SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 12, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Andrias, Sweeny, Renwick, JJ.

3951-
3951A Jason Ford, an infant, by his mother and natural guardian, Sabine Kerinsant, et al., Plaintiffs-Respondents, Index 13598/03

-against-

The City of New York, et al., Defendants-Appellants.

[And a Third Party Action]

Gottlieb Siegel & Schwartz, LLP, Bronx (Stuart D. Schwartz of counsel), for The City of New York and The Board of Education of the City of New York, appellants.

White Fleischner & Fino, LLP, New York (Jason Steinberg of counsel), for Richmond Elevator Co., Inc., appellant.

Fiedelman & McGaw, Jericho (James K. O'Sullivan of counsel), for Centennial Elevator Industries, Inc. and New York City School Construction Authority, appellants.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for respondents.

Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered March 20, 2007, which denied as untimely the motion by defendants Centennial and School Construction Authority (SCA) and the cross motions by the remaining defendants for summary judgment dismissing the complaint, unanimously affirmed, without

costs. Order, same court and justice, entered on or about December 19, 2007, which, upon reconsideration, adhered to the prior decision, unanimously affirmed, without costs.

On October 15, 2002, the then-16-year-old infant plaintiff was a student at Harry S. Truman High School in the Bronx. While roughhousing with 17-year-old student Mainor Lopez in an alcove near the cafeteria adjacent to the custodian's elevator, on the third floor of the school, he fell or was thrown into the elevator doors, causing them to bend, and the bottom of the doors to give way into the shaft. Plaintiff fell down the shaft and sustained serious injuries.

This action was commenced in March 2003. All defendants have denied the essential allegations in the complaint and asserted affirmative defenses and cross claims.

A preliminary conference was held in August 2003, at which time all outstanding discovery was scheduled for completion. Plaintiff's deposition was not completed as scheduled because of his medical condition, but his counsel requested permission to file a Note of Issue anyway and all defendants agreed. On November 5, 2004, the Note of Issue and Statement of Readiness were filed, incorrectly stating that all discovery had been completed. Outstanding discovery included, inter alia, the deposition of Douglas Smith, Chief Inspector for the Elevator Division of the New York City Department of Buildings, and James

Duffy, an employee of defendant Richmond Elevator Co.

At a pretrial conference in October 2005, the IAS court directed the parties to complete some unspecified discovery prior to the next conference, scheduled for January 20, 2006. On that date, the parties appeared and entered into a stipulation to complete all outstanding discovery, and the matter was scheduled for a final conference on May 19, 2006.

This "final conference" resulted in a stipulation signed by counsel for all parties and "so-ordered" by the court, providing that depositions were to be completed on various dates, the latest being July 25, 2006. Any independent medical examinations were to be conducted before July 28, 2006. The stipulation provided that defendants' time to move for summary judgment "is extended to 60 days after completion of EBTs." The court added the following language: "Failure to comply with the foregoing may warrant imposition of sanctions, including waiver of discovery. No EBT may be adjourned without Court approval." Another "final conference" was scheduled for October 27, 2006. At that conference, the matter was set down for trial on March 12, 2007, with the court records noting that "all parties request this date." There is no indication in the record that any discussion regarding outstanding discovery took place at this conference.

Duffy's EBT was timely commenced on June 15, 2006. When plaintiff's counsel was unable to complete the deposition in one

day, the parties agreed to continue it on a future date. It was ultimately completed on December 18, 2006, approximately two months after the trial date was set. No approval by the court for the enlargement of time to complete Duffy's deposition was sought.

SCA and Centennial moved for summary judgment dismissing the complaint on February 1, 2007; they claimed their motion was timely, having been made within the 60-day window of the so-ordered stipulation. Richmond, the City and the Board of Education also sought summary judgment dismissing the complaint. Plaintiffs did not oppose the motions or cross motions. However, none of the defendants argued that this was an inexcusable default. Rather, on March 12, 2007, defendants agreed to adjourn the motions to permit plaintiffs to submit opposition. The court rejected the application to adjourn, deemed the motions submitted and entered an order on March 20, 2007, denying all motions on the ground that they were untimely. Citing the so-ordered stipulation requiring all EBTs to be conducted on specific dates, the last being July 25, 2006, with no adjournments without prior court approval, the court noted that no such approval was sought or given. Since all motions were submitted more than 60 days beyond the date set for completion of discovery, the motions were untimely. The court did not consider the merits of the motions.

All defendants moved to reargue. SCA, Centennial and

Richmond argued they had good reason to assume the original motions were timely as the motions were made within 60 days of the completion of Duffy's deposition, and the completion of Duffy's deposition was not an "adjournment" that required court approval but merely a continuation to accommodate plaintiffs' counsel. The City and Board of Education acknowledged that their motions were not made within 60 days of the completion of Duffy's deposition but asserted that they were timely because the deposition of *another* defendant remained outstanding. All defendants also argued that the court should have considered the merits of their motions.

This time, plaintiffs opposed the applications on the merits, but did not argue the original motions were untimely. The court rejected defendants' motions for "reargument and renewal," citing the procedural history of the case in detail and stating that "None of the parties have given any credible reason why Duffy's deposition was not concluded by June 15, 2006, and why it did not occur until six months later."

CPLR 3212(a) provides that a court may set the time within which a party may move for summary judgment. Here, the court did just that. Contrary to defendants' claims, the so-ordered stipulation explicitly provided that defendants had 60 days after completion of the EBTs to move for summary judgment, and that no EBTs could be adjourned without court approval. The argument

that Duffy's EBT was not "adjourned" but merely "continued" does not survive close scrutiny. In fact, the parties' behavior was not consistent with an innocent misunderstanding that they had the right to adjourn the deposition for a prolonged period of time. On the contrary, all counsel, plaintiffs' included, knew at the October 27, 2006 final pre-trial conference that Duffy's EBT had not been completed, and that a date to complete it had not even been set. Yet counsel went ahead on that date and not only agreed to, but *requested*, a trial date of March 12, 2007. If defendants' attorneys honestly believed they had the right to submit a motion for summary judgment due to the unfinished Duffy deposition, they should have informed the judge, during the conference, that a trial date should not be set because of the incomplete deposition and potential motion practice. Instead, as a further demonstration of their complete disregard for the so-ordered stipulation, they filed the initial summary judgment motions on February 1, 2007, more than three months after the final pretrial conference. They offered no explanation for waiting until 40 days prior to the trial date to move for summary judgment. Defense counsels' complete disregard of the court's mandate culminated on March 12, 2007, the actual trial date they had selected approximately five months earlier, when they agreed to adjourn the summary judgment motions to permit plaintiffs' counsel to respond.

It is commendable that all counsel here showed each other professional courtesy. The court deserves the same consideration. The IAS court demonstrated a remarkable willingness to permit counsel to complete discovery on their own terms. However, orders, including so-ordered stipulations, "are not options, they are requirements, to be taken seriously by the parties. Too many pages of the Reports, and hours of the courts, are taken up with deadlines that are simply ignored" (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726-27 [2004]). "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]).

Counsel argue that they acted in good faith believing that they were within the 60-day window to move for summary judgment, and claim that the so-ordered stipulation provided them 60 days from the time EBTs were complete to so move. They also contend that if the court looks at the merits of their argument, summary judgment would be appropriate, even if tardy. This attempt to fall within the "good cause" provision of CPLR 3212(a) is unavailing. The "good cause" exception requires the moving party to show "a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]). In *Brill*, the Court of Appeals specifically refused to

consider the merits of an untimely motion for summary judgment. Indeed, four months after that decision, the Court reiterated that "if the merit of the motion itself constituted good cause, the statutory deadline would be circumvented and the practice of delaying such motions until the eve of trial encouraged" (*Miceli*, 3 NY3d at 726).

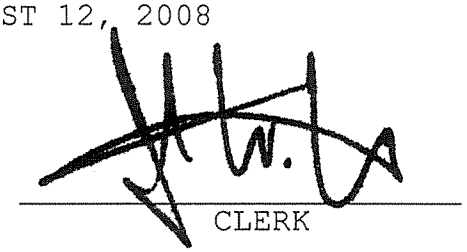
We simply cannot accept defendants' claims concerning alleged ambiguities in the so ordered stipulation, particularly in light of the fact that, according to the City's papers, the deposition of a defendant still had not taken place as of the time of the motions. To accept this argument would mean that counsel, not the court, can set the schedule and pace of discovery, and that the end of discovery would be a fluid, moving goal, not a fixed point in time. The court system simply cannot be run in this fashion.

Nor does our decision in *Vila v Cablevision of NYC* (28 AD3d 248 [2006]) require a different result. There, the so-ordered stipulation required dispositive motions to be made within "90 days from completion of outstanding depositions - 9/29/03." The last deposition was actually held approximately 3 months later. The IAS court found the motions for summary judgment to be untimely. We reversed, finding that language to be ambiguous, and as such, constituted the requisite "good cause" to permit filing of the motions. Here, the court specifically inserted

language requiring court approval for adjournments of the scheduled dates of the EBTs, something absent from the order in *Vila*. As a result, the order here was neither vague nor ambiguous, and counsel's claims of "good cause" for the untimely submission of the motions are without merit.

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

ENTERED: AUGUST 12, 2008



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Gonzalez, J.P., Williams, Catterson, Moskowitz, JJ.

3239 George Kralik, et al., Index 107822/98
Plaintiffs-Respondents,

-against-

239 East 79th Street Owners Corp.,
Defendant-Appellant.

- - - - -

Council of New York Cooperatives,
Amicus Curiae.

Rosenberg & Pittinsky, LLP, New York (Laurence D. Pittinsky of counsel), for appellant.

Finder Novick Kerrigan LLP, New York (Thomas P. Kerrigan of counsel), for respondents.

Snow Becker & Krauss P.C., New York (Marc J. Luxemburg of counsel), for amicus curiae.

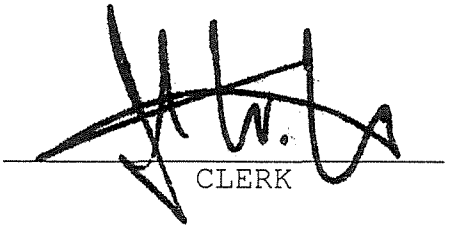
Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered June 1, 2006, which, inter alia, granted plaintiffs' motion for summary judgment declaring them to be holders of unsold shares in defendant cooperative corporation, entitled to sublet without consent or fee, and enjoined defendant from interfering with such rights, unanimously affirmed, with costs.

Even assuming, as the coop argues, that the definition of "unsold shares" in paragraph 38 of the proprietary lease as certain shares issued "pursuant to" the offering plan served to incorporate by reference the specific provisions of the offering plan relied on by the coop, nothing in the offering plan

indicates that noncompliance with such provisions divests holders of unsold share of that status (*see Bestform, Inc. v Herman*, 23 AD3d 253 [2005], *lv denied* 6 NY3d 705 [2006]). Also even assuming, as the coop argues, that mere intent to occupy the apartment, as opposed to actual occupancy, on the part of a holder of unsold shares terminates that status, no issue of fact exists as to plaintiffs' intent to occupy; the coop failed to adduce any proof of such intent even though one of the plaintiffs had been deposed, and any contention by the coop that further disclosure might reveal evidence of such intent would reflect nothing more than an ineffectual "mere hope" insufficient to defeat summary judgment.

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

ENTERED: AUGUST 12, 2008



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Saxe, J.P., Nardelli, Catterson, McGuire, JJ.

3852 Joaquin Campuzano, et al., Index 22636/04
Plaintiffs-Appellants-Respondents,

-against-

Board of Education of the City of New York,
Defendants-Respondents-Appellants,

JJ Lyons Associates, Inc.,
Defendant.

Alexander J. Wulwick, New York, for appellants-respondents.

Fabiani Cohen & Hall LLP, New York (Lisa A. Sokoloff of counsel), for respondents-appellants.

Order, Supreme Court, Bronx County (Paul A. Victor, J.), entered on or about March 3, 2008, which, to the extent appealed from, denied plaintiffs' motion for partial summary judgment on their Labor Law § 240(1) claim and denied the cross motion by defendants-appellants Board of Education of City of New York, New York City School Construction Authority and TDX Construction Corp. for summary judgment dismissing the complaint as against them, unanimously modified, on the law, plaintiffs' motion for partial summary judgment on the Labor Law § 240(1) claim granted, the cross motion granted to extent of dismissing the common-law negligence and Labor Law § 200 and § 241(6) claims, and otherwise affirmed, without costs.

Plaintiff Joaquin Campuzano and a coworker, while performing asbestos abatement work, were removing a heavy duct from a

ceiling by cutting it with an acetylene torch. They started this work on a scaffold, but Campuzano determined it was dangerous to work that way, and decided instead to set up a ladder adjacent to the scaffold. While Campuzano was standing on the ladder and holding the hoses for the torch, a portion of the duct fell, hitting him and the ladder and knocking him to the ground.

Plaintiffs made a prima facie showing that defendants violated Labor Law § 240(1), i.e., failed to provide Campuzano with an adequate safety device, and that the violation was a proximate cause of the accident. Thus, plaintiffs made a prima facie showing of entitlement to judgment as a matter of law on their Labor Law § 240(1) claim (*see Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287 [2008]; *see also Panek v County of Albany*, 99 NY2d 452, 458 [2003]). In opposition, defendants failed to raise a triable issue of fact regarding whether the ladder was an adequate safety device or Campuzano's own acts or omissions were the sole proximate cause of the accident (*see Kosavick, supra; see also Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]). In particular, there is no evidence controverting Campuzano's assertions that the ladder was a safer method of proceeding with the assigned job; that the scaffold was too small for two employees safely to stand on while performing the work; and that Campuzano was never instructed not to use a ladder in addition to the scaffold. Thus, summary

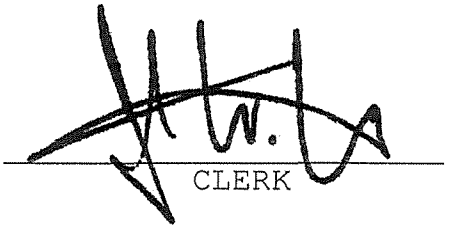
judgment should be granted to plaintiffs on their Labor Law § 240(1) claim.

Because defendants did not exercise supervisory control over Campuzano's work, the common-law negligence and Labor Law § 200 claims must be dismissed (*see Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Given the absence of a violation of an implementing regulation setting forth a specific standard of conduct, plaintiffs' Labor Law § 241(6) claim must also be dismissed (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-505 [1993]).

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: AUGUST 12, 2008



CLERK

Saxe, J.P., Nardelli, Catterson, McGuire, DeGrasse, JJ.

3858 Dan Granirer, et al., Index 109915/06
Plaintiffs-Appellants-Respondents,

-against-

The Bakery, Inc., et al.,
Defendants-Respondents-Appellants.

Turek Roth Spiegel, LLP, New York (Glenn H. Spiegel of counsel), for appellants-respondents.

Ahmuty, Demers & McManus, New York (Deborah Del Sordo of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered September 17, 2007, which, in an action for, inter alia, breach of a proprietary lease and breach of the warranty of habitability, to the extent appealed from, granted plaintiffs' motion for an abatement of their maintenance until the apartment is restored to a habitable condition and denied their motion to direct defendants to pay their alternate housing expenses, and granted defendants' cross motion to the extent of dismissing the complaint as against the individual defendants, modified, on the law, the cause of action for breach of fiduciary duty dismissed as against the corporate defendant, and otherwise affirmed, without costs.

While triable factual issues exist as to the cooperative defendant's failure to make the required repairs and whether plaintiff denied it access to the apartment, the evidence that

the apartment cannot be safely inhabited in its present condition supports a 100% abatement of plaintiffs' maintenance, as authorized by their proprietary lease. We reject defendants' contention that plaintiffs' abatement should not include their contribution to the cooperative's tax and mortgage obligations.

Also, as a matter of simple contract interpretation, the abatement should include these incidents of plaintiffs' ownership of shares in the cooperative. Paragraph 4(b) of the proprietary lease appurtenant to plaintiffs' apartment provides for an abatement of "rent." Under paragraph 1(b) "rent" or "maintenance" is a fixed proportion of the lessor's "cash requirements." Paragraph 1(c) defines "cash requirements" as:

> "the estimated amount in cash which the Directors shall from time to time in their judgment determine to be necessary or proper for (1) the operation, maintenance, care, alteration and improvement of the corporate property during the year or the portion of the year for which such determination is made; (2) the creation of such reserve for contingencies as they may deem proper; and (3) the payment of all obligations, liabilities or expenses incurred or to be incurred, after giving consideration to (i) income expected to be received during such period (other than rent from proprietary leases), and (ii) cash on hand which the Directors in its [*sic*] discretion may choose to apply."

The above definition is broad enough to encompass taxes and mortgage payments. The parties to this detailed and carefully crafted proprietary lease could have excluded these incidents of

ownership from the abatement provision of paragraph 4(b) had they chosen to do so.

Paragraph 4(b) of the proprietary lease provides:

> "*In case the damage resulting from fire or other cause shall be so extensive as to render the apartment partly or wholly untenantable, or if the means of access thereto* shall be destroyed, the rent hereunder shall proportionately abate until the apartment shall again be rendered wholly tenantable or the means of access restored; but if said damage shall be caused by the act or negligence of the Lessee or the agents, employees, guests or members of the family of the Lessee or any occupant of the apartment, such rental shall abate only to the extent of the rental value insurance, if any, collected by Lessor with respect to the apartment" (emphasis added).

In *Suarez v Rivercross Tenants' Corp.* (107 Misc 2d 135 [1981]), the Appellate Term, First Department, opined that:

> "A proprietary lessee is entitled to the statutory protection [of the warranty of habitability] as well as the noninvesting, ordinary tenant. While there is thus created the anomalous situation that one who is essentially an owner (by virtue of his purchase of shares) is in a sense suing himself, the situation is not vastly different from any stockholder who has occasion to sue the corporation of which he is a pro rata owner by purchase of stock" (at 139).

One commentator, in impliedly stating that tax and mortgage obligations fall within the parameters of maintenance abatements delineated in proprietary leases, observed that:

> "Maintenance fee abatements by cooperative owners can be far more detrimental than

> abatements by condominium owners. The cooperative maintenance fee is not only used to maintain the common elements, but also to pay the underlying mortgage on the property and its taxes. Furthermore, if the cooperative corporation goes insolvent, the property is foreclosed upon, and the shareholders' proprietary leases are rendered void. Even with such grave consequences hanging in the balance, however, our legal system demands that the decision to take such potentially drastic action should be left to the aggrieved party" (Christopher S. Brennan, Notes, *The Next Step in the Evolution of the Implied Warranty of Habitability: Applying the Warranty to Condominiums*, 67 Fordham L Rev 3041, 3069 [1999] [footnotes omitted]).

In sum, we are aware of no authority, nor is any proffered by defendants, stating that the abatement clearly provided for in the lease does not include plaintiffs' pro rata share of the cooperative's tax and mortgage responsibilities. Further, the court properly declined to compel the cooperative to pay for plaintiffs' alternate living expenses without regard to insurance reimbursement or maintenance abatement and absent a hearing thereon (*cf. Ogust v 451 Broome St. Corp.*, 285 AD2d 412, 414 [2001]).

Plaintiffs properly pleaded a cause of action for breach of the covenant of quiet enjoyment by alleging a constructive eviction, i.e., that the conditions in their home, attributable to the cooperative's failure to make the necessary repairs, compelled them to move out (*see Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]).

Contrary to plaintiffs' contention, the complaint does not allege any individual wrongdoing by the individual defendants, who are members of the cooperative's board of directors, separate and apart from their collective actions taken on behalf of the cooperative (*see Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 10 [2006]).

The cause of action for breach of fiduciary duty should have been dismissed as against the cooperative, as well as the individual defendants, because it is merely duplicative of the cause of action for breach of the proprietary lease (*see Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407, 408 [2007]).

All concur except Catterson and McGuire, JJ. who concur in part and dissent in part in a separate memorandum by McGuire J. as follows:

McGUIRE, J. (concurring in part and dissenting in part)

I disagree with the majority in one respect, namely, its conclusion that plaintiffs' abatement should include their contribution to the cooperative's tax and mortgage obligations. Paragraph 4(b) of the proprietary lease does not purport to address this specific issue. Rather, it provides for a "proportiona[l] abate[ment]" of rent if, among other things, damage to the apartment is so extensive as to render it "partly or wholly untenantable." To be sure, it is possible to read paragraph 4(b) to provide for a 100% abatement when the apartment has been rendered wholly untenantable. But that reading certainly is not compelled by the language of paragraph 4(b).

In my view, the more sensible reading of the lease and paragraph 4(b) is that plaintiffs should not be relieved of their obligation to pay that portion of the maintenance that reflects taxes, mortgage costs and other incidents of ownership. If plaintiffs ultimately prevail in this action and are awarded damages for all costs they incurred in securing alternative housing and the apartment is restored to its prior condition, plaintiffs of course will continue to own the shares relating to the apartment. Thus, to relieve plaintiffs of any obligation to pay taxes, mortgage costs and other incidents of ownership would confer a windfall on them and inflict an unjustified penalty on all other shareholders, including shareholders who are utterly

innocent of any wrongdoing relating to the "untenantable" condition of plaintiffs' apartment. Under the majority's interpretation of paragraph 4(b), all shareholders would pay not only their own share of their incidents of ownership but would subsidize on a pro rata basis plaintiffs' share.

I believe the majority's interpretation of paragraph 4(b) is at odds with the principle of construction requiring a court to give the "construction most equitable to both parties instead of the construction which will give one of them an unfair and unreasonable advantage over the other" (*Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 438 [1994] [internal quotation marks omitted]).

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

ENTERED: AUGUST 12, 2008

AUG 12 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David B. Saxe
David Friedman
James M. Catterson
Rolando T. Acosta, JJ.

2733
Index 400173/04
590721/04

James D. Lee,
Plaintiff-Appellant,

-against-

Astoria Generating Company, L.P., et al.,
Defendants-Respondents.

- - - - -

Astoria Generating Company, L.P., et al.,
Third-Party Plaintiffs-Respondents,

-against-

Elliott Turbomachinery Co., Inc., et al.,
Third-Party Defendants-Respondents.

Plaintiff appeals from an order of the Supreme Court, New York County (Carol Edmead, J.), entered on or about January 23, 2007, which insofar as appealed from, granted motions by defendants, the barge's owners, and by third-party defendants, plaintiff's employers, for summary judgment dismissing the complaint.

Hofmann & Associates, New York (Paul T. Hofmann and Timothy F. Schweitzer of counsel), for appellant.

Mauro Goldberg & Lilling LLP, Great Neck (Deborah F. Peters and Caryn L. Lilling of counsel) and Robin, Harris, King & Fodera, New York, for Astoria Generating Company, L.P., Orion Power New York GP, Inc., Orion Power New York, L.P., and Orion Power New York LP, LLC, respondents.

Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock and Steven B. Prystowsky of counsel), for Elliott Turbomachinery Co., Inc. and Elliott Company, respondents.

ACOSTA, J.

The issue in this case is whether the barge containing an electricity generating turbine upon which plaintiff was working when he was injured is a "vessel" under the Longshore and Harbor Workers' Compensation Act (LHWCA, 33 USC § 901), thereby precluding plaintiff from pursuing an action ultimately against defendants (collectively Astoria), the owners of the barge, other than for negligence. We hold that the barge was not a vessel, and therefore, plaintiff's Labor Law § 240(1) and § 241(6) claims against Astoria are not precluded by the LHWCA. Alternatively, we hold that even if the barge were a vessel, federal maritime jurisdiction would not preempt these claims in any event.

On April 16, 2001, plaintiff, an employee of Elliott Turbomachinery, Co., Inc. and Elliott Company (collectively Elliott), injured his back while performing work as a millwright at the Gowanus Gas Turbines electric generation facility in Brooklyn, a facility that is owned and operated by Astoria.

The Gowanus facility is an electrical power generating station consisting of land-based structures as well as four barges, each of which houses eight gas turbine electrical generating units (*see Matter of Consolidated Edison Co. of N.Y. v City of New York*, 44 NY2d 536 [1978]). The mechanical parts of these turbines move inside cylindrical steel turbine "shells." The shells are housed within steel box-like enclosures called "exhaust wells," which are affixed to the deck of the barges.

The side walls to the exhaust wells are approximately fifteen feet high. Access hatches, known as "stack hatches" or "sniffers," are located on top of the exhaust wells. The distance from the stack hatch opening in the top of the exhaust well down to the top of the steel shell inside is about six to eight feet. The primary purpose of a stack hatch or sniffer is to do visual inspection from above and for gas detection; it was not designed for entry to perform major work.

The barges are connected to the power grid and are ready to produce electricity. They are moved to a drydock for periodic maintenance, which is generally done approximately once a decade. They are capable of being moved for the purpose of providing electric power at other locations. Barge No. 1, the barge where plaintiff was injured, as well as one of the other barges, were moved to Astoria, Queens in 1996 so that its generators could provide electric power following a fire at a generating station there that left the area without sufficient power. Although the barges were returned to their present location approximately three months later, they can be moved if the need arises.

Third-party defendant Elliott is a corporation based in Pennsylvania that overhauls and maintains steam turbines used for the generation of electric power. Elliott entered into a contract with Astoria/Orion to perform an overhaul of the turbines. According to Joseph Vasquez, the general manager of the facility, the turbines were undergoing a "major overhaul"

rather than normal maintenance, but not because of any kind of damage in particular (R. 348). Elliott's work involved disassembling the entire turbine, shipping parts of it back to its shop in Pennsylvania for restoration or replacement, and returning it to the site. There, Elliott's millwrights reassembled the turbines.

On the day of the accident, Plaintiff was working on a turbine on barge number one. He was ordered by his supervisor to enter the turbine's exhaust well through the stack hatch to weld some fixtures inside. Plaintiff used a long metal extension ladder to get to the top of the exhaust well. He then entered the hatch opening by grasping its sides and lowering his body, feet first, down to the top of the steel cylindrical turbine shell. From there, he was to climb down to the base of the exhaust well, but his feet slipped out from under him and he fell eight feet to the base of the exhaust well, injuring his back. There is no indication in the record that plaintiff was provided a ladder for use inside the well, a safety harness or any other type of safety device.

The normal means of entry into an exhaust well was through a hole cut with an acetylene torch into the exhaust well's steel side walls. Earlier in the renovation such a hole had been cut, but the day before the accident, the side panel had been welded back onto the unit despite the fact that the welding job to which plaintiff had been assigned was not completed.

As a result of the accident, plaintiff was awarded benefits under LHWCA because he was injured on "navigable" waters. The LHWCA "establishes a comprehensive federal workers' compensation program that provides longshoremen [and harbor workers] and their families with medical, disability, and survivor benefits for work-related injuries and death" (*Howlett v Birkdale Shipping Co.*, 512 US 92, 96 [1964]; 33 USC § 903), regardless of fault. This statute provides that workers who receive no-fault workers' compensation payments from their employers for injuries sustained in the course of their employment are precluded from seeking any other remedy against their employers (33 USC § 905[a]; *Emanuel v Sheridan Transp. Corp.*, 10 AD3d 46, 51 [2004]).

An injured worker may bring an action against a third-party owner of the vessel without losing his or her worker-compensation rights (*Howlett,* 512 US at 96; *see Emanuel,* 10 AD3d at 51). However, the nature of the action against the owner depends on whether the craft upon which the employee was working was a vessel. If the craft is a vessel, 33 USC 905(b) generally limits recovery under maritime law to the third-party owner's own negligence only (*see Scindia Steam Navigation Co. v De Los Santos*, 451 US 156 [1981]).

The legislative history of the LHWCA is very clear as to why this is so. As enacted, the employer's compensation for liability under LHWCA was to be exclusive. Section 933(a) of

LHWCA provided that if a third party was liable in damages for the employee's injuries, the employee could recover against the third party. Nineteen years after the enactment of LHWCA, the Supreme Court held, in *Seas Shipping Co. v Sieracki* (328 US 85 [1946]), that a longshoreman could recover from a third-party shipowner for the vessel's unseaworthiness (a claim based on strict liability for the stevedoring company's negligence). The Court then held in *Ryan Stevedoring Co. v Pan-Atlantic S.S. Corp.* (350 US 124 [1956]), that the shipowner could recover full indemnity for any amount paid on the *Sieracki* claim because of an implied warranty of workmanlike service running from the stevedore employer to the shipowner (*see* Force and Norris The Law of Maritime Personal Injuries [5th ed], § 8:13). Thus, the *Sieracki-Ryan* rule effectively eliminated the "exclusive and in place of all liability" provision of the LHWCA (*id.*). Concerned over this development, the stevedore's insurance companies appealed to Congress. Noting that "*vessels* by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from a covered employer for employee injuries" (HR Rep 92-1441, 1972 US Code Cong & Admin News 4698, 4704, emphasis added), Congress overruled the *Sieracki-Ryan* rule for "vessels" with the 1972 addition of § 905(b).

A vessel is "any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment" (*Stewart v Dutra Constr. Co.*, 543 US 481, 497 [2005]). Notwithstanding this expansive definition, not all watercraft are vessels. In determining whether a structure qualifies as a vessel, it is necessary to examine the structure's purpose and the business in which it is engaged (*see Pavone v Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 [5th Cir 1995]). *Pavone* held that a floating casino did not constitute a vessel where the casino was moored "in a semi-permanent or indefinite manner" (*id.* at 570). The Fifth Circuit's decision was based in large part on the fact that the barge had never been used as a seagoing vessel to transport cargo, passengers or equipment, as well as the barge's substantial dockside attachment to land. Furthermore, the purpose of the barge was a land-based enterprise (casino), and it was not engaged in maritime commerce.

A decade after *Pavone*, the United States Supreme Court addressed the issue of whether a dredge is a vessel under LHWCA in *Stewart v Dutra Constr. Co.* (543 US 481, supra). Citing *Pavone,* the Court noted that while a structure's use or capability of use as a means of transportation is a major factor in considering whether a craft is a vessel, the inquiry does not end there. Rather, as a practical matter, when a ship is

permanently moored or otherwise rendered incapable of movement, the craft will not be considered a vessel for maritime law purposes (*id.* at 494).

If the craft is not a vessel, neither the express language of LHWCA nor its legislative history prevents plaintiff from pursuing a New York Labor Law claim against the third-party owner of the craft, even if the claims are base on strict liability. The LHWCA "preserves to covered employees any remedy that otherwise exists against third parties, including those that arise under state law" (Force and Norris, § 8:1). "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, *he need not elect whether to receive such compensation or to recover damages against such third person*" (33 USC § 933[a], emphasis added).[1] Congress's concern over a vessel's superior economic strength relative to

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[1] A covered employee can still sue nonvessel-owner third parties under general maritime law tort principles (Cheavens, Terminal Workers' Injury and Death Claims, 64 Tulane L Rev, 361, 364 [1989], citing *Melerine v. Avondale Shipyards*, 659 F.2d 706, 708 [5th Cir 1981] and *Harrison v Flota Mercante Grancolombiana, S.A.*, 577 F2d 968, 977 [5th Cir 1978]. In *Chandris, Inc v Latsis* (515 US 347, 356 [1995]), the Supreme Court cited Cheavens in noting that injured workers such as a vessel's crew members, who are covered employee under LHWCA, "may still recover under an applicable state workers' compensation scheme or, in admiralty, under general maritime tort principles."

stevedores by forcing the latter to indemnify the owners simply does not apply to circumstances where the craft is not a vessel.

Here, plaintiff asserted state labor law claims (Labor Law § 200, § 240[1] and § 241[6]) against Astoria, the owner of the barge, for his injuries. Astoria subsequently filed a third-party complaint against Elliott seeking indemnification.

Citing LHWCA (33 USC § 905[a])[2], Elliott moved for summary judgment dismissing the complaint and the third-party complaint, arguing, inter alia, that it is immune from suit under federal law and that plaintiff's claims were preempted by federal maritime law. Astoria cross-moved for summary judgment, also arguing that plaintiff's claims were preempted and that, in any event, plaintiff failed to state a claim against it under the Labor Law. In the alternative, Astoria sought summary judgment granting it a defense and conditional indemnification from

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[2] Section 905(a) provides in relevant part:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death.

Elliott based on what it maintained was an indemnification provision contained in the contract between them.

Plaintiff opposed the motions, arguing that his Labor Law claims were not preempted by federal law because the barge upon which he was injured is not a "vessel" as that term has been defined (*see Stewart v Dutra Constr. Co.*, 543 US 481, *supra*; *Pavone v Mississippi Riverboat Amusement Corp.*, 52 F3d 560, *supra*), inasmuch as it is permanently anchored, is connected to city utilities, lacks propulsion equipment, does not serve a transportation function, and was built as an extension of a land-based activity. Therefore, he maintains substantive maritime law does not apply.

The court granted the motions and dismissed the complaint primarily on its holding that the barge was a vessel and thus the action was subject to maritime law.

Contrary to the motion court, we hold that the structure in question is not a "vessel." An overview of the physical characteristics as well as the purpose of the Gowanus Gas Turbine Generating Station all lead to the conclusion that the power barge upon which plaintiff was injured is not a vessel.

The barges on the Gowanus site, which undeniably float, are nonetheless attached to piers at the facility by way of spud beam clamping systems, which allow the barges to rise and fall with the tide. The barges are connected to New York City water pipes,

and the electrical power lines of the barges run to the Con Ed substation that abuts the property. Their only movement over water is to a drydock for periodic maintenance, which is done approximately once a decade. The barges arrived at the site in about 1969, and Astoria maintains it has no intention to move any of the barges for any reason other than periodic maintenance (*see Kathriner v Unnisea, Inc.*, 975 F2d 657 [9th Cir 1992]). The electricity created at the facility is conveyed over Astoria's and Con Ed's power line transmission system to Con Ed's nearby Brooklyn and Queens customers.

Moreover, the turbine facility, whose sole purpose is to provide electrical power to these neighborhoods, is permanently moored, serves no ancillary maritime purpose, and was not intended to operate as a vessel in navigation. The facility receives its utilities from shore, and as noted, provides power via lines that run from the barge to the Con Ed substation. The facility is not self-propelled, and was designed and intended to be a power plant, not a means of water transportation or maritime commerce (*see De La Rosa v St. Charles Gaming Co.*, 474 F3d 185 [5th Cir 2006] [Boat not a vessel where its intended use was as an indefinitely moored floating casino]). Indeed, in *Matter of Consolidated Edison Co. of N.Y. v City of New York* (44 NY2d 536 [1978]), decided prior to Astoria's purchase of the facility, the Court of Appeals found that these very barges were the functional

equivalent of land-based structures, and taxation of them as realty, not personalty, was proper. Moreover, electricity from the turbines can only be produced with the communication, remote start, fire protection, fuel, water, and power lines connected to the Con Ed substation, a land-based structure. The barge's attachments to Con Ed's land-based substation render the barge's capability to move theoretical rather than practical (*Stewart*, 543 US at 494).

Inasmuch as plaintiff's action against Astoria is not governed by maritime law, his claims are subject to New York State's Labor Law (*Florida Fuels v Citgo Petroleum Corp.*, 6 F3d 330, 332 [5th Cir 1993]; *Holland v Sea-Land Serv.*, 655 F2d 556, 559 [4th Cir 1981]; *see generally Victory Carriers v Law*, 404 US 202 [1971]). The dismissal of plaintiff's § 240(1) and § 241(6) claims were thus not warranted under maritime law principles.[3] Accordingly, upon a search of the record, this Court holds that plaintiff established its entitlement to partial summary judgment as to liability on his § 240(1) claim.

Labor Law § 240(1) creates a nondelegable duty upon property owners to provide safety equipment to protect workers against falling from a height. Under this provision, plaintiff does not

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[3] Astoria did not appeal the portion of the order that dismissed its third-party complaint since it was not aggrieved by the court's order dismissing plaintiff's action in its entirety.

have to show that Astoria had actual supervision or control over the work he was performing in order for liability to be found (*Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 499-501 [1993]). That plaintiff was working on a turbine rather than a building is of no moment, inasmuch § 240(1) applies to all structures (*see e..g. Gordon v Eastern Ry. Supply,* 82 NY2d 555 [1993]; *Mosher v State of New York,* 80 NY2d 286 [1992]; *Lombardi v Stout,* 80 NY2d 290 [1992]).

Here, plaintiff was not given the proper equipment to lower himself approximately 15 feet to the base of the exhaust well to weld fixtures inside. The absence of proper safety equipment caused plaintiff's fall and injury. Accordingly, plaintiff established his prima facie entitlement to summary judgment, and the burden thus shifted to Astoria to raise triable issues of fact, which it failed to do. Notwithstanding Astoria's assertions to the contrary, there is no indication in the record that plaintiff's actions were the sole proximate cause of his injuries (*see Montalvo v Petrocelli Constr., Inc.,* 8 AD3d 173, 175 [2004]). Just to work on these turbines, a hole had to be cut out on the side of the half-inch thick walls of the wells. Indeed, the panel that had been cut out of the side of the exhaust well to allow the workers' entry was welded back in place the day prior to plaintiff's injury. Furthermore, there was testimony that plaintiff complained but was essentially told that

if he did not enter the well through the hatch at the top, he could pack his tools and go home.

Nor was plaintiff engaged in routine maintenance (*Aguilar v Henry Mar. Serv., Inc.*, 12 AD3d 542, 543-544 [2004][where the work included removal and replacement of a bulwark, reconditioning wheels and shafts, installing new fendering, engine overhaul, painting and zincs, tank cleaning, and installing new deck winches, all of which was expected to take several weeks to complete]). In examining the totality of the work done on the project, the overhaul of the turbines resulted in a significant physical change to the turbine, rather than simple, routine activity that would fall outside the scope of the statute (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-882 [2003] [actively inspecting an air conditioning fan that was being overhauled]; *Joblon v Solow*, 91 NY2d 457, 465 [1998] [extending wiring within a utility room and chiseling a hole through a concrete wall]); *Velasco v Green-Wood Cemetery*, 8 AD3d 88 [2004] [replacing loose and broken slate roof tiles, cleaning gutters, installing new flashing cement and copper flashing, and repairing a roof leak]; *Mannes v Kamber Mgt.*, 284 AD2d 310 [2001] [hanging pipes from ceiling and extending them through a wall to an adjacent structure]).

This job lasted several months, with parts having to be shipped to Pennsylvania for restoration or replacement. There

was nothing routine about this work (*cf. Munoz v DJZ Realty, LLC*, 5 NY3d 747 [2005]; *Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526 [2003]), other than the fact that a total mechanical overhaul was performed on the massive turbines on a relatively periodic basis.

The motion court also did not analyze the facts of this case under Labor Law § 241(6) with regard to plaintiff's claim that defendants violated the Industrial Code as it applies to vertical passages.[4] Given that plaintiff had to climb approximately 15 feet to get to the access hatch on top of the turbine's exhaust well, and then lower himself through the hatch onto the top of the turbine shell and down to the base of the exhaust well, during which he fell approximately 8 feet, there is, at the very least, a question of fact regarding whether this section of the Industrial Code precludes an award of summary judgment to defendants. Plaintiff's description of how he had to access the work area, provides evidence that is contrary to defendants' assertion that the area was at ground level, which would render this section inapplicable.

The court was correct, however, in finding that Astoria did not have supervisory control over the injury-producing activity

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[4] 12 NYCRR 23-1.7(f) provides that "Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their installation in which case ladders or other safe means of access shall be provided."

necessary to support a finding of liability for common-law negligence or under Labor Law § 200 (*Balbuena v New York Stock Exch., Inc.* 45 AD3d 279, 280 [2007]).

Inasmuch as maritime law is not applicable in this action, the court should not have dismissed Astoria's third-party claims for defense and indemnification without analyzing those claims under applicable state law (*see Pennisi v Standard Fruit & S.S. Co.*, 206 AD2d 290 [1994]). As Astoria did not appeal from the dismissal of its third-party claims, however, we are barred under these circumstances from granting relief to a nonappealing party (*see Hecht v City of New York*, 60 NY2d 57 [1983]).

As an alternative holding, even assuming that the barge in question was a vessel, we nonetheless hold that New York's Labor Law is not preempted by Federal maritime jurisdiction. "The fact that Federal maritime law is involved does not necessarily mean that State law is superseded" (*Cammon v City of New York,* 95 NY2d 583, 587 [2000]). Rather, "[i]n assessing whether the State rule is preempted, a number of factors may be considered, including whether the State rule conflicts with Federal law, hinders uniformity, makes substantive changes, or interferes with the characteristic features of maritime law or commerce" (*id. at 588*).

In analyzing these factors in a factual pattern remarkably similar to those in the instant case, the Court of Appeals in

Cammon held that Federal maritime law did not preempt New York's Labor Law. The plaintiff in *Cammon*, who was in the process of repairing a pier, was injured while working on a float stage in navigable waters that was secured to a land-based transfer station. In his complaint, he alleged violations of Labor Law § 200, § 240 and § 241. The Court relied heavily on the "maritime but local" rule, which allows for the application of state rules "as to certain local matters regulation of which would work no material prejudice to the general maritime law" (*Grant Smith-Porter Ship Co. v Rohde*, 257 US 469, 477 [1922]). Noting that the objective of Federal maritime law was to protect workers engaged in maritime activities, the Court of Appeals held that applying New York's Labor Law to the facts presented in *Cammon* was "unlikely to disrupt Federal maritime activity" since it would not "unduly interfere[] with the federal interest in maintaining the free flow of maritime commerce" (*id.* at 589, citing Justice Souter's concurring language in *American Dredging Co. v Miller*, 510 US 443, 458 [1994]). "Local regulations that do not affect vessel operations, but rather govern liability issues with respect to landowners and contractors within the State, have no extraterritorial effect" (*Cammon*, 95 NY2d at 589).

This is especially so when the health and safety of workers is involved. "Protecting workers employed in the state is within the historic police powers of the State and there is no 'clear

and manifest' congressional intent to preempt this state prerogative" (*Gravatt v City of New York,* 1998 US Dist LEXIS 4886, *32, 1998 WL 171491, *12 [SD NY]). Moreover, strict liability statutes, such as Labor Law § 240(1), are not necessarily inconsistent with federal maritime law (*Gravatt,* 1998 US Dist Lexis 4886, *37, 1998 WL 171491, *14).

The dissent's insistence to the contrary, *Cammon* is not limited solely to claims against landowners. Although the Court there relied on New York City's landlord status, its decision was based on the activity's impact on traditional maritime commerce. We also reject the argument that Labor Law § 240(1)'s strict liability standard conflicts with federal maritime law and should be preempted. This is especially true where, as here, "the tort was maritime but local and there are no far-reaching implications for vessels, seafarers or entities engaged in maritime commercial transactions, there is no threat to the uniformity of the Federal maritime law sufficient to displace application of an important State health and safety measure, even though it may impose strict liability" (*Cammon,* 95 NY2d at 590).

Nor does our holding in *Emanuel,* where the § 240 claim was properly dismissed as in conflict with maritime law, dictate an inconsonant result. *Emanuel* was a rigger on an oil/transport barge (a vessel) whose cargo was discharged so that permanent repairs could be made before resuming operation. Here, as noted,

plaintiff was injured on a barge connected to a land-based structure which provided a land-based service, namely electric power.

Accordingly, the order of Supreme Court, New York County (Carol Edmead, J.), entered on or about January 23, 2007, which insofar as appealed from, granted motions by defendants, the barge's owners, and by third-party defendants, plaintiff's employers, for summary judgment dismissing the complaint, should be reversed, on the law, without costs, the motions denied, plaintiff's claims pursuant to Labor Law § 240(1) and § 241(6) reinstated, and plaintiff granted partial summary judgment as to liability on his 240(1) claim.

All concur except Friedman, J. who dissents in part in an Opinion.

FRIEDMAN, J. (dissenting in part)

In *Stewart v Dutra Constr. Co.* (543 US 481 [2005]), the United States Supreme Court held that the term "vessel" in the Longshore and Harbor Workers' Compensation Act (LHWCA, or "the Act") (33 USC §§ 901-950) is broadly defined to "include[] every description of watercraft . . . used, or capable of being used, as a means of transportation on water" (1 USC § 3). The majority, in determining that the barge on which plaintiff was injured is not a "vessel" under the LHWCA, looks for primary guidance, not to *Stewart*, but to a readily distinguishable Fifth Circuit case decided ten years earlier. It seems to me that our primary guide in deciding this appeal should be *Stewart* and its progeny, and the clear weight of authority since *Stewart* supports holding the barge at issue to constitute a "vessel" under the LHWCA.

Moreover, the LHWCA provides that a negligence action against a vessel owner is the "remedy . . . exclusive of all other remedies against the vessel" for injuries covered by the Act (33 USC § 905[b]). The defendants in this action are the entities that owned and operated the barge on which plaintiff was injured. Contrary to the majority's contention that this action may go forward even if plaintiff was injured on a "vessel," the United States Supreme Court has recognized that § 905(b) expressly preempts causes of action against a vessel owner on

grounds other than negligence, such as plaintiff's claims seeking to hold defendants vicariously liable under state law. The Court of Appeals decision on which the majority relies, *Cammon v City of New York* (95 NY2d 583 [2000]), is not to the contrary, as it dealt with a claim against a landowner, not a vessel owner. Accordingly, I respectfully dissent to the extent the majority modifies to reinstate the causes of action under Labor Law § 240(1) and § 241(6), which, as applied to the defendants in this action, are not premised on such defendants' negligence, but on their alleged vicarious liability as owners of the barge. I believe that the order appealed from, which rendered summary judgment dismissing the complaint in its entirety, should simply be affirmed.[1]

Plaintiff, a millwright, injured himself in the course of overhauling a power-generating turbine on a barge moored in the Gowanus Canal in Brooklyn. The barge was part of the Gowanus Power Generating Facility (the Gowanus facility), a group of turbine-bearing barges owned and operated by defendants Astoria Generating Company, L.P., Orion Power New York GP, Inc., Orion Power New York, L.P., and Orion Power New York LP, LLC (collectively, Astoria/Orion). At the time of his injury, plaintiff was working in the employ of third-party defendants

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[1]Given the absence of any evidence of negligence by defendants, I concur in the affirmance of the dismissal of plaintiff's common-law negligence and Labor Law § 200 causes of action.

Elliott Turbomachinery Co., Inc. and Elliott Company (collectively, Elliott).

In administrative proceedings before the United States Department of Labor, plaintiff prevailed on his claim against Elliott to recover statutory benefits under LHWCA. In this action, plaintiff sues Astoria/Orion, the owner and operator of the Gowanus facility, to recover damages based on the same incident, asserting causes of action under Labor Law § 240(1) and § 241(6). Plaintiff adduced no evidence that any negligence of Astoria/Orion itself contributed to the causation of his accident.

I begin with a review of relevant aspects of the LHWCA, which "provides workers' compensation to land-based maritime employees" (*Stewart*, 543 US at 488 [emphasis omitted]).[2] The LHWCA provides for a covered employee's right to compensation from his or her employer for a work-related injury (33 USC § 904[a]), "irrespective of fault as a cause for the injury" (33

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[2]The LHWCA applies (subject to exceptions not pertinent here) to claims for "disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)" (33 USC 903[a]). For purposes of the LHWCA, the term "employee" is defined to mean "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker," subject to certain exceptions (including one for "a master or member of a crew of any vessel") not pertinent here (33 USC 902[3]).

USC § 904[b]), and provides that such compensation is the exclusive remedy against the employer available to the employee (33 USC § 905[a]). In addition, § 905(b) of the LHWCA provides that a covered worker whose injury was "caused by the negligence of a vessel . . . may bring an action against such vessel" to recover damages for its negligence, and that such a negligence action is the worker's "exclusive" remedy "against the vessel" (33 USC § 905[b]).[3] The United States Supreme Court has recognized that, in amending the LHWCA to add subsection (b) to § 905, "Congress' intent . . . [was] to eliminate the vessel's nondelegable duty [under prior law] to protect longshoremen from

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[3]In pertinent part, 33 USC 905(b) provides:

"(b) Negligence of vessel

"In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

It should be noted that, as used in the LHWCA, the term "vessel" includes "said vessel's owner, . . . operator, . . . master, officer, or crew member," inter alia (33 USC § 902[21]).

the negligence of others" (*Howlett v Birkdale Shipping Co., S.A.*, 512 US 92, 104 [1994], citing *Scindia Steam Nav. Co. v De Los Santos*, 451 US 156, 168-169 [1981]; *see also id.*, 451 US at 172 [§ 905(b) "reject(s) the notion of a nondelegable duty on the shipowner to provide a safe place to work"]; *id.* ["(T)he congressional intent (was) to foreclose the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty"]). Thus, 33 USC § 905(b) "make[s] the vessel answerable [only] for its own negligence" (*id.* at 168).

Since plaintiff has prevailed on his claim for LHWCA benefits against his employer (Elliott), there can be no dispute that claims arising from the injuries he incurred in the subject incident fall within the scope of the LHWCA. Further, given the aforementioned absence of evidence that plaintiff's injuries were caused by any negligent conduct by Astoria/Orion itself, the causes of action asserted against Astoria/Orion under Labor Law § 240(1) and § 241(6) are necessarily predicated on an owner's nondelegable duty under those statutes to see that the statutory requirements are complied with at the work site.[4] Thus, to the extent the barge on which the accident occurred was a "vessel"

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[4]The record establishes that plaintiff was working under the sole direction, supervision and control of Elliott, his employer, and contains no evidence of any negligence on the part of Astoria/Orion that may have been causally related to the accident. Given its affirmance of the dismissal of the negligence and Labor Law § 200 claims against Astoria/Orion, the majority apparently agrees with me on this point.

within the meaning of the LHWCA, holding Astoria/Orion vicariously liable for a violation of Labor Law § 240(1) or § 241(6) poses a stark conflict with the exclusivity provision of 33 USC § 905(b), which, to reiterate, immunizes the owner of a "vessel" from liability to a covered worker on the basis of any theory of nondelegable duty (*see Scindia Steam*, 451 US at 172 [§ 905(b) "foreclose(s) the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty"]). For the reasons discussed below, it is my view that the barge in question does constitute a "vessel" under the LHWCA, and, therefore, plaintiff's causes of action under Labor Law § 240(1) and § 241(6) are preempted pursuant to the Supremacy Clause of the United States Constitution.

Since the LHWCA does not define the distinguishing characteristics of a vessel, the Supreme Court has held that a definition of the term set forth elsewhere in the United States Code applies to the Act (*see Stewart*, 543 US at 490).[5] That definition -- as previously noted, an exceedingly broad one -- is as follows: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water" (1 USC § 3).

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[5]As the Supreme Court noted, although the LHWCA does contain a definition of the term "vessel" (33 USC § 902[21]), that definition, "[r]ather than specifying the characteristics of a vessel, . . . instead lists the parties liable for the negligent operation of a vessel" (*Stewart*, 543 US at 489 n 2).

In discussing the statutory definition of "vessel," the Supreme Court observed that "a watercraft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement" (543 US at 494). The Court further noted:

> "Section 3 requires only that a watercraft be 'used, or capable of being used, as a means of transportation on water' to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose." (*Id.* at 495).

Moreover, "a watercraft need not be in motion to qualify as a vessel under § 3"(*id.*). While acknowledging that "structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time," the Court explained that "a structure's locomotion at any given moment" does not determine whether it has vessel status (*id.* at 496). The Court elaborated:

> "A ship long lodged in a drydock or shipyard can again be put to sea, no less than one permanently moored to shore or the ocean floor can be cut loose and made to sail. *The question remains in all cases whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one.*" (*Id.* [emphasis added]).

In sum, under *Stewart*, a "vessel" for purposes of the LHWCA "is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment," and "[d]espite [any] seeming incongruity of grouping [the craft] alongside more traditional seafaring vessels" (543 US at 497). Applying this standard in

Stewart, the Supreme Court held that a massive dredge, which "moved long distances by tugboat" and "short distances by manipulating its anchors and cables" (*id.* at 484), was a vessel for purposes of the LHWCA. In subsequent decisions, watercraft that have been held to qualify as vessels under the *Stewart* standard include: a moored dormitory barge that had no means of self-propulsion and was towed by tug between project locations (*Holmes v Atlantic Sounding Co., Inc.*, 437 F3d 441 [5th Cir 2006]); a cleaning barge that had no means of self-propulsion and was moored to a riverbed (*Bunch v Canton Mar. Towing Co., Inc.*, 419 F3d 868 [8th Cir 2005]); a dredge similar to the one in *Stewart* (*Uzdavines v Weeks Mar., Inc.*, 418 F3d 138 [2d Cir 2005]); a construction barge used in the installation of an underwater sewer main (*Calcaterra v City of New York*, 45 AD3d 270 [2007]); riverboat casino that was released from its moorings only for maintenance, namely, to be spun around to dislodge accumulated drift material (*Booten v Argosy Gaming Co.*, 364 Ill App 3d 697, 848 NE2d 141 [2006], *appeal denied* 221 Ill 2d 632, 857 NE2d 669 [2006]); and two riverboat casinos that were moored to shore at all times except for 200 hours of cruising per year mandated by state gaming laws (*Harvey's Casino v Isenhour*, 713 NW2d 247 [Iowa App 2006], *affd* 724 NW2d 705 [Iowa 2006], *cert denied* __ US __, 127 S Ct 2943 [2007]).

Contrary to the majority's position, the power-generating barge on which plaintiff was injured qualifies as a "vessel" under *Stewart*, which, to reiterate, requires only that "the watercraft's use 'as a means of transportation on water' [be] a practical possibility," not "merely a theoretical one" (543 US at 496). In this case, the use of the subject barge as a means of transportation on water is plainly a practical possibility, as the barge is detached from its moorings and moved by tug to drydock for maintenance about once every 10 years. Moreover, the barge can be moved to provide power at other locations when necessary. In 1996, for example, the barge was moved to Astoria, Queens, to provide energy to that area after a fire at a generating station caused a power shortage there. After three months in Astoria, the barge was moved back to its home base in Gowanus. When the barge is moved, it serves to transport the power turbines it supports to the trip's destination.

The foregoing facts establish that the subject barge is "practically capable of marine transportation" (*Stewart*, 543 US at 497). In the past, it has been detached from its moorings and moved to receive periodic maintenance. In addition, when needed, the barge has been moved to provide power at a location experiencing a temporary shortage and, thereafter, to be returned to Gowanus. In the future, it will again be moved to receive periodic maintenance, and it may well also be moved again to address temporary power shortages in other areas and then to

return to Gowanus. Under *Stewart*, this suffices to render the barge a "vessel" for purposes of the LHWCA. It is of no moment that the barge's primary purpose is not transportation, that its movements are infrequent, or that it lacks means of self-propulsion. As the Eighth Circuit stated of a tow barge (the Rand) that was moored in the Mississippi River for use as a restaurant, bar and gas station:

> "The Rand was 'capable of use' as a vessel, albeit under tow. While it may have been inefficient or expensive to use the Rand as a vessel, those factors do not serve to strip the Rand of its vessel status. The Rand fits 'into the category of many other vessels with similarly limited capacities.' Although the Rand probably will never 'slip her moorings' and set off toward open waters, she is nonetheless a towable vessel capable of use as a means of transportation on water" (*United States v Templeton*, 378 F3d 845, 852 [8th Cir 2004] [holding that the Rand constituted a "vessel" under a statutory definition identical in substance to 1 USC § 3] [citations omitted]).

In considering whether the subject barge constituted a "vessel" under the LHWCA, it should be borne in mind that the question on this appeal is not whether plaintiff's claim falls within the "maritime jurisdiction," an inquiry that would involve applying a two-part test of "location" and "connection with maritime activity" (*Jerome B. Grubart, Inc. v Great Lakes Dredge & Dock Co.*, 513 US 527, 534 [1995]). Whether or not plaintiff's claim would fall within the maritime jurisdiction, his claim *does* fall within the scope of the LHWCA, which covers claims both within and without the maritime jurisdiction.[6] Since it is

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[6]As previously noted, the LHWCA covers the "disability or (continued...)

undisputed that the injury sued upon falls within the coverage of the LHWCA -- indeed, plaintiff, having prevailed against his employer on his claim for LHWCA benefits, is estopped to assert otherwise -- the only real question on this appeal is whether the barge on which the injury occurred qualifies as a "vessel" under the LHWCA, so as to render applicable to Astoria/Orion, the barge's owner, the immunity from liability without fault provided by 33 USC § 905(b).

As discussed above, it is my view that the power barge on which plaintiff was injured constituted a "vessel" for purposes of the LHWCA under the broad standard the Supreme Court established in *Stewart*.[7] The majority's conclusion to the

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[6](...continued)
death" of a covered employee "result[ing] from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel*)" (33 USC § 903[a] [emphasis added]). Thus, claims for injuries suffered on land and *not* caused by a vessel on navigable waters may be covered by the LHWCA, even though such claims fall outside the maritime jurisdiction (*see* 46 USC § 30101[a] ["The admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land"]).

[7]Since plaintiff was not required to show that his injury occurred on a "vessel" to prevail on his claim for LHWCA benefits, he is not estopped to deny that the subject barge was a vessel. Nonetheless, it is noteworthy that, in the administrative proceedings on the claim for LHWCA benefits, his counsel specifically argued that plaintiff's work on the barge "subjected [him] to a certain element of danger which comes with
(continued...)

contrary is not warranted by the authority it cites. *Pavone v Mississippi Riverboat Amusement Corp.* (52 F3d 560 [5th Cir 1995]), the decision on which the majority places greatest emphasis, involved a moored riverboat casino that, unlike the barge here, "was joined to a shore-side building" (*id.* at 564). Moreover, there is no indication in the *Pavone* decision that the owner had any definite intention, once the riverboat was moored in its berth at the time of the subject incident, of moving the boat ever again (unless a weather emergency occurred), even for maintenance.[8] Here, by contrast, the owner plans to move the power barge to and from drydock for periodic maintenance while it remains in use. The Fifth Circuit's decision in *De La Rosa v St. Charles Gaming Co., Inc.* (474 F3d 185 [5th Cir 2006]), follows *Pavone*, and is distinguishable on the same grounds. Another case cited by the majority, *Kathriner v Unnisea, Inc.* (975 F2d 657 [9th Cir 1992]), is readily distinguishable on the ground that, as noted in *Stewart* (543 US at 494), a "large opening [had been] cut into [the] hull" of the subject structure (a floating

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[7](...continued)
working on the water"; that "the barge rocks and moves with wind and the tide"; and that plaintiff's work was "not land-based." Plaintiff's counsel even referred to the barge as a "vessel."

[8]While *Pavone* is cited in *Stewart*, the Supreme Court cited the case, without discussing its facts in any detail, only for the statement that the riverboat casino there at issue was not a vessel because it "was moored to the shore in a semi-permanent or indefinite manner" (543 US at 494, quoting *Pavone*, 52 F3d at 570).

processing plant), which rendered the structure incapable of travel over water (975 F2d at 660). Finally, *Matter of Consolidated Edison Co. of N.Y. v City of New York* (44 NY2d 536 [1978]) concerned the classification of the subject barge for purposes of its taxability by the City of New York under the Real Property Tax Law, and has no relevance to the question of whether the barge constituted a "vessel" under the LHWCA, as that federal statute has been construed by the Supreme Court.

For all of the reasons discussed above, the record establishes that (1) the LHWCA applies to plaintiff's claim, (2) the injury occurred aboard a "vessel" within the meaning of the LHWCA, and (3) the instant action is brought against the owner of that vessel. Thus, the only matter remaining for consideration is whether the exclusivity provision of § 905(b) of the LHWCA preempts plaintiff's causes of action under Labor Law § 240(1) and § 241(6). In my view, it plainly does. As noted above, the intent of Congress in enacting § 905(b) was specifically to exempt the owner of a vessel, in its capacity as such, from liability without fault, including liability based on any theory of nondelegable duty, for injuries befalling workers covered by the LHWCA. Indeed, since the congressional intent to eliminate the non-fault liability of vessel owners "is explicitly stated in

the statute's language" (*Jones v Rath Packing Co.*, 430 US 519, 525 [1977]), this is an instance of express preemption, as the Supreme Court itself has recognized:

> "[The LHWCA] provides nonseaman maritime workers . . . with no-fault workers' compensation claims (against their employer, § 904[b]) and negligence claims (against the vessel, § 905[b]) for injury and death. *As to those two defendants, the LHWCA expressly pre-empts all other claims*, § 905(a), § (b)" (*Norfolk Shipbuilding & Drydock Corp. v Garris*, 532 US 811, 818 [2001] [emphasis added]).

Because we are dealing with a federal statute that directly applies to the situation at bar and conflicts with the state law remedies invoked by plaintiff, the flexible approach to application of state law in cases also generally subject to federal maritime law, as reflected in *Cammon* (95 NY2d 583 [2000], *supra*), is out of place. Although the injury in *Cammon* was covered by the LHWCA (under which the plaintiff received benefits), the suit in state court was against the City of New York based on its ownership of the South Bronx Marine Transfer Station, where the plaintiff was injured while making repairs to a pier from a "float stage" in the water (*id.* at 586). Thus, the prosecution of the *Cammon* claims against the City under Labor Law § 240(1) and § 241(6) did not present any conflict with the LHWCA, in general, or with § 905(b) thereof, in particular. Similarly, in *Olsen v James Miller Mar. Serv., Inc.* (16 AD3d 169 [2005]), in which we held that maritime law did not preempt the Labor Law claims of a plaintiff who fell through a hole in the

deck of barge while engaged in the pier-repair project, the only claims at issue on the appeal were those against Con Edison, as lessee of the pier, and Con Edison's general contractor (*see also Gravatt v City of New York*, 1998 WL 171491, *10-16 [SD NY 1998] [holding that Labor Law claims against City, as owner of a bridge, and Massand, an engineering firm, were not preempted, while denying motions to dismiss claims under 33 USC § 905(b) and the Jones Act against S & B, the employer and vessel owner]). Neither *Cammon*, *Olsen* nor *Gravatt* addressed Labor Law claims against a party that would have fallen within the scope of the term "vessel" as used in the LHWCA (*see* 33 USC § 902[21]).

On point is our decision in *Emanuel v Sheridan Transp. Corp.* (10 AD3d 46 [2004]), in which we held preempted a Labor Law § 240(1) cause of action brought by the administratrix of a shipyard worker against the owner and the operator of a vessel in drydock (*id.* at 58-59). The decedent in *Emanuel*, like plaintiff in this case, was covered by the LHWCA (*id.* at 52). The same result should follow here.

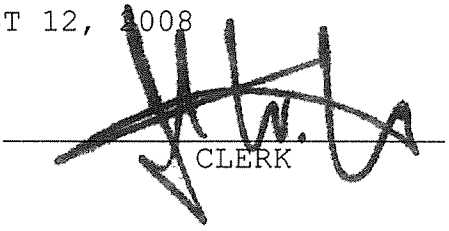
I close with the following observations. The majority holds in the first instance that plaintiff's Labor Law claims against Astoria/Orion are not barred because, in the majority's view, the barge on which plaintiff was injured was not a "vessel" within the meaning of the LHWCA. While I disagree with the majority on the question of whether the barge was a "vessel" (as discussed

above), I agree with the majority that, if the barge were not a "vessel," the LHWCA would not preempt plaintiff's Labor Law claims. I have a more profound disagreement with the majority's alternative holding that, even if the barge was a "vessel" under the LHWCA (as I believe it was), the displacement of the federal statutory provision expressly barring this action can be justified by appeal to the flexible analysis used to determine the applicability of state law in situations also subject to the general federal maritime jurisdiction (*see Cammon*, 95 NY2d at 587-590). To reiterate, the majority's use of this sort of flexible analysis -- which the Court of Appeals quite properly employed in *Cammon*, where the defendant was *not* sued based on its ownership of a vessel -- is altogether out of place here, where the defendant is a vessel owner that the LHWCA expressly immunizes from liability on grounds other than its own negligence. Whatever flexibility we may have in harmonizing federal and state interests in other contexts, we have no authority to refuse to apply a federal statute that, by its plain terms, expressly applies to the situation at bar. Nothing in *Cammon* remotely supports the majority's view that, even if the barge was a "vessel," we may permit this action to go forward notwithstanding the express bar of a duly enacted federal statute.

For all of the foregoing reasons, I respectfully dissent as to the reinstatement of the causes of action under Labor Law § 240(1) and § 241(6).

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

ENTERED: AUGUST 12, 2008



CLERK

AUG 12 2008

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, J.P.
Milton L. Williams
James M. Catterson
Karla Moskowitz, JJ.

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2798
Index 119170/06

x

Christina Sassi-Lehner, et al,
Plaintiffs-Appellants,

-against-

Charlton Tenants Corp., et al.,
Defendants-Respondents.

x

Plaintiffs appeal from an order of the Supreme Court, New York County (Edward H. Lehner, J.), entered April 2, 2007, which, inter alia, denied their motion for summary judgment declaring them to be holders of unsold shares allocated to three apartments in defendant cooperative corporation, and declared that plaintiffs are not holders of unsold shares, and thus are not entitled to assign the shares without board approval; and from an order, same court and Justice, entered June 4, 2007, which denied reargument.

Bernstein Nackman & Feinberg, LLP, New York (Roger J. Bernstein of counsel), for appellants.

Karlsson & Ng, P.C., New York (Kent Karlsson of counsel), for respondents.

CATTERSON, J.

In this declaratory judgment action, the plaintiffs seek a declaration that they are the holders of unsold shares in a cooperative corporation and thus entitled to assign, sell or transfer the shares without board approval. The question presented is whether the plaintiffs are entitled to claim the status of holders of "unsold shares" when they acquired the shares through a foreclosure sale.

It is undisputed that defendant Charlton Tenants Corp. is a cooperative incorporated in New York State in 1980. It was established by the sponsor, BDR Associates, to effect a cooperative conversion of a six-story residential apartment building located in Manhattan.

The conversion of the building to cooperative ownership began in 1982. The unit specifically at issue, apartment 4C, was not sold at the closing date of the conversion because a nonpurchasing, rent-controlled tenant chose not to vacate the apartment. At that point, the sponsor became the "holder of unsold shares" corresponding to apartment 4C.

By the third anniversary of the closing, the sponsor transferred ownership of these shares and the proprietary lease for apartment 4C to purchaser Mark Greenbaum. The Fifth Amendment of the offering plan, dated July 22, 1985, identified Greenbaum as the designated holder of the shares to apartment 4C.

Greenbaum was the last individual to be listed in any of the amendments to the offering plan as a holder unsold shares of apartment 4C.[1]

When Greenbaum defaulted on an obligation secured by the shares and the proprietary lease for apartment 4C, the shares and lease were sold at a foreclosure sale by the Federal National Mortgage Association (hereinafter referred to as "Fannie Mae"). Michael & Christina Sassi, already shareholders in the coop, purchased the shares of apartment 4C (and for two other apartments in the building) from Fannie Mae at the foreclosure sale. At the time the Sassis purchased the shares, the apartments were still occupied by tenants with lifetime tenancy under either rent control or rent stabilization.

Michael Sassi died in June 2001. In December 2003, Christiana Sassi transferred the shares of apartment 4C to her adult daughters, the plaintiffs, Christina Sassi-Lehner and Gabriella Sassi-Hill, a transfer not generally subject to board approval because it was an intrafamily transfer.

Meanwhile, apartment 4C continued to be occupied by the prior tenant. Neither Michael nor Christina Sassi, nor the plaintiffs were listed as holders of unsold shares in any

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[1]The record shows that no amendment subsequent to the Eleventh Amendment dated July 2, 1990, which states that Greenbaum is the holder of 483 unsold shares allocated to the apartment, indicates any ownership of unsold shares.

subsequent amendments to the offering plan.

In autumn 2005, the tenant in apartment 4C stopped paying rent and surrendered possession of the apartment. In December 2006, the plaintiffs contracted to sell the apartment. However, the defendant coop board refused to allow a closing without a formal application seeking consent to the sale.

On December 28, 2006, this declaratory judgment action was filed whereby the plaintiffs sought a declaration that they are holders of unsold shares in the defendant coop.

Following oral argument, the court denied the motion for declaratory judgment by memorandum decision and order dated March 28, 2007, based upon its examination of the proprietary lease and the offering plan and its amendments. The court concluded that the "crucial cooperative document to determine the issue is the [Offering] Plan, which states that a holder of unsold shares must be a person 'designated' by the sponsor." The court further determined that because neither the plaintiffs nor their parents had ever been designated by the sponsor as a holder of unsold shares, the plaintiffs could not claim status as holders of unsold shares.

The plaintiffs moved for reargument on April 26, 2007, which motion was denied on May 25, 2007. Both the March 28, 2007 decision and order, and the subsequent order denying reargument are the subject of this appeal.

The plaintiffs assert that pursuant to the Court of Appeals decision in Kralik v. 239 E. 79th St. Owners Corp. (5 N.Y.3d 54, 799 N.Y.S.2d 433, 832 N.E.2d 707 (2005)), the offering plan is not a controlling document and that in order to determine their status as holders of unsold shares, this Court is limited to a review of the certificate of incorporation, the bylaws, and the proprietary lease. Specifically, the plaintiffs rely on Paragraph 38(a) of the proprietary lease which states:

> "The term 'Unsold Shares' means and has exclusive reference to the shares of the [l]essor which were issued to the [s]ponsor or individuals produced by the [s]ponsor pursuant to the [o]ffering [s]tatement- [p]lan of [c]ooperative [o]rganization or [c]ontract of [s]ale under which the [l]essor acquired the [l]easehold to the building; and, all shares which are [u]nsold [s]hares retain their character as such (regardless of transfer) until (a) such shares become the property of a purchaser for bona fide occupancy (by himself o[r] a member of his family) of the apartment to which such shares are allocated, or (2) the holder of such shares (or a member of his family) becomes a bona fide occupant of the apartment. This Paragraph 38 shall become inoperative as to this [l]ease upon the occurrence of either of said events with respect to the [u]nsold s]hares held by the [l]essee named herein or his assignee."

The plaintiffs focus on two phrases found in Paragraph 38(a). First, that unsold shares are shares that "were issued to the [s]ponsor or individuals produced by the [s]ponsor" and second, the phrase that states unsold shares:

> "retain their character as such (regardless of transfer) until (a) such shares become the property of a purchaser for bona fide occupancy (by himself o[r] a member of his family) of the apartment to which such shares are allocated or (2) the holder of such shares (or a member of his family) becomes a bona fide occupant of the apartment."

The plaintiffs contend that pursuant to Paragraph 38(a) they are holders of unsold shares because their shares were originally held by the sponsor, and because neither they nor their parents ever occupied the apartment. Further, the plaintiffs argue that "regardless of transfer" means that unsold shares which were initially held by the sponsor may be transferred in perpetuity, regardless of who acquires them or how, whether by purchase or foreclosure. The person owning the shares has all the rights of a holder of unsold shares until such time as he or she occupies the apartment or the shares are owned by a purchaser who occupies the apartment.

The defendants contend that the motion court was correct because it found that the lease must necessarily be read in conjunction with the offering plan which states that a current holder of unsold shares must be an individual who was designated by the sponsor to be such either at closing or within three years of the closing.

For the reasons set forth below, we find that the motion court properly determined that Kralik does not prohibit our review of the offering plan, and that, indeed, the term "holder of unsold shares", as it appears in the proprietary lease, cannot be understood without referencing the offering plan in this case.

At the outset, we note that Kralik does not stand for the proposition that an offering plan may never be considered in

resolving questions over unsold shares. The Kralik Court simply did not exclude an offering plan from being considered a relevant document as a matter of law. The Court in Kralik merely rejected the coop's attempts to change the terms of the Kraliks' contract with the coop by reading the Attorney General's regulations into the proprietary lease.

The Kralik Court reiterated the basic concept that a determination as to whether a party is a holder of unsold shares should be made "solely by applying ordinary contract principles to interpret the terms of the documents defining their contractual relationship with the cooperative corporation." 5 N.Y.3d at 57, 799 N.Y.S.2d at 434; see Fe Bland v. Two Trees Mgt. Co., 66 N.Y.2d 556, 563, 498 N.Y.S.2d 336, 340, 489 N.E.2d 223, 227 (1985)(stating that "the relevant provisions of the related documents must be read together"); see also Brennan v. Breezy Point Coop., 63 N.Y.2d 1022, 1025, 484 N.Y.S.2d 510, 512, 473 N.E.2d 738, 740 (1984). Indeed, this Court has found post-Kralik that there are circumstances where the offering plan is to be "taken together" with the controlling documents. See LJ Kings, LLC v. Woodstock Owners Corp., 46 A.D.3d 321, 848 N.Y.S.2d 42 (2007); Likokoas v. 200 E. 36th St. Corp., 48 A.D.3d 245, 850 N.Y.S.2d 451 (2008); Matter of Schapira v. Grunberg, 30 A.D.3d 345, 819 N.Y.S.2d 8 (2006).

In applying the principles of basic contract interpretation,

we find that, in this case, the definition of holder of unsold shares cannot be understood without reference to the offering plan since the proprietary lease unequivocally states that "the term 'Unsold Shares' means and has *exclusive* reference to the shares of the [l]essor which were issued to the [s]ponsor or individuals produced by the [s]ponsor *pursuant to the [o]ffering [s]tatement- [p]lan* of [c]ooperative [o]rganization" (emphasis added). Thus, to accept the plaintiffs' suggestion that this Court should simply overlook the words "pursuant to the offering statement" found in Paragraph 38(a) is contrary to the plain language of the proprietary lease and to basic principles of contract interpretation. RM 14 FK Corp. v. Bank One Trust Co., N.A., 37 A.D.3d 272, 274, 831 N.Y.S.2d 120, 123 (2007)(contracts are to be interpreted so that no portion of the contract is rendered meaningless).

The offering plan "under which the [l]essor acquired the [l]easehold to the building" provides that "unsold shares" are those shares not sold by the closing date; that is, shares allocated to apartments occupied by non-purchasing tenants at the time of conversion. Further, the offering plan provides that those unsold shares would either be acquired by the sponsor or they would be issued to a "financially responsible individual person *or persons" produced by the sponsor* at the time of closing. Additionally, the sponsor "may at any time after closing

assign such blocks of shares and proprietary leases to individuals *designated* by it as holders of [u]nsold [s]hares." (emphasis added). Finally, the offering plan mandates that "no later than the third anniversary of [c]losing, the [s]ponsor must have assigned all [u]nsold [s]hares... to individuals *designated by it* as holders of unsold shares."[2] (emphasis added).

Accordingly, paragraph 38(a) of the proprietary lease reflects that unsold shares in this case were issued in a finite number (only those allocated to apartments not purchased by occupying tenants at time of closing); they were issued to specific entities (sponsor and financially responsible individuals produced or designated by sponsor); and they were issued at a particular point in time, that is at closing, with transfers to be made by the sponsor during a period of three years following closing until the sponsor held no more unsold shares. A plain reading of this first sentence of paragraph 38(a), therefore, makes patent that the plaintiffs do not qualify as original holders of unsold shares with the appurtenant rights of selling, assigning or transferring their shares without Board approval.

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[2]The "Unsold Shares" section of the offering plan concludes by listing the desirable rights that holders of unsold shares possess. It states:"[a]ny Unsold Shares and leases acquired by a holder of Unsold Shares may be sold, assigned, or transferred by him or her or his or her apartment may be sublet by him or her, without restriction or approval."

Paragraph 38(a), however, contemplates that the specific individuals designated or produced by the sponsor to be holders of unsold shares (that is, owners of occupied apartments) may subsequently want to, or have to, take advantage of the desirable characteristics of the unsold shares and, without Board approval, assign, sublet, lease or transfer them to a third party. The paragraph provides for such a situation by stating: that "all... [u]nsold [s]hares retain their character as such (regardless of transfer)" until the holder occupies the apartment or until a purchaser occupies the apartment.

Arguably, the phrase, "regardless of transfer" is problematic. The plaintiffs, in fact, contend that it precisely reflects their situation; and that unsold shares retain their desirable character from inception until the end of recorded time regardless of how they are conveyed from one owner to another, or whether there has been a designation by the sponsor, so long as neither the holder nor a subsequent purchaser or their families occupy the apartment for their own use.

We disagree. Given the context, and the positioning of the phrase "regardless of transfer" the words must be interpreted to mean only those transfers effected by the previously mentioned "individuals produced by the [s]ponsor pursuant to the [o]ffering [plan]."

It is an elementary principle of law that every phrase and

word in a contract must be given meaning; therefore, the phrase "regardless of transfer" must be given full effect. See Mionis v. Bank Julius Baer & Co., 301 A.D.2d 104, 109, 749 N.Y.S.2d 497, 502 (2002). In this case, "regardless of transfer" is superfluous and meaningless if it is interpreted to reflect the plaintiffs' position of transfers in perpetuity. Read without the phrase, the sentence, all unsold shares retain their character as such until such shares are purchased for bona fide occupancy or the holder becomes a bona fide occupant, would be more than sufficient to establish the plaintiffs as holders of unsold shares with all appurtenant rights. Thus, the only possible way to give full effect to that phrase is to acknowledge its limiting action. In other words, "regardless of transfer" limits any transfers of "unsold shares" to those only where the transferor is an individual designated or produced by the sponsor. The paragraph therefore, does not encompass a situation where unsold shares retain their desirable characteristics in subsequent transfers between parties where one of them is not an individual that was designated or produced by the sponsor. See LJ Kings, LLC v. Woodstock Owners Corp., 46 A.D.3d at 322, 848 N.Y.S. 2d at 43 (limited liability company (LLC) was found to be a holder of unsold shares in coop under controlling documents, namely, offering plan and proprietary lease, where LLC purchased shares from designated holder of unsold shares, no bona fide

purchaser had purchased apartment for occupancy, and neither LLC nor any immediate family member ever occupied apartment). Accordingly, since the plaintiffs acquired the shares from their parents who purchased the shares at a foreclosure sale from Fannie Mae, who was not designated by the sponsor as a holder of unsold shares, the plaintiffs cannot be recognized as holders of unsold shares.

Accordingly, the order of the Supreme Court, New York County (Edward H. Lehner, J.), entered April 2, 2007, which, inter alia, denied plaintiffs' motion for summary judgment declaring them to be holders of unsold shares allocated to three apartments in defendant cooperative corporation, and declared that plaintiffs are not holders of unsold shares, and thus are not entitled to assign the shares without board approval, should be affirmed, without costs. Appeal from order, same court and Justice, entered June 4, 2007, which denied reargument, should be dismissed, without costs, as taken from a nonappealable order.

All concur.

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

ENTERED: