APL-2015-00247

New York County Clerk's Index No. 155632/12

Court of Appeals

STATE OF NEW YORK

GEORGE NEWMAN and JOANNE NEWMAN,

Plaintiffs-Appellants,

against

RCPI LANDMARK PROPERTIES, LLC,
TISHMAN SPEYER PROPERTIES, INC.
and TISHMAN SPEYER PROPERTIES, L.P.,

Defendants-Respondents.

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

MARGARET G. KLEIN
President of the Defense Association of New York, Inc.

BY: ANDREW ZAJAC
DAWN C. DESIMONE
Defense Association of New York, Inc. as Amicus Curiae

MCGAW, ALVENTOSA & ZAJAC
Two Jericho Plaza, Suite 202
Jericho, New York 11753
516-822-8900

Of Counsel:

Andrew Zajac
Rona L. Platt
Brendan T. Fitzpatrick
Jonathan T. Uejio

Date Completed: March 1, 2016

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES i

CORPORATE DISCLOSURE STATEMENT 1

PRELIMINARY STATEMENT 2

STATEMENT OF FACTS 5

POINT I

PLAINTIFF'S ACTIONS CONSTITUTED THE SOLE PROXIMATE CAUSE OF THE INCIDENT, AND THIS COURT SHOULD AFFIRM THE DISMISSAL OF HIS COMPLAINT. 10

POINT II

THE PLAINTIFF'S CHOICE TO PROCEED IN THE MANNER IN WHICH HE DID WAS UNFORESEEABLE AS A MATTER OF LAW 23

CONCLUSION 26

TABLE OF AUTHORITIES

PAGE(S)

CASES

Blake v. Neighborhood Housing Servs. of New York City,
1 N.Y.3d 280 (2003) 14,19

Bombero v. NAB Construction Corp.,
10 A.D.3d 170, 172 (1st Dep't 2004) 10

Bridges v. Riverbay Corp.,
102 A.D.2d 800, 64 N.Y.2d 1075 (1985) 13

Cherry v. Time Warner, Inc.,
66 A.D.3d 233 (1st Dep't 2009) 21

Derdiarian v. Felix Contracting Corp.,
51 N.Y.2d 308, 314 (1980) 12

Di Ponzio v. Riordan,
89 N.Y.2d 578, 584(1997) 23,24

Gasper v. Ford Motor Company,
13 N.Y.2d 104 (1963) 10

Macey v. Truman,
70 N.Y.2d 918 (1987) 13,14,19

Marin v. San Martin Rest., Inc.,
287 A.D.3d 441 (2nd Dep't 2001) 11

Miro v. Plaza Constr. Corp.,
9 N.Y.3d 948 (2007) 19

Misirlakis v. East Coast Entertainment Properties, Inc.,
297 A.D.2d 312 (2nd Dep't 2002) 20

Montgomery v. Federal Express Corp.,
4 N.Y.3d 805 (2005) 11,15,19,20,21

Nalepa v. South Hills Business Campus, LLC,
123 A.D.3d 1190 (3rd Dep't 2014) 16

Nallan v. Helmsley-Spear, Inc.,
50 N.Y.2d 507 (1980) 12

Piccirillo v. Beltrone-Turner,
284 A.D.2d 854, 856 (3d Dep't 2001) 13

Plass v. Solotoff,
5 A.D.3d 365, 367 (2d Dep't 2004) 20

Powers ex rel. Powers v. 31 E 31 LLC,
24 N.Y.3d 84, 94 (2014) 23

Robinson v. East Med. Ctr.,
6 N.Y.3d 550 (2006) 16,19,20

Tagle v. Jakob,
97 N.Y.2d 165, 168 (2001) 23

Torres v. 1420 Realty, L.L.C.,
111 A.D.3d 434 (1st Dep't 2013) 16,25

Urias v. Orange County Agricultural Society, Inc.,
7 A.D.3d 515, 516 (2nd Dep't 2004) 20

Ventricelli v. Kinney Sys. Rent A Car, Inc.,
45 N.Y.2d 950, 952 (1978) 24

Weingarten v. Windsor Owners Corp.,
5 A.D.3d 674, 675 (2nd Dep't 2004) 20

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; to promote diversity in the legal profession 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 is an action to recover damages for personal injuries commenced by the highly-experienced plaintiff stemming from his ill-advised decision to descend from a loading platform by stepping onto piled-up crates. The plaintiff chose to do so notwithstanding the nearby presence of a securely-mounted ladder for use in descending from the platform.

It is well settled that the law does not protect an experienced worker from injuries caused solely by his or her ill-advised decision to proceed with the work in an incautious manner, when alternative, safe means are readily available. Those principles are sound and there is no policy reason to revisit them. Application of those principles should result in an affirmance herein.

STATEMENT OF FACTS

Almost twenty-five years ago, following a twenty-five year career as a patrol officer with the New York City Police Department, George Newman ("Plaintiff") started working as a part-time security officer at Rockefeller Center (R. 110-111). Rockefeller Center is comprised of ten buildings between 47th Street and 51st Street, from 5th Avenue to 6th Avenue, in New York City (R 276). All ten buildings are connected at the concourse level and the subbasement level (R 276 - 277). The subbasement includes several loading docks which service all of the buildings in the complex (R 123, 281 - 282). While most of the loading docks have ramps leading from the floor where one would park a vehicle to the top of the loading dock, one loading dock does not (R 285). That loading dock, located near Column 75, is the south loading dock, also referred to as the "620 loading dock" (R 285). The 620 loading dock is approximately 16 feet deep (from the edge of the platform to the back wall) and 14 feet wide (from side to side) (R 133, 163, 281). The loading platform is approximately three to four feet off the ground and is made of concrete (R 136). Unlike the other loading docks, the 620 loading dock has a yellow ladder secured to the wall to

provide people with a means of getting between the floor and the loading dock platform (R 285, 337, 339, 341, 344).

Between 1991 and 1998, Plaintiff patrolled Rockefeller Center for Rockefeller & Company (R 110-111). Beginning in August 1997 and continuing through at least April 29, 2012, Plaintiff was employed as a part-time security guard by Lazard Freres, a tenant at 30 Rockefeller Plaza (R. 104). Lazard Freres maintained a separate security staff from that maintained by the building manager, Tishman Speyer Properties, L.P. (R 118 - 119). For at least fifteen years prior to being injured, Plaintiff worked between two and five days a week, averaging approximately 40 hours a week patrolling Lazard Freres' premises and related facilities at Rockefeller Center (R 104). His duties included making rounds between the security rooms, elevator rooms, elevator shafts areas, computer rooms, subbasement storage facilities, and the freight area (R 113, 119, 144).

On the morning of Sunday, April 29, 2012, Plaintiff reported for an 8:00 a.m. to 4:00 p.m. shift (R 126 - 127). He was assigned to work with a partner, Kenny Rinaldi (R 124 - 125). Sometime after 9:00 a.m., he and Mr. Rinaldi headed to the subbasement to check out the computer room and the new storage room that Lazard Freres had taken (R 129, 132).

After showing Mr. Rinaldi the new storage area, which was located in a corridor leading from the elevator to the 620 loading dock, Plaintiff followed his partner (R 132, 161, 164). They emerged from the corridor onto the back of the 620 loading dock, off to the right of center (R 149 - 150). Plaintiff had traversed the 620 loading dock several months prior to the accident, although at that time he had neither climbed up on, or down from, the loading platform (R 144, 154 - 155).

Mr. Rinaldi walked to the center of the well-lit, 14 foot wide platform and stepped down onto a stack of plastic crates that had been placed at the foot of the loading dock platform (R 159, 160, 167). Three crates were stacked, with two on the bottom and one on the top (R 172). The top of the top crate was even with the platform (R 175). Plaintiff followed behind Mr. Rinaldi and watched as his partner climbed down the crates, despite the fact that a bright yellow ladder was secured on the wall less than 10 feet away (R 167, 285). At no time prior to following Mr. Rinaldi across the loading platform or down the crates did Plaintiff look to either side of the well-lit 14 foot wide loading platform to see if there was another means by which to get down (R 157). Rather, without looking to see if any proper

means of descending from the platform existed, he stepped onto the top crate, taking Mr. Rinaldi's extended hand (R 175 - 176). As Plaintiff began to step with his second foot, he let go of Mr. Rinaldi's hand, his leg gave way, the crates shifted and he fell to the ground (R 177).

Who placed the crates against the loading dock is a mystery. Plaintiff testified that he had no idea who stacked the three plastic crates by the south side loading dock (R 173). James Hagen, the Protection Supervisor for Tishman Speyer Security who was on duty on April 29, 2012, also testified. Mr. Hagen has been employed at the location, both for prior ownership and for Tishman, since 1981 (R 274). Mr. Hagen testified that at no time prior to the date of loss had he ever seen milk crates stacked up against any loading dock at Rockefeller Center (R 290). He also testified that he was unaware of anyone using milk crates as steps to climb up to or down off of the 620 loading dock or any other Rockefeller Center loading dock either before the date of loss or after (R 293). According to Mr. Hagen, the first time he ever observed milk crates in the loading dock area, let alone stacked up in the loading dock area, was when he reported to the accident scene (R 290).

The defendants moved for summary judgment, which was

denied by the trial court. The motion court stated that "[i]ssues of fact exist as to who the Defendants were negligent in allowing the crates as makeshift steps to remain and whether Plaintiff and to what extent Plaintiff was also negligent." (R 6-7)

The Appellate Division, First Department reversed and dismissed the complaint. 124 A.D.3d 551. Among other things, the court stated that "[p]laintiff's choice to use the crates rather than the ladder was the sole proximate cause of his injuries." (citations omitted)

Thereafter, this Court granted plaintiff's motion for permission to appeal.

POINT I

PLAINTIFF'S ACTIONS CONSTITUTED THE SOLE PROXIMATE CAUSE OF THE INCIDENT, AND THIS COURT SHOULD AFFIRM THE DISMISSAL OF HIS COMPLAINT

It has long been the law that when an experienced worker chooses to perform his or her work incautiously, the worker's action for personal injuries stemming from that choice is subject to dismissal. For example, in Gasper v. Ford Motor Company, 13 N.Y.2d 104 (1963), a window cleaner made the unfortunate choice to sit on a plank which he placed across the glass face of a horizontally opened window. The window collapsed and the worker fell to his death. In dismissing the complaint, this Court held that "[no] duty rest[s] upon an owner to secure the safety of his servant against a condition, or even defects, risks or dangers that may be readily observed by the reasonable use of the senses, having in view the age, intelligence and experience of the servant." 13 N.Y.2d at 110 (citations and internal quotation marks omitted).

Naturally, the Appellate Division continues to properly apply this principle. For instance, in Bombero v. NAB Construction Corp., 10 A.D.3d 170, 172 (1st Dep't 2004), the court stated that "[w]hen a worker confronts the ordinary and

obvious hazards of his employment, and has at his disposal the time and other resources . . . to enable him to proceed safely, he may not hold others responsible if he elects to perform his job so incautiously as to injure himself." quoting, Marin v. San Martin Rest., Inc., 287 A.D.3d 441 (2nd Dep't 2001).

This case presents yet another scenario in which a plaintiff's knowing decision to eschew a safe passage of travel for a more dangerous—and ultimately, injury producing—path warranted the finding the injured party's actions represented the sole proximate cause of the incident. Here, the Appellate Division, First Department correctly relied upon this Court's decision in Montgomery v. Federal Express Corp., 4 N.Y.3d 805 (2005) to conclude Plaintiff's actions constituted the sole proximate cause of his accident, and this Court should affirm.

According to the uncontested facts in this case, the highly-experienced plaintiff worked as a security officer at Rockefeller Center since 1991 and was very familiar with its buildings and layout. On the date of the incident, plaintiff was on the 620 loading dock. Unlike the other loading docks, the 620 loading dock had a yellow ladder secured to the wall to provide people with a means of getting between the floor

and the loading dock platform. Plaintiff had traversed the 620 loading dock several months before the accident, albeit he never climbed up or down from the loading platform. His partner walked to the center of the well-lit, 14-foot wide platform and stepped down onto a stack of plastic crates that had been placed at the foot of the loading dock platform. Plaintiff blindly followed and chose to climb down the crates, despite the presence of a bright yellow ladder was secured on the wall less than 10 feet away. As plaintiff began to step with his second foot, he let go of his partner's hand, his leg gave way, the crates shifted, and he fell to the ground.

Plaintiff sued for negligence. As with any negligence action, a plaintiff must demonstrate not only that the defendant owed a duty of care and that this duty was breached, but also that this breach was a substantial causative factor in the sequence of events that led to the injury. See, Nallan v. Helmsley-Spear, Inc., 50 N.Y.2d 507 (1980). The concept of proximate cause "stems from policy considerations that serve to place manageable limits upon liability that flows from negligent conduct." Derdiarian v. Felix Contracting Corp., 51 N.Y.2d 308, 314 (1980). (citations omitted) "[L]ogical inferences [are] to be drawn

from the evidence." Piccirillo v. Beltrone-Turner, 284 A.D.2d 854, 856 (3d Dep't 2001). (citations and internal quotation marks omitted) Where evidence of proximate cause is insufficient, dismissal is warranted no matter how clear the duty or how clear its breach. See, Bridges v. Riverbay Corp., 102 A.D.2d 800, 800, aff'd on opinion below, 64 N.Y.2d 1075 (1985) (complaint dismissed where plaintiff failed to show causal connection between landlord's negligence in permitting use of fireworks in the parks at the defendant's housing complex and "independent assault" by an "unknown person who ignited the firecracker at the peephole of her door").

The admissible evidence in this case shows that plaintiff's own actions in trying to alight from the loading dock despite the presence of a safer avenue represented the sole, proximate cause of the incident. That was the scenario in Macey v. Truman, 70 N.Y.2d 918 (1987), where this Court found a defendant was entitled to summary judgment because plaintiff's injury was not the result of any purported unsafe condition left uncorrected on the premises, but was the direct result of the course and the manner in which plaintiff alone pursued his tasks.

In Macey, the defendant had permitted the plaintiff and others to enter his land and cut various trees that had been previously marked prior for removal. During the cutting of the marked trees, one of them fell and became entangled on a standing tree that was not marked. The plaintiff failed to dislodge the marked tree. He and his two companions decided to cut down the unmarked tree that the marked one rested on. While they cut the unmarked tree, it fell on the plaintiff. Despite the defendant having invited the plaintiff on his land and marking the trees that the plaintiff was expected to cut down, this Court found the plaintiff's injury did not result from any unsafe condition the defendant had left uncorrected on his land. Rather, the plaintiff was injured as a direct result of the course he and his companions decided to pursue his tasks. Id., 70 N.Y.2d at 919. This Court found the law imposed no duty upon the defendant as the possessor of the land to have protected the plaintiff from the unfortunate consequences of his own actions. Id.

This Court has applied the defense of sole proximate cause to dismiss claims based upon negligence as well as those making allegations based upon the absolute liability found in Labor Law § 240(1). See, Blake v. Neighborhood Housing Servs. of New York City, 1 N.Y.3d 280 (2003) (the

plaintiff was entirely responsible for his own injuries where he misused a safety device free of any defects). This case presents a situation where the defense was appropriately applied to dismiss plaintiff's negligence cause of action. Indeed, while the liability asserted in Montgomery v. Federal Express Corp., supra was based upon negligence and Labor Law § 240(1), the facts there are akin to those in this matter as it involved a plaintiff's choice to proceed on an unsafe path where there was a clear, obvious, and safe alternative.

In Montgomery, the plaintiff and his supervisor were assigned to work in an elevator "motor room" that was located about four feet above the roof level of the building. Upon arriving at the roof on the date of the incident, they discovered that the stairs that led from the roof to the motor room had been removed. This Court noted that while "[t]here was no ladder in the immediate vicinity, . . . ladders were available at the job site." Id., 4 N.Y.3d at 806. In its decision that this Court affirmed, the Appellate Division, First Department held "[a]t that point, the normal and logical response would have been to go and get a ladder or other appropriate safety device to gain access to the motor room." Montgomery v. Federal Express Corp., 307 A.D.2d 865, 866 (1st Dep't 2003). Instead, the workers found a

bucket and placed it upside down in order to get up to the top of a motor room. When the plaintiff went to get down from the roof, he jumped and injured his knee. Based upon those facts, this Court affirmed the First Department's decision that "since ladders were readily available, plaintiff's 'normal and logical response' should have been to get one. Plaintiff's choice to use a bucket to get up, and then to jump down, was the sole cause of his injury." Id., at 806; see, also, Nalepa v. South Hills Business Campus, LLC, 123 A.D.3d 1190 (3rd Dep't 2014) and Torres v. 1420 Realty, L.L.C., 111 A.D.3d 434 (1st Dep't 2013).

More recently, this Court considered the issue of whether a plaintiff's refusal to choose a safe manner to work constituted the sole proximate cause of an incident in Robinson v. East Med. Ctr., 6 N.Y.3d 550 (2006). In Robinson, the plaintiff worked in a building under construction and was using a six-foot ladder to install components of pipe hanging systems onto overhead structural beams. The ladder was sufficient to allow the plaintiff to perform safely his task in a hallway. But when the plaintiff moved from the hallway into an office, he observed that the structural beams were at a height of twelve to 13 feet from the floor, a height greater than in the hallway. The

plaintiff, however, chose to stand on the top cap of the six-foot ladder and continued with his work. As he worked, the plaintiff lost his balance and fell. The plaintiff testified he had asked for an eight-foot ladder a few hours before the incident, and his foreman replied "I'll see if I can get you one." Id., 6 N.Y.3d at 553. While the foreman did not supply plaintiff with an eight-foot ladder, the plaintiff knew there were eight-foot ladders on the job site *and* knew where they were stored.

This Court affirmed the dismissal of the plaintiff's complaint, but unlike the Appellate Division, it ruled the plaintiff's conduct was, as a matter of law, the sole proximate cause of his injuries, holding that the plaintiff's choice to proceed with the six-foot ladder despite knowing there were eight-foot ladders available to allow him to perform his work safely, as well as where to find them, was the sole cause of the accident:

> Plaintiff knew that he needed an eight-foot ladder in order to screw the rods into the clamps once he left the hallway and entered the office suite. He acknowledges that there were eight-foot ladders on the job site, that he knew where they were stored, and that he routinely helped himself to whatever tools he needed rather than requesting them from the foreman. While intimating that all the eight-foot ladders may have

> been in use at the time of his accident, plaintiff also conceded that his foreman had not directed him to finish the piping in the office suite before undertaking other tasks, and testified that there was sufficient other work to occupy him for the rest of the workday. He also testified that on prior occasions he had waited for a ladder to be freed up by other workers. He claims to have asked his foreman for an eight-foot ladder only an hour or two before he started to install the rods in the office suite. Yet he proceeded to stand on the top cap of a six-foot ladder, which he knew was not tall enough for this task, without talking to the foreman again, or looking for an eight-foot ladder beyond his immediate work location.

Id., at 554-55.

Holding that a defendant cannot be held liable where "adequate safety devices are available at the job site but the worker either does not use or misuses them," this Court concluded that "there were adequate safety devices—eight-foot ladders—available for plaintiff's use at the job site." Id., at 554-55. Thus, this Court concluded "[p]laintiff's own negligent actions—choosing to use a six-foot ladder that he knew was too short for the work to be accomplished and then standing on the ladder's top cap in order to reach the work—were, as a matter of law, the sole proximate cause of his injuries." Id., at 555. (emphasis added).

Under Montgomery, Macey, Blake, and Robinson, liability cannot be imposed where an injured plaintiff chooses an unsafe path, performs his or her work in an unsafe manner, or refuses to use adequate safety devices that are available at the job site, but instead, and for no good reason, chooses to proceed in an unsafe manner.

Contrary to plaintiff's contention, this Court's decision in Miro v. Plaza Constr. Corp., 9 N.Y.3d 948 (2007) does not warrant a different conclusion as it is consistent with Robinson and Montgomery. In Miro, the plaintiff slipped and fell as he climbed down a ladder he was using to install fire alarms. The ladder was covered partially with sprayed-on fireproofing material, and plaintiff alleged the fireproofing material caused him to slip. The plaintiff knew the material was on the ladder but chose to use it anyway; he testified at his deposition he could have requested a different ladder, but he did not do so. This Court affirmed the denial of the plaintiff's summary-judgment motion, but also denied summary judgment to the defendants, holding the defendants were not entitled to summary judgment because "it is not clear from the record how easily a replacement ladder could have been procured." Id., 9 N.Y.3d at 949.

Here, however, there is no such material issue of fact precluding summary judgment. To the contrary, as in Robinson and Montgomery, there was a safe avenue for plaintiff to alight from the loading dock—a bright yellow ladder that was merely 10 feet away from him. But plaintiff chose not to use it, instead deciding to descend down stacked crates. This is akin to the plaintiff's decision in Montgomery; the "normal and logical" choice for plaintiff was to choose the safe, and readily-available ladder that was mere feet from him. See, also, Misirlakis v. East Coast Entertainment Properties, Inc., 297 A.D.2d 312 (2nd Dep't 2002)(affirming summary judgment in favor of the defendants where "plaintiff's unnecessary and unforeseeable act" of attempting to gain access to a building by climbing onto a fire escape from a dumpster was "the sole and superseding proximate cause of his injuries."); Weingarten v. Windsor Owners Corp., 5 A.D.3d 674, 675 (2nd Dep't 2004) (plaintiff's unforeseeable act of standing on a folding chair while trying to climb into an unoccupied freight elevator was the sole and superseding cause of his injuries.); Urias v. Orange County Agricultural Society, Inc., 7 A.D.3d 515, 516-17 (2nd Dep't 2004) (plaintiff's complaint dismissed as his unforeseeable act was the sole proximate cause of the accident); Plass v. Solotoff,

5 A.D.3d 365, 367 (2d Dep't 2004) (plaintiff "unilaterally made the determination" to proceed in an unsafe manner, and his "actions were the sole cause of his injuries as a matter of law").

Here, plaintiff chose the dangerous alternative and yet he seeks to hold others liable for his decisions. Indeed, despite the fact that a safe means of descent was supplied and was in close proximity to the place where the incident occurred, plaintiff demands the courts allow him to shift the blame for his choices to others. Plaintiff places particular reliance upon the Appellate Division, First Department's decision in Cherry v. Time Warner, Inc., 66 A.D.3d 233 (1st Dep't 2009) and the claim he did not know the bright yellow ladder existed. Contrary to counsel's interpretation of the facts, there can be no debate the bright yellow, wall-mounted ladder was visible and "readily available" for plaintiff's use. In addition, Plaintiff had worked at Rockefeller Center since 1991. The ladder was available for his use, but he chose not to use it, instead following his partner, just as plaintiff in Montgomery followed his supervisor in using the bucket turned upside down.

Plaintiff asks this Court to ignore the fact that a safe, wall-mounted ladder was less than 10 feet away from

where the incident occurred (R. 167, 285). According to plaintiff, his choice to blindly follow a coworker and ignore an open and obvious ladder that would have provided a safe descent should simply result in the denial of summary judgment. Contrary to plaintiff's contentions, his choices did constitute the sole proximate cause of the incident in this case, and this Court should affirm.

POINT II

THE PLAINTIFF'S CHOICE TO PROCEED IN THE MANNER IN WHICH HE DID WAS UNFORESEEABLE AS A MATTER OF LAW

In New York, "landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition." Tagle v. Jakob, 97 N.Y.2d 165, 168 (2001). "The existence and scope of this duty is, in the first instance, a legal question for the courts to determine by analyzing the relationship of the parties, whether the plaintiff was within the zone of foreseeable harm, and whether the accident was within the reasonably foreseeable risks." Powers ex rel. Powers v. 31 E 31 LLC, 24 N.Y.3d 84, 94 (2014). DANY respectfully submits that the Appellate Division correctly dismissed the complaint in this case because the plaintiff's use of stacked milk crates as a makeshift stairway was not reasonably foreseeable when there was a bright yellow ladder attached to one side of the fourteen foot wide loading dock.

As this Court explained in Di Ponzio v. Riordan, "conduct is considered negligent when it tends to subject another to an unreasonable risk of harm arising from one or more *particular* foreseeable hazards." 89 N.Y.2d 578, 584

(1997) (emphasis is in original; citation omitted).

In Di Ponzio, this Court reasoned that the particular hazards of allowing motorists to leave their cars running while filling their tanks at a gas station were the potential starting of fires or causing explosions. However, since the plaintiff there was injured when an unattended car with its engine running rolled backwards, the plaintiff's accident was not a reasonably foreseeable result of defendant's failure to monitor drivers filling up gas with their engines running. Id. at 584-586.

In Ventricelli v. Kinney Sys. Rent A Car, Inc., plaintiff was struck by another car while standing behind his parked vehicle, which had a defective trunk lid that he was attempting to secure. This Court noted that the negligence of the defendant in "providing an automobile with a defective trunk lid would result in plaintiff's repeated attempts to close the lid was reasonably foreseeable." 45 N.Y.2d 950, 952 (1978). Obviously, in addition to the danger that an open trunk lid might obscure the driver's vision, a wayward lid might also cause the driver to stop to close the trunk in a dangerous place, like at the side of a highway. However, since plaintiff was injured by another vehicle while safely parked in a parking lot, the accident was not a foreseeable

result of defendant's negligence. Id. Similarly, in Torres v. 1420 Realty, L.L.C., 111 A.D.3d 434, 434 (1st Dep't 2013), the plaintiff's use of a "paint bucket as a step stool, which was placed on an uneven floor, was not foreseeable," since the plaintiff's ill-advised choice to use the bucket as a step stool was not reasonably foreseeable and thus severed the chain of causation.

Here, the foreseeable hazard of permitting milk crates on the floor of a loading dock might be the danger of someone tripping over them and falling, not using them as a means of descent. Moreover, even if it might be foreseeable that someone might stack crates up to create a makeshift stairway, it was not reasonably foreseeable that the experienced plaintiff would choose to use it as such when there was a perfectly safe attached ladder less than ten feet away on one end of the narrow fourteen foot dock. Therefore, DANY respectfully submits the Appellate Division correctly dismissed plaintiff's complaint.

CONCLUSION

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

Dated: Jericho, New York
March 1, 2016

Respectfully submitted,

Margaret G. Klein, Esq.
President of the Defense Association of New York, Inc.

Andrew Zajac, Esq.
Dawn C. DeSimone, Esq.
Amicus Curiae Committee of the Defense Association of New York, Inc.
c/o McGaw, Alventosa & Zajac
Two Jericho Plaza, Ste. 202
Jericho, New York 11753-1681
(516) 822-8900

By: ______________________
Andrew Zajac, Esq.

Of Counsel

Andrew Zajac, Esq.
Rona L. Platt, Esq.
Brendan T. Fitzpatrick, Esq.
Jonathan T. Uejio, Esq.