APL-2013-00237

New York County Clerk's Index No. 102526/10

Court of Appeals

STATE OF NEW YORK

JOSEPH W. POWERS,
by his GUARDIAN AD LITEM,
WILLIAM T. POWERS,

Plaintiff-Appellant,

against

31 E 31 LLC and B & L MANAGEMENT CO., INC.,

Defendants-Respondents.

BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC. AS *AMICUS CURIAE*

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President of the Defense Association of New York, Inc.

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CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. (hereinafter "DANY") as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

DANY is a bar association, whose purpose is to bring together by association, communication and organization attorneys and qualified non-attorneys in the State of New York who devote a substantial amount of their professional time to the handling of litigated civil cases and whose representation in such cases is primarily for the defense; to continue to improve the services of the legal profession to the public; to provide for the exchange among the members of this association of such information, ideas, techniques, procedures and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers; to elevate the standards of trial practice and develop, establish and secure court adoption or approval of a high standard of trial conduct in court matters; to support and work for the improvement of the adversary system of jurisprudence in our courts and facilitate and expedite the trial of lawsuits; to initiate a program of education and information in law schools in emphasizing trial practice for defense attorneys; to inform its members and their clients of developments in the courts and

legislatures affecting their practice and by proper and legitimate means to aid in such developments when they are in the public interest; to establish an educational program to disseminate knowledge by means of seminars and other pedagogical methods on trial techniques for the defense; to promote improvements in the administration of justice; to encourage prompt and adequate payment of every just claim and to present effective resistance to every non-meritorious or inflated claim; and to take part in programs of public education that promote safety and help reduce losses and costs resulting from accidents of all kinds.

This action is one for damages for personal injuries sustained by plaintiff when he fell from a setback ledge outside of the second floor of an apartment that his friend, Conway, had recently moved from, but still had the keys to, to the bottom of a "shaft" area adjacent to the setback ledge. Plaintiff here contends that his act of improperly climbing out onto the setback ledge in the early morning hours after a night of drinking and walking around with Conway, who no longer lived in the apartment, and other friends, was a foreseeable incident for which the defendant should be held responsible. DANY respectfully submits that this would impermissibly transform the defendant and all similarly situated owners in this State into guarantors of safety rendering them responsible for the

consequences of any incident occurring on their property whether foreseeable or not. But that is not the standard for negligence. And crucial to any determination of what is probable is consideration of the concept of foreseeability. Foreseeability is what one would reasonably expect, not what might conceivably occur, and it does not call for prophetic vision.

Here, no special danger at this building warned the defendant that there was need of the special measures of precaution demanded by plaintiff. No like accident had occurred before. There was no indication that residents were improperly using the setback ledges at all, much less to congregate to smoke or drink. Not only was this activity barred, the testimony showed that no one from the defendant knew such activity had occurred. Therefore, ordinary caution did not involve forethought of this extraordinary peril.

DANY further respectfully submits that, as more fully set forth in this brief, the Appellate Division properly held that the defendants met their initial summary judgment burden by way of the certificate of occupancy and that plaintiff failed to raise an issue of fact as to the purported building code violations.

Finally, this brief will show that the contentions regarding Labor Law § 240 and window guard regulations, which are raised by amicus curiae New York State Trial Lawyers

Association and embraced by plaintiff, are devoid of merit.

The order of the Appellate Division should be affirmed.

STATEMENT OF FACTS

a. Factual Background

Plaintiff Joseph W. Powers and three friends spent the early morning hours of Saturday, August 23, 2008 drinking at several locations in New York City. [A120-126; A146-149; A151-152; A249-A252]. At or about 4 a.m., and after having had drinks in two different bars, one of the foursome, Christopher Conway, brought the group to "have a few beers" at his former apartment located at 31 East 31st Street in Manhattan (the "Building"). [A106; A256]. Although Mr. Conway had moved out of Apartment 2C in the Building several days before, he retained keys to the apartment. [A99-100; A106].

Upon arrival at the apartment, Mr. Conway gave his friends a brief tour. [A168] Included on the tour was a stop on a setback ledge located outside Apartment 2C. [A168] The setback ledge was accessed through a window at an end of a hallway within the apartment and Mr. Conway led the group in climbing through the window onto the setback ledge. [A168; A261-262]. The area was fairly dark, although the moon provided some light, as did light spilling out of the windows of the adjacent apartments and from the city in general. [A267-268]. After walking around on the ledge for a few minutes, the entire group climbed back through the window and back into Apartment 2C. [A177; A269]. At some point after all four had returned inside,

the other three realized that Mr. Powers was not in the apartment. [A192; A195; A270]. A search ensued and he was located at the bottom of a "shaft" area adjacent to the setback ledge. [A117; A189; A273; A274]. No one witnessed Mr. Powers' fall. At the hospital at 5:53 am, approximately one hour after he fell, Mr. Powers' blood alcohol level was 153 mg/dl or 0.15%. [SA2; SA-60].

The Building has thirteen stories with setback ledges outside the second, third and fourth floors. [A342; A360; A371). No doors provide access to any of these setback ledges; the ledges can be accessed solely by climbing through an apartment window set between 2.5 and 3 feet off the floor. [A380-81; A383]. The building superintendent testified that tenants were not permitted onto the setback ledges. [A380]. He further testified that he never observed anyone on the setback ledges, including the one outside of his apartment on the third floor. [A371, A377; A386]. The superintendent also testified that he never heard of anyone using the ledges "to do anything". [A386]

Mr. Conway testified that occasionally, he and others residing in Apartment 2C would use the setback ledge to smoke but that he had never discussed using the setback ledge with anyone from the building, nor had he ever seen any building personnel out there. [A110-111; A114; A116].

The second floor setback ledge outside of Apartment 2C is located in the back of the building and is approximately five feet wide. [SA4]. At all times relevant to the matter at bar, no tables, chairs or potted plants were set up on the second floor setback ledge. [A113; A179-180; A287]. The second floor setback ledge does not have a parapet or a railing. [A118; A374]. A gutter runs along the edge of the setback ledge; leaders from the setback ledges on the higher floors extend into the second story setback ledge and leaders from the second story setback ledge feed into the Building's drainage system. [SA4].

The distance to street level from the second floor setback ledge is approximately eighteen feet (SA4). A portion of the setback ledge abuts a building facing 32nd Street; however, there is another portion of the ledge which abuts an area where the other building is not built up. Rather, there is an area approximately six feet four inches by eight feet five inches which, when one looks down from the second floor setback ledge, one sees the top of the cellar level of the building located on 32nd Street. [SA4-5]. This area is the "shaft" where plaintiff was found by his friends.

The Building was constructed in 1909 as a commercial loft building. [SA5]. At that time, the Building Code of 1895 (the "1895 Code") was in effect. [A421-429]. Under the 1895 Code, buildings whose walls were finished with rain gutters did not

need to have parapets. [A429]. The 1895 Code was superseded by the New York City Building Code of 1916 (the "1916 Code") [A430-435], which was itself replaced by the New York City Building Code of 1938 (the "1938 Code"). [A436-445]. Under both the 1916 Code and 1938 Code, parapet walls were not required when the walls were finished with gutters. [A435; A445]. In 1968, the New York City Building Code was again revised (the "1968 Code"). In 1979, conversion of the Building to a multiple dwelling was completed, at which time the current Certificate of Occupancy was issued. [A417-A420; SA20-SA23]. The Certificate of Occupancy indicates on its face that the conversion was done under the "New Code." [SA20]. The work that was performed, which was all interior work, was done under the 1968 Code. [SA6-SA7]. Under Section 27-115 of the 1968 Code, the entire building would have to be brought into compliance with the 1968 Code only if the cost of the alterations being performed exceeded sixty percent (60%) of the building's value. [A454; SA8]. If the cost of the alterations was less than sixty percent of the building's value, only the portions being altered were potentially subject to the 1968 Code. [A454]. The conversion cost $1,380,000. [SA8]. In order for the conversion to be subject to Section 27-115 of the 1968 Code, the value of the Building would have to have been no more than $2,300,000. [SA-8]. According to Cornelius Denis, defendant's engineering

expert and a former Deputy Commissioner of the New York City Department of Buildings, the value of the Building exceeded $2,300,000 in 1979. [SA3; SA8].

b. Procedural Background

Defendants moved in Supreme Court, New York County for summary judgment, arguing that: plaintiffs' claims premised upon any statutory violations should be dismissed; since no one saw the accident and plaintiff does not recall it, there was no showing of proximate cause; any danger of falling off the setback ledge was open and obvious; and, plaintiff's unforeseeable conduct was a superseding and sole proximate cause of his injuries. Defendants' motion was denied.

The Appellate Division, First Department reversed and dismissed the complaint. In so doing, the court held that "[h]ere, given the nature and location of the setback, it was unforeseeable that individuals would choose to access it, and thus defendant had no duty to guard against such an occurrence." 105 A.D.3d 657, 657, 965 N.Y.S.2d 7, 8. That court also determined that plaintiff failed to raise any issue of fact on the purported statutory violations. 105 A.D.3d at 657-58, 965 N.Y.S.2d at 8-9.

Plaintiff moved in this Court for leave to appeal and that motion was granted. 21 N.Y.3d 863, 972 N.Y.S.2d 220 (2013).

POINT I

THE APPELLATE DIVISION CORRECTLY RULED THAT THIS INCIDENT WAS UNFORESEEABLE AS A MATTER OF LAW, AND THIS COURT SHOULD AFFIRM

Despite the tragic nature of plaintiff's injuries, the incident in this case was not within the range of prudent foresight, and the Appellate Division, First Department correctly ruled that the defendant was not liable for this unforeseeable incident. Plaintiff's allegations sounded in negligence. Negligence, however, does not impose liability for what is *possible*, but what is the *probable* consequence of an act or omission. Negligence had been defined as "the absence of care, according to the circumstances." Palsgraf v. The Long Island R.R. Co., 248 N.Y. 339, 341 (1928). A "wrong is defined in terms of the natural or probable." Id., 248 N.Y. at 345.

Actionable negligence is not premised whether anything could have been done to prevent an incident, but what a reasonably prudent person would have done under the circumstances. Contrary to plaintiff's assertions, the mere fact that an incident occurred does not establish liability on the part of a defendant. See, Lewis v. Metro Transportation Auth., 99 A.D.2d 246, 472 N.Y.S.2d 368, aff'd, 64 N.Y.2d 670, 485 N.Y.S.2d 252 (1994). Owners or possessors of land owe a duty to

act in a reasonable manner in maintaining their property in a reasonably safe condition in view of all circumstances. See, Basso v. Miller, 40 N.Y.2d 233, 386 N.Y.S.2d 564 (1976). But owners are not guarantors of safety. See, Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507, 429 N.Y.S.2d 606 (1980). And an owner will not be held liable for failing to guard against the remote possibility of an accident that could not have been foreseen in the exercise of ordinary care. See, Hubbell v. City of Yonkers, 104 N.Y. 434 (1887).

Here, no special danger at this building warned the defendant that there was need of the special measures of precaution demanded by plaintiffs. No like accident had occurred before. There was no indication that residents were improperly using the setback ledges at all, much less to congregate to smoke or drink. Not only was this activity barred, the testimony showed that no one from the defendant knew such activity had occurred. Therefore, ordinary caution did not involve forethought of this extraordinary peril.

Plaintiff, however, demands that his act of improperly climbing out onto the setback ledge in the early morning hours after a night of drinking and walking around with Conway, who no longer lived in the apartment, and other friends, was a foreseeable incident for which the defendant should be held responsible. Respectfully, this would impermissibly transform

the defendant and all similarly situated owners in this State into guarantors of safety, rendering them similarly situated responsible for the consequences of any incident occurring on their property whether foreseeable or not. But that is not the standard for negligence. And crucial to any determination of what is probable is consideration of concept of foreseeability. Foreseeability is what one would reasonably expect, not what might conceivably occur, and it does not call for prophetic vision.

Foreseeability alone, does not define duty: it merely determines the scope of the duty once it is determined to exist. See, Hamilton v. Beretta U.S.A. Corp., 96 N.Y.2d 222, 232, 727 N.Y.S.2d 7, 12 (2001). Foreseeability has been called "a critical factor" in defining an alleged tortfeasor's duty. See, Blye v. Manhattan & Bronx Surface Tr. Operating Auth., 124 A.D.2d 106, 109, 511 N.Y.S.2d 612, 614 aff'd, 72 N.Y.2d 888, 532 N.Y.S.2d 752 (1988). Whether a breach of a duty has occurred depends upon whether the resulting injury was a reasonably foreseeable consequence of the defendant's conduct. See, Danielenko v. Kinney Rent A Car, Inc., 57 N.Y.2d 198, 455 N.Y.S.2d 555 (1982). If the incident was not foreseeable, or if the owner's conduct was reasonable in light of the circumstances, there is no negligence and no liability. Id., 57 N.Y.2d at 204. As this Court held in 1931, liability can always

be found "(l)ooking back at the mishap with the wisdom born of the event." Greene v. Sibley, Lindsay & Curr Co., 257 N.Y. 190, 192 (1931)(no negligence on part of workman, who had gone down on his knees to look up at a cash register, in failing to foresee that the plaintiff, who was standing at the counter, would not observe his changed position).

Contrary to plaintiffs' contentions and those of amicus curiae New York State Trial Lawyers' Association ("NYSTLA") the liability of a landowner is not limitless as its duty will only arise when the risk is foreseeable. See, Palsgraf, supra, 248 N.Y. at 344. The concept of proximate cause "stems from policy considerations that serve to place manageable limits upon liability that flows from negligent conduct." Derderian v. Felix Contracting Corp., 51 N.Y.2d 308, 434 N.Y.S.2d 166 (1980). In DiPonzio v. Riordan, 89 N.Y.2d 578, 657 N.Y.S.2d 377 (1997), this Court held that a landowner is not liable for the consequences of every remote event:

> [A]lthough virtually every untoward event can theoretically be foreseen "with the wisdom born of the event," the law draws a line between remote possibilities and those that are reasonably foreseeable because "[n]o person can be expected to guard against harm from events which are . . . so unlikely to occur that the risk . . . would commonly be disregarded. (citations omitted)

Id., 89 N.Y.2d at 583, 657 N.Y.S.2d at 380.

As there is little debate about the facts in this case, the

issue of foreseeability and proximate cause can be considered by the court as a matter of law. See, Ventricilli v. Kinney Sys. Rent A Car, Inc., 45 N.Y.2d 950, 411 N.Y.S.2d 1149 (1978). Plaintiff in Ventricilli leased a car with a trunk lid that repeatedly flew open. Plaintiff complained of the defective trunk to the lessor, Kinney, on several occasions. On the date of the incident, plaintiff parked alongside the curb on a city street and tried to slam the trunk shut when Antonio Maldonado's car, which was parked several lengths behind plaintiff, jumped forward and struck him. The jury eventually apportioned fault: 80% to Kinney and 20% to Maldonado.

This Court found that the issues of proximate cause and foreseeability could be considered by the courts. Id., 45 N.Y.2d at 952. In addressing Kinney's liability, this Court determined that while its conduct was a cause of the accident, it was not a proximate cause. This Court reasoned that the word "proximate" meant that the law refused to "trace a series of events beyond a certain point." (citation omitted) Id. The immediate cause of the incident was Maldonado's operation of his vehicle. Id. While it was reasonably foreseeable that Kinney providing a car with a defective trunk would result in plaintiff's repeated attempts to close it, this Court ruled that the collision of the vehicles was not foreseeable. Id.

Plaintiff presents the issue as, in looking back with the

wisdom born of the event, should the setback ledge have had a parapet or railing? That, however, is not the question that must be asked. Because it certainly would have behooved the train guards in Palsgraf to have cautioned the man with the package to wait for another train and for the mechanic in Greene to have warned of his change in pose. But for well over a century, this State has refused to impose a duty upon owners to construct their buildings and maintain their properties in such a manner as to make accidents impossible, "or to use the highest degree of diligence" to make them safe. See, Lafflin v. The Buffalo & Southwestern R.R. Co., 106 N.Y. 136, 139 (1887). Rather, owners in this State are bound to exercise "ordinary care" under the circumstances. Id.

Here, the Appellate Division correctly concluded that the defendant was not liable for this unforeseeable incident. In other words, the court simply ruled that the defendant satisfied its duty of care under the circumstances. The Appellate Division not deviate from this precedent or impose a lesser duty of care upon the defendant. It simply applied this Court's rulings to the undisputed facts, and an affirmance is warranted.

Plaintiff places particular reliance upon this Court's decision in Lesocovich v. 180 Madison Ave. Corp., 81 N.Y.2d 982, 599 N.Y.S.2d 526 (1993) in arguing that the Appellate Division's decision should be reversed. The facts in Lesocovich, however,

were not akin to those in this matter. In Lesocovich, a roof covered a one-story portion of a three-story residential and commercial building. At the time of the incident, the plaintiff had been invited to the building as the guest of a tenant who was using the roof for entertaining. They accessed the roof through a bedroom window in the tenant's apartment. While at the gathering, the plaintiff fell from the flat roof and was rendered a quadriplegic.

According to the facts set forth by this Court, when the tenant had taken possession of the apartment, the window screen had been removed and was lying on the roof. Cinder blocks that may have been used as sitting stools were also on the roof. The roof was not part of the tenant's leased space, and permission was never sought to use it. This Court noted, however, that "it had been used in this manner on prior occasions." Indeed, the dissent in the Appellate Division had noted that the tenant had used the roof on several occasions to sun bathe and to cook out on a charcoal grill. See, Lesocovich v. 180 Madison Ave. Corp., 185 A.D.2d 599, 602 (3d Dep't 1992). The dissent also pointed out that the tenant had seen the landlord's agents making repairs to the roof and that there was an entranceway to an enclosed porch on the roof that was not boarded up. Id. And the tenant was never told the roof or porch was not to be used. The plaintiff claimed that there should have been a railing or

parapet wall around the edge of the roof and that this failure constituted negligence.

In reinstating the plaintiff's complaint, this Court ruled that the defendant failed to satisfy its burden as a summary judgment movant in the first instance. Id., 81 N.Y.2d at 985. This Court identified several issues of fact and ruled that "reasonable persons could differ" as to whether the defendant should have done more to prevent access, and whether the defendant should have foreseen that tenants and their guests would use the roof and porch for recreational purposes and be likely to fall from it because it lacked a railing or a parapet wall. Id.

The instant action is not a case like Lesocovich where young adult tenants in an urban setting used an easily-accessible, flat-roof surface with an enclosed porch adjoining their apartment for sunbathing, cookouts, and socializing with friends in good weather. Here, the facts involve a setback ledge, not a roof and porch sufficient to support what essentially was an outdoor party. The ledge outside Apartment 2C was about five feet wide. [SA 4]. There was no evidence of past parties, such as cinderblocks used as the equivalent of sitting stools. The ledge was not used to cook out on a grill. No one even placed potted plants on the ledge. [A 113, 179-80, 287]. Conway said he and others in his apartment would

occasionally use the ledge to smoke, but he had never discussed this with others in the building or seen any building personnel out on the ledge. [A 110-11, 114, 116]. Conway did not even live in the apartment anymore. The building superintendent testified tenants were not permitted onto the ledges and that he had never seen anyone on them. [A 371, 377, 380, 386]. He had never heard of anyone using the ledges "to do anything." [A 386].

To impose liability upon the defendant in this case would unreasonably expand the duty of care owed by owners in this State. According to plaintiff's theory, an owner would have to anticipate that a prior tenant would return to his or her apartment in the early morning hours after several hours of drinking with his compatriots. The owner must also anticipate that this former tenant and his friends will access a five-foot ledge outside of the apartment through a window to walk around on despite the fact that the owner had prohibited such conduct, and there were no reports of any tenant doing anything on this ledge, much less walking around at 4:00 a.m.

There is no duty to warn against an extraordinary occurrence that would not suggest itself to a reasonably careful and prudent person as one which should be guarded against. See, Toes v. National Amusements, Inc., 94 A.D.3d 742, 941 N.Y.S.2d 666 (2d Dep't 2012). The Second Department in Fellis v. Old

Oaks Country Club, Inc., 163 A.D.2d 509, 558 N.Y.S.2d 183 (1990), mot. for lv. den., 77 N.Y.2d 802, 567 N.Y.S.2d 643 (1991) considered a similar scenario where there was an unforeseeable misuse of the defendant's property. In Fellis, while exiting a bar at about 3:00 a.m. on September 9, 1986, Michael Lopez—the assistant manager of Old Oaks Country Club, Inc.—invited the decedent to accompany him to the club for a late night snack. The decedent had formerly worked at the club as a waitress. The club was closed, but Lopez used his set of keys to enter the premises. Other employees with keys had also brought guests back to the club after closing hours. The general manager of the club was aware of this practice, but never prohibited it.

The kitchen was located on the second floor and was equipped with a dumbwaiter that was used to transport supplies from the ground floor to the kitchen. The dumbwaiter was about 3 1/2 feet high, 3 feet wide, and 2 feet deep. It operated by pushing a button located on the wall outside of it. Although the dumbwaiter had originally been fitted with doors at the ground level that would render the lift inoperable if not closed, the doors had been removed approximately three years before the accident when it broke down. A repairman informed the club's general manager that the doors could not be repaired. In order to remain functional, either the doors had to be

permanently removed or the entire unit replaced. The general manager decided to have the doors removed and later informed the board of this decision. After doors were removed, Lopez and other employees regularly rode the dumbwaiter despite the existence of a flight of stairs located near the dumbwaiter that provided access to the second-floor kitchen.

As he had done on prior occasions when he returned to the club after closing hours to get something to eat, Lopez conducted a cursory security check to make certain the doors were locked and the windows were closed. He next turned on the light that illuminated the stairway leading to the kitchen and instructed the decedent to use the stairs. Lopez then boarded the dumbwaiter. While standing in a crouched position, he activated the control button. As the dumbwaiter started to ascend to the kitchen level, the decedent attempted to jump inside. With only her upper torso inside the dumbwaiter, the decedent sustained fatal injuries when she became wedged between the ascending dumbwaiter and elevator shaft. A subsequent autopsy revealed that the decedent had a blood alcohol level of .26.

The Appellate Division considered these facts and applied controlling law, ruling that there was no legal duty to protect against an occurrence that was "extraordinary in nature and, as such, would not suggest itself to a reasonably careful and

prudent person as one" that should be guarded against. Id., 163 A.D.2d at 511, 558 N.Y.S.2d at 185. The Second Department concluded that despite the fact that the club was arguably aware of the fact that the dumbwaiter had no doors, but remained operational, it owed no duty of care because the decedent's use of the dumbwaiter was not a reasonably foreseeable risk. Id. According to the court, the "form of construction and the size of the dumbwaiter conclusively establish that it was designed solely as a freight elevator." Id. According to the Appellate Division, because the dumbwaiter could barely accommodate an adult, "(t)he remote possibility that a person would seek to use the subject dumbwaiter as a passenger elevator by attempting to board the ascending lift, while it was already occupied by an adult, constitutes an occurrence that is extraordinary in nature," and there was no duty by the defendants "to guard against such a remote possibility." Id.

This State has never equated foreseeability with clairvoyance, and it has never imposed a duty upon owners akin to that of a guarantor of safety. Owners should not, and cannot, be held liable for the consequences of every occurrence on their property, no matter how remote the possibility. See, DiPonzio, supra. But that is precisely what plaintiff and amicus NYSTLA demand in this case. Instead, DANY respectfully asks this Court to follow its long-standing precedent and affirm

the First Department's ruling.

POINT II

THE APPELLATE DIVISION CORRECTLY HELD THAT PLAINTIFF FAILED TO RAISE AN ISSUE OF FACT ON HIS CLAIM OF STATUTORY VIOLATIONS

DANY, respectfully submits that because the certificate of occupancy was prima facie evidence that the building substantially complied with all applicable statutes and Building Code provisions, plaintiff had the burden of raising an issue of fact as to whether a statute or Building Code provision had been violated. A careful review of the record, the relevant New York Multiple Dwelling Law (hereinafter "MDL") provisions and New York City Building Code provisions shows plaintiff did not offer evidence of a Building Code or statutory violation sufficient to raise an issue of fact. Therefore, the Appellate Division correctly dismissed plaintiff's complaint.

A. Certificate Of Occupancy Was Prima Facie Proof Of Compliance

DANY respectfully submits that a valid certificate of occupancy is prima facie proof that the building substantially complied with all applicable statutes and Building Code provisions. By its terms, a certificate of occupancy certifies that the building "conforms substantially to the approved plans and specifications and to the requirements of all applicable laws, rules, and regulations for the use and occupancies

specified herein." [SA 20, 22]. In other words, the certificate of occupancy is the City's certification that "said dwelling conforms in all respects to the requirements of [the MDL], to the building code and rules and to all other applicable law, ..." MDL § 301 (McKinney's).[1] This Court and the Appellate Division accord evidentiary significance to the issuance of a certificate of occupancy. See, Hyman v. Queens Cnty. Bancorp, Inc., 3 N.Y.3d 743, 744-745, 787 N.Y.S.2d 215, 216 (2004)(no "triable issue of fact regarding the defective or dangerous condition of the premises, particularly in light of the certificate of occupancy issued to defendant in 1978"); DeNicola v. Scarpelli, 154 A.D.2d 462, 463-464, 546 N.Y.S.2d 629, 631 (2d Dep't 1989)("the certificates of occupancy, which state on their face that the premises conform 'to all the requirements of the Building Zone Ordinances,' establish the legality of the use of the premises"); DiPasquale v. Haskins, 25 A.D.2d 490, 491, 266 N.Y.S.2d 955, 956 (4th Dep't 1966)("A certificate of occupancy is complementary to a building permit which in effect says that what the applicant proposes to do will

[1] Defendant, as a good faith purchaser, was surely entitled to rely on the certificate of occupancy. *See* Edwards v. Murdock, 283 N.Y. 529, 533 (1940)(certificate of occupancy issued to predecessor in interest could not be revoked where purchaser relied on certificate's existence). 31 E 31 LLC acquired the premises where plaintiff fell by deed dated September 18, 2003, long after the 1979 certificate was issued. A copy of the recorded deed is available on ACRIS. http://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2003092300700001.

be in conformity with pertinent ordinance provisions. The certificate of occupancy certifies that what has actually been done conforms substantially to the approved plans and specifications.")

The issuance of a certificate of occupancy is prima facie evidence of compliance with applicable law because there is a "presumption that public officers have performed the duties imposed upon them by law." Town of Union v. J & M Pallet Co., 50 A.D.2d 628, 629, 374 N.Y.S.2d 749, 752 (3d Dep't 1975); Kayfield Const. Corp. v. Morris, 15 A.D.2d 373, 379, 225 N.Y.S.2d 507, 515 (1st Dep't 1962)("a presumption of regularity attends the action of the Board, and it is incumbent upon the petitioner to overcome that presumption and establish the action to have been without reasonable foundation."); Baumann & Sons Buses, Inc. v. Patchogue-Medford Union Free Sch. Dist., 231 A.D.2d 566, 567, 647 N.Y.S.2d 288, 288 (2d Dep't 1996)(citing Kayfield); see, also, De Lancey v. Piepgras, 138 N.Y. 26, 42 (1893)(a comptroller's deed is "presumptive evidence of itself that the previous proceedings have been regular, and that all the prescribed preliminary steps have been taken; and the recitals in it are evidence against one who claims under the original owner by a subsequent conveyance, or does not pretend to claim under him at all; and the grant cannot be impeached collaterally in a court of law upon the trial of an

ejectment."). Thus, the certificate of occupancy was prima facie evidence that the building complied with all applicable codes, regulations, and statutes and it fell to plaintiff to raise a material issue of fact in order to avoid summary judgment.

B. No Building Code Violation

DANY respectfully submits that plaintiff failed to offer evidence of a violation of the Building Code or a statute sufficient to raise an issue of fact. In the first instance, the Multiple Residence Law was simply inapplicable to the premises because the building from which plaintiff fell was located in New York City. See, New York Mult. Resid. Law § 3 (McKinney's)("1. This chapter shall apply to all cities of less than three hundred twenty-five thousand population and to all towns and villages.").

Plaintiff's contention that New York City Admin. Code § 27-333 required a parapet wall is without merit. Section 27-333 applies to "buildings of construction class II-A, II-B, or II-C," whereas the building here was a class I-B building. [SA 31]. Moreover, parapets are only required under this provision on buildings "that have roof construction of combustible materials." The Building Code defines a roof as the "topmost slab or deck of a building, either flat or sloping, with its supporting members, not including vertical support." New York

City Admin. Code § 27-232. Thus, because the setback ledge was not the "topmost slab or deck of [the] building," it was not a roof within the meaning of the Building Code and therefore § 27-333 did not apply.

Plaintiff's contention that § 62 of the Multiple Dwelling Law applied to require parapet walls on the setback ledge outside the second floor windows is also without merit. New York Mult. Dwell. Law § 62 (McKinney's). Since the certificate of occupancy constituted prima facie evidence of no code or statutory violation, plaintiff had the burden of presenting evidence sufficient to raise an issue of fact. Here, because the building was erected prior to 1909, plaintiff had to offer evidence that MDL § 62 applied to the building. Moreover, because the certificate of occupancy was issued, plaintiff had to offer evidence that the Building Department did not except parapets on the ledge as "not necessary for safety." Plaintiff, however, failed to offer evidence sufficient to raise an issue of fact as to either issue.

In any case, MDL § 62 requires a parapet wall or guard rail to protect "[e]very open area of a roof, terrace, areaway, outside stair, stair landing, retaining wall or porch and every stair window of a multiple dwelling . . ." The apparent purpose of the statute is to require protection in areas routinely frequented by building occupants that pose a fall risk. The

limited scope of the legislature's concern is highlighted by the exception for "the open area of a roof of a garden-type maisonette dwelling project." MDL § 62.

In the case at bar, plaintiff fell from a narrow ledge that could be accessed only by climbing through a window, an area where building occupants had no legitimate reason for visiting. DANY respectfully submits that this Court should not strain to find this area was within the scope of the statute given the limited scope of the legislature's concern.

In fact, the ledge from which plaintiff fell did not fall within the limited scope of the statute's protection. As shown above, the ledge was not a roof as that term is defined in the Administrative Code. Nor was the ledge an outside stair, stair landing, retaining wall, or stair window. The ledge was also not an areaway, which is generally understood as "a sunken space affording access, air, and light to a basement." http://www.merriam-webster.com/dictionary/areaway

The ledge was also not a porch because there was no building entrance to the ledge and it was therefore not "a structure attached to the entrance of a building that has a roof" or "a covered area adjoining an entrance to a building…." http://www.merriam-webster.com/dictionary/porch Similarly, the ledge was not a terrace as that word is generally understood in this context since it was not "a colonnaded porch or promenade"

or "a flat area next to a building where people can sit and relax." http://www.merriam-webster.com/dictionary/terrace Since there was no access to the ledge except through a narrow window, the ledge was not a terrace. Thus, since the ledge from which plaintiff fell was not an open area of "a roof, terrace, areaway, outside stair, stair landing, retaining wall or porch" or "stair window," the statute did not require a parapet.

This Court's decision in Lesocovich v. 180 Madison Ave. Corp., 81 N.Y.2d 982, 599 N.Y.S.2d 526 (1993) is not to the contrary. In Lesocovich, the existence of "a doorway which had once led to an enclosed porch on the roof," even though sealed off (Lesocovich v. 180 Madison Ave. Corp., 185 A.D.2d 599, 601, 586 N.Y.S.2d 681, 683 (3d Dep't 1992) rev'd, 81 N.Y.2d 982 (1993)), was sufficient to raise an issue of fact about "whether, under the applicable law, the failure to install a railing or parapet wall constitute[d] a violation" of MDL § 62. Lesocovich, 81 N.Y.2d at 985, 599 N.Y.S.2d at. Therefore, this Court should find that the Appellate Division properly dismissed plaintiff's claim of code and statutory violations.

POINT III

THE ARGUMENTS ADVANCED BY PLAINTIFF AND THE NYSTLA BASED ON LABOR LAW §240 AND WINDOW GUARD REGULATIONS ARE COMPLETELY MISPLACED

Point III of the amicus curiae brief of NYSTLA centers on the premise that "[a] special concern for height-related hazards has always characterized our State's jurisprudence," with specific reference to Labor Law §240 and window guard regulations (See NYSTLA brief, at p. 16). This argument, which is embraced by plaintiff on page 21 of his reply brief, is specious and should be instantly rejected by this Court.

As to Labor Law §240, this Court has made it abundantly clear that the special protection of the statute is reserved for a narrow class of individuals. For instance, in Whelen v. Warwick Valley Civic and Social Club, 47 N.Y.2d 970, 419 N.Y.S.2d 959 (1978), this Court held that a volunteer who fell from a defective ladder had no claim under the statute. In so doing, this Court stated the following:

> Although the Labor Law defines an individual "employed" as including one who is "permitted or suffered to work" (s 2, subd. 7), this definition must be read in conjunction with that of "employee" which is defined as "a mechanic, workingman or laborer working for another for *hire*" (s 2, subd. 5). To come within the special class for whose benefit absolute liability is imposed upon contractors, owners and their agents to furnish safe equipment for

> employees under section 240 of the Labor Law, a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent. A volunteer who offers his services gratuitously cannot claim the protection afforded by the "flat and unvarying duty" flowing to this special class contained in section 240.

47 N.Y.2d at 971, 419 N.Y.S.2d at 959 (citation omitted)(Court's emphasis). See, also, Stringer v. Musacchia, 11 N.Y.3d 212, 869 N.Y.2d 362 (2008).

Obviously, plaintiff herein does not even come close to being within the "special class" of persons who are entitled to the protection of Labor Law §240.

As to window guard regulations, surely plaintiff and NYSTLA do not intend to equate plaintiff to a child ten years of age or under.

These contentions betray the weakness of the arguments for reversal of the Appellate Division's decision. Indeed, on page 17 of the brief submitted by NYSTLA, it is stated that these regulations are intended "to protect those individuals who either by virtue of age or occupation are not in a position to determine for themselves the safety and security of their environments . . ."

Plaintiff herein was not injured because of any "age or occupation." Rather, as correctly determined by the Appellate Division, he was a victim of his own unforeseeable conduct.

CONCLUSION

For the foregoing reasons, the order appealed from should be affirmed.

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