If a deposition of a person is to be taken in New Jersey, pursuant to the laws of the foreign state which is New York, its laws must also be addressed. Consequently, *CPLR Section 3108* is applicable because it pertains to the *Interstate Depositions Discovery Act ("Act").* See *Wynkoop v. County of Nassau,* 139 AD2d 731 (2nd Dept., 1988). Pursuant to the *Act,* New York litigants wishing to depose an out-of-state witness in one of the participating jurisdictions must also generally adhere to certain requirements. The lawyer representing a party in New York State court must issue a New York subpoena pursuant to the rules of *CPLR Article 23.* After the subpoena is issued in New York, the lawyer must obtain a subpoena form of the county or district where the witness resides and prepare such form in order to incorporate the same terms as the original subpoena. After the form is completed, the attorney must present a clerk of the court in a district or county where the witness resides with the completed subpoena form and the original subpoena. The clerk will issue an identical subpoena under the seal of such statement for service upon the person consistent with the original subpoena [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Pursuant to the *Act,* discovery authorized by the subpoena is to comply with the rules of the state where it occurs which is New Jersey. Motions to quash, enforce or modify the subpoena issued pursuant to the *Act* shall be brought in and governed by the rules of the discovery state which is New Jersey. Thus, certain procedures are to be followed. Although *CPLR 3108* indicates that a commission is favored, the New Jersey statute indicates that the commission is not necessary. However, if a litigant is not inclined to use the commission, the foreign state subpoena which is New York and the New Jersey subpoena can be served by a New Jersey practitioner. Nonetheless, those subpoenas need to be in a certain form and served in a certain manner. However, the procedures were not followed in this instance. Pursuant to *CPLR 3108,* Defendant was to obtain an order granting leave to serve the New Jersey subpoenas. Defendant did not do this. Instead Defendant served all the subpoenas in this matter first and this Court only learned about the subpoenas during the trial when Plaintiff objected. Further, the New Jersey subpoenas were required to have specific language which was absent. Since Defendant failed to follow the required procedure, the subpoenas were not served properly pursuant to *CPLR 3108* and New Jersey law [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

This Court notes that counsel failed to demonstrate unusual circumstances as well as substantial prejudice if this information is not allowed pursuant to *CPLR Section 3102(d).* While this Court observes that the taking of a deposition in the middle of a trial is indeed unusual, this information about Tyler Klose and Alycia Messina could have been ascertained during normal pre-trial discovery. Consequently, certain trial strategy decisions were made which had consequences. As a result, this Court determined that there was no substantial prejudice to Plaintiff since he was aware of the witness list two months before trial and no substantial prejudice to Defendant because there was testimony from other witnesses at the party. Thus, this Court denied Defendant's request for use of the testimonies of Tyler Klose and Alycia Messina [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

A party who fails to secure testimony or evidence during discovery may not resort to a trial subpoena to obtain materials which could have been obtained in pre-trial disclosure. See *Mastel & Co. V.*

Smyth Masterson, supra.; Matter of Terry D., supra. Discovery is precluded pursuant to *22 NYCRR Section 202.21* after the Note of Issue is filed, absent unusual circumstances, including the deposition of a witness who could have been deposed during discovery. In the present case, the witnesses in New Jersey were known to Defendant for quite some time. Thus, it cannot be considered an unusual circumstance. See *Ehrhart v. Nassau County, supra; Singh v. Finnerman, supra; Tirado v. Miller, supra; Audiovox v. Benyamini, supra* [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Even if this Court should have admitted the testimonies, it was harmless error to exclude such testimonies. The testimonies related to Plaintiff's knowledge about where the bathroom was located. The jury found that Defendant was not negligent for not having a bathroom on the roof. See *Hayden v. Siena, supra; Barone v. City of Mount Vernon, supra; Sheridan v. Sheridan, supra; Mohammed v. TA, supra* [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Despite Defendant's argument about strong policy considerations to support its conclusion that it had no duty to protect Plaintiff, this Court adheres to its decision in not to give an assumption of risk Pattern Jury Instruction. Plaintiff's accident does not qualify as a non-sporting event. Thus, an assumption of risk PJI charge is not warranted. See *Truvia v. Lake George Central School District, supra* [Defendant 1, Exhs. A-J; Plaintiff 2; Defendant 3, Exhs. K-L].

Therefore, it is ORDERED that:

Defendant's motion to set aside the jury verdict and in the alternative for a new trial is DENIED in its entirety.

Clerk to enter Judgment.

The foregoing constitutes the Decision and Order of the Court.

Enter:

March 31, 2016
Tirpack v. 125 North 10, LLC
(Index No. 13824/12)

DAWN JIMENEZ-SALTA
Justice Supreme Court

Hon. Dawn Jimenez-Salta

KINGS COUNTY CLERK
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