NEW YORK SUPREME COURT - COUNTY OF BRONX

PART

Case Disposed	☒
Settle Order	☐
Schedule Appearance	☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

LISA A. AHEARN

-against-

P&E REALTY CO, LLC and PERRY GAULT MANAGEMENT CO. INC.

Index Nº. 301987/2007

Hon. DIANE A. LEBEDEFF

Justice.

The following papers numbered 1 to ____ Read on this motion,
Noticed on _____ and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2, X	
Replying Affidavit and Exhibits	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Dated: 12/16/2010

Hon. _____
J.S.C.

DIANE A. LEBEDEFF

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 17
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LISA A. AHEARN,

Plaintiff,

-against- Index No: 301987/07

P & E REALTY CO. LLC and PERRY GAULT MANAGEMENT CO. INC.,

Defendants.

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HON. DIANE A. LEBEDEFF

Defendants P & E Realty Co. LLC. ("P & E Realty") and Perry Gault Management Co. Inc. ("Perry Gault") move for summary judgment dismissing the complaint on the grounds that there are no triable issues of fact. This action seeks to recover for personal injuries allegedly sustained by plaintiff Lisa A. Ahern in a fall while she was descending the stairs in a building owned, managed, controlled and/or maintained by defendants.

Plaintiff alleged that the fall took place on November 24, 2006, at a multiple dwelling located at 327 East 206th Street in Bronx County, when she was descending the stairs between the first and second floors. She alleged that she was on the third step down and she fell forward after several fingers on her right hand became "caught between the railing and the metal part of the staircase" because of an insufficient amount of finger clearance space (plaintiff's deposition, dated June 2, 2008, p. 23). Plaintiff further claimed that she had resided in an apartment on the premises for 26 years, and she had used the same set of stairs when entering or exiting the

building (plaintiff's deposition, dated June 2, 2008, p. 6, 17). Plaintiff also claimed that, during the years she resided at the premises, her fingers never became stuck while using the stairs and that she had never made a complaint to building personnel regarding the condition of the handrail (plaintiff's deposition, dated June 2, 2008, p. 41-41).

Angelo Colon, defendant Perry Gault's handyman and building manager, testified based upon his 20 years of living and working at the premises. He asserted that the subject handrail was on the right-hand side of the stairs going down. Colon claimed that he never received any complaint concerning the handrail nor that a person's finger could become stuck because of insufficient clearance space on the handrail (Colon deposition, dated June 2, 2008, p. 30, 43-45).

Defendants submit the affidavit of their expert, Vincent A. Ettari, P. E., a licensed engineer. In his affidavit, dated June 16, 2008, Ettari stated that the premises and the subject handrail were constructed in 1922. He asserted that "the stairway and handrail in question are, and remain, subject to the New Construction Standards which were in effect in 1922" (Ettari affidavit, ¶ 15). Following a review of the records and an inspection of the handrail, Ettari opined "to a reasonable degree of engineering certainty" that: (1) the "subject stairway, and its handrail, affords a reasonable degree of safety to all those who enter, or exit" (Ettari affidavit, ¶ 27); (2) that the stairway and handrail were "exempt from . . . the requirements of the 1938 Edition of the New York City Building Code . . . [and] the 1968 Edition of the New York City Building Code" (Ettari affidavit, ¶ 27); and, (3) the "stairway in question, along with its handrail, is <u>not</u> required by the New York City Housing Maintenance Code to have been retrofitted with handrails or otherwise have its existing handrail reconstructed" (Ettari affidavit, ¶ 27).

In opposition, plaintiff submits the affidavit of her expert, Robert L. Schwartzberg, P.E., a licensed engineer. In his affidavit, dated September 25, 2009, Schwartzberg opines that it is his "professional opinion that hazardous conditions were created and allowed to remain in place . . . . In particular, I noted that the finger clearance or space between the handrail and the adjacent steel stairway stringer was less than one half inch. Good and accepted practice as regards finger clearance and as mandated by the Building Code of the City of New York is to provide a minimum finger clearance of one and one half inches" (Schwartzberg affidavit, ¶ 5).

Further, Schwartzberg states that the building is subject to The New Code of Ordinances of the City of New York, adopted on June 20, 1916 (the "1916 Code"), which provides:

> "'6. Hand rails. – Stairs shall have walls or well secured balustrades of guards on both sides, and shall have handrails on both sides. When the required width of a flight of stairs exceeds 88 inches, an intermediate handrail, continuous between landings, substantially supported and terminating at the upper end in newels or standards at least 6 feet high, shall be provided.'" (Schwartzberg affidavit, ¶ 9; quoting New Code of Ordinances of the City of New York, adopted June 20, 1916).

The stairway in question has a single handrail. Schwartzberg concedes that "the 1916 Code is silent on [the issue of] appropriate finger clearance" (Schwartzberg affidavit, ¶ 9).

The gravamen of plaintiff's complaint is that she was injured by the alleged defective condition that existed on the premises: the handrail in question had an insufficient amount of finger clearance. In order to recover, an injured party "must demonstrate that the landlord created, or had actual or constructive notice of, the hazardous condition which precipitated the injury" (*Perez v Bronx Park S. Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]; *lv denied* 97 NY2d 610 [2002]; *see also Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

A party moving for summary judgment "'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Finkelstein v Cornell Univ. Med. Coll.*, 269 AD2d 114, 117 [1st Dept 2000]; quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). When the movant on a summary judgment motion demonstrates its entitlement on that motion, the burden then shifts to the opposing party to demonstrate, by admissible evidence, that a material issue of fact remains (*see* CPLR 3212[b]; *Davenport v County of Nassau*, 279 NY2d 497, 498 [2001]).

Here, defendants have established their prima facie entitlement to summary judgment as a matter of law by their submission of the affidavit of their expert who opined that the stairway and its handrail was safe and exempt from the 1938 and 1968 codes, thereby eliminating any material issues of fact (*see Finkelstein v Cornell Univ. Med. Coll.*, *supra*, 269 AD2d at 117). Defendants further support their position with the decision in *Merino v New York City Tr. Auth.* (218 AD2d 451, 457 [1st Dept 1996]; *aff'd* 89 NY2d 824 [1996]), which held that "[t]he law is settled that a party is under no legal duty to upgrade a structure, which was originally built in compliance with the law, by reason of subsequent changes in specifications."

The burden then shifts to the plaintiff to demonstrate that a material issue of fact remains. On this record, Schwartzberg's opinion fails to contravene the evidence submitted by defendants that the handrail was exempt from any finger clearance requirements of the 1938 and 1968 codes. Although Schwatzberg implies that the Building Code of the City of New York required the subject handrail to have a one and one half inch minimum finger clearance, neither he nor plaintiff cite to a particular section of that Code. Moreover, his reliance upon the 1916 Code which is silent as to finger clearance, the issue at the center of this action, is equally unpersuasive

(*Mauro v Rosedale Enters., supra*, 60 AD3d 401 at 401-02). Further, Schwartzberg's opinion that defendants were on notice of the handrail's condition contravenes the building manager's testimony that no complaints had ever been received concerning the subject handrail.

It is also noted that the affidavit of plaintiff's expert arguably must be rejected because the identification of the expert and tender of such expert opinion was belated and followed the February 20, 2009, filing of the Note of Issue herein (*Mauro v Rosedale Enters.*, 60 AD3d 401, 401-02 [1st Dept 2009], "We need not determine whether the affidavit of plaintiffs' expert engineer should not have been considered in light of plaintiffs' failure to identify this expert during pretrial disclosure, despite repeated court orders to do so .... The expert affidavit, even if considered, fails to raise a triable issue of fact, instead citing various broad or inapt engineering rules, regulations and standards"; internal citations omitted; *see e.g. Soldano v Bayport-Blue Point Union Free School Dist.*, 29 AD3d 891, 891 [2d Dept 2006], "The plaintiffs failed to identify the expert in pretrial disclosure, and served the affidavit, which was elicited solely to oppose the defendant's motion for summary judgment, after filing a note of issue and certificate of readiness attesting to the completion of discovery"; *Vereczkey v Sheik*, 57 AD3d 527 [2d Dept 2008]; *appeal dismissed* 12 NY3d 805 [2009]; *King v Gregruss Mgt. Corp.*, 57 AD3d 851 [2d Dept 2008]).

Based on the foregoing, defendants' motion for summary judgment dismissing the complaint is granted.

This decision constitutes the order of this Court.

Dated: December 16, 2010

Diane A. Lebedeff, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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LISA A. AHEARN,

Plaintiff(s),

- against -

P&E REALTY CO. LLC and
PERRY GAULT MANAGEMENT CO. INC.,

Defendant(s).

----------X

NOTICE OF MOTION

Index No.: 301987/07

RD: 7/15/09

PLEASE TAKE NOTICE, that upon the annexed affirmation of **JUDAH Z. COHEN, ESQ,** dated the 16th day of June, 2009, the annexed affidavit of Vincent Ettari, the pleadings, discovery and deposition testimonials and upon all pleadings and proceedings and annexed exhibits, heretofore had herein, the undersigned will move this court, at the Motion Support Office, at the Courthouse located at 851 Grand Concourse, Room 217, Bronx, New York, on the **15th day** of **July, 2009** at **9:30 a.m.**, in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order pursuant to CPLR Rule 3212, granting summary judgment in favor of the defendants, P&E **REALTY CO. LLC and PERRY GAULT MANAGEMENT CO. INC**, thereby dismissing the plaintiff's Complaint in its entirety on the grounds that there are no triable issues of fact as to the allegations of negligence on the part of the defendants; and in plaintiff's utter inability to present and establish a prima fasciae case of negligence; together with such other and further relief that this court deems just.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR Rule 2214(b), answering affidavits or memoranda, if any, are required to be served no later than seven (7) days prior to the return date of this motion.

Dated: New York, New York
June 16, 2009

Yours, etc.

JEFFREY SAMEL & PARTNERS

By:
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------X

LISA A. AHEARN,

Plaintiff(s),

AFFIRMATION IN SUPPORT

- against -

Index No.: 301987/07

P&E REALTY CO. LLC and
PERRY GAULT MANAGEMENT CO. INC.,

Defendant(s).

RD: 7/15/09

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JUDAH Z. COHEN, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms the truth of the following, pursuant to the dictates of the CPLR:

1. I am an associate attorney with the law firm of JEFFREY SAMEL & PARTNERS, attorneys for defendants **REALTY CO. LLC and PERRY GAULT MANAGEMENT CO. INC**; and based upon a review of the file as maintained by your affirmant's office, am fully familiar with the facts and circumstances surrounding the above captioned litigation.

2. I make this Affirmation in Support of the instant motion for Summary Judgment pursuant to CPLR Rule 3212, seeking a complete dismissal of plaintiff's Complaint; together with such other and further relief that this Court deems just.

3. This is an action for personal injuries allegedly sustained by plaintiff on November 24, 2006 at about 7:35 a.m., when plaintiff allegedly fell "while descending... stairs... due to the dangerous and hazardous condition of the wooden handrail... which was loose, dilapidated, broken...", at the premises known as 327 East 206th Street, Bronx. Plaintiff claims that as she was descending a staircase, she fell because her fingers got stuck in between the handrail and the stringers and/or balusters of the ascending steps.

PROCEDURAL HISTORY

4. This action was commenced by service of plaintiff's Summons & Complaint, dated October 9, 2007. (Annexed hereto as ***Exhibit "A"***.) Issue was joined by service of defendants' Answer, dated December 5, 2007 by which defendants denied all allegations of negligence. (Annexed hereto as ***Exhibit "B"***.)

5. Thereafter, plaintiff served a Bill of Particulars, dated January 15, 2008. Therein, it is alleged that the accident occurred on "the 2nd floor staircase leading to the first floor 3rd step from the top step, 13th step from the bottom landing." (***Exhibit "C"***, at ¶4.)

6. Thereafter, on June 2, 2008 the depositions of both plaintiff and defendants' witness, Angelo Colon, were conducted. (Annexed hereto as ***Exhibit "D"***, deposition transcript of plaintiff.) (Annexed hereto as ***Exhibit "E"***, deposition transcript of defendant.)

7. Concluding the discovery process, plaintiff filed her Note of Issue and Certificate of Readiness, declaring all discovery complete, on February 19, 2009. (Annexed hereto as ***Exhibit "F"***.) Accordingly, the instant timely motion for summary judgment now ensues.

FACTUAL HISTORY

Plaintiff's testimony

8. Plaintiff, a 40-year-old woman, weighing over 300 pounds, testified that she has resided at 327 East 206th Street, apartment 55, for the last 26 years. (***Exhibit "D"***, at pg. 6 and pg. 9.) Plaintiff also testified that the accident which is the subject of this lawsuit occurred on November 24, 2006 at approximately 7:30 a.m., at 327 East 206th Street. (***Id.*** at pgs. 13-14 and pg. 15-16 and pg. 20:21-23.)

9. As on every day that she entered or left the building, plaintiff testified that she used the very same set of stairs where her accident is alleged to have occurred. (***Id.*** at pg. 17:3-7.) On the

day of incident, plaintiff testified that her accident occurred "between the second and first floor" on the staircase. (***Id.*** at pg. 21:2-3.) Plaintiff also testified that the staircase is equipped with a handrail on one side. (***Id.*** at pg. 22:16-18.) Thus, if plaintiff is descending the stairs, the handrail would be to her right. (***Id.*** at pg. 22:19-23.)

10. In describing the mechanism of her accident, plaintiff testified the staircase was clearly lit (***id.*** at pg. 32:21-22), and as she descended the accident occurred as follows:

> **Q.** How many steps did you take down from the second floor towards the first floor before your accident happened?
> **A.** Three.
> **Q.** On that third step, what happened?
> **A.** My fingers got caught in between the railing and the metal part of the staircase.
> **Q.** What is the metal part of the staircase?
> **A.** The metal part of the staircase that is ascending up. [***Id.*** at pg. 23:3-15.]
>
> * * *
>
> **Q.** When you went from the first step down the second step going down, where was your hand at that point? [***Id.*** at pg. 32:23-25]
> **A.** On the railing.
> Q. Was your hand, as you went down the first and second step, was your hand sliding down the railing or gripping it?
> **A.** Gripping it.
> **Q.** And you let go and gripped it again?
> **A.** I gripped it.
> **Q.** As you stepped down the staircase, did you let go and grip it again or slide your grip?
> **A.** I let go and gripped it until the third step.
> **Q.** What happened when you got to the third step with regard to your hand?
> **A.** My fingers got stuck.
> **Q.** Was it all of your fingers or some of them?
> **A.** Four
> **Q.** Four fingers?
> **A.** Four fingers. [***Id.*** at pg. 33:2-22]
>
> * * *
>
> **Q.** When your fingers got stuck, what happened?
> **MR FELLUS**: Objection to form.
> **A.** I fell. [***Id.*** at pg. 34:7-10.]

11. At plaintiff's deposition, she was shown photographs, and during the questioning relating to the photographs,[1] she testified that her finger got stuck, in between the handrail (on the right hand side) of the stairs she was descending and the stringers and balusters of the stairs that ascend, at precisely the third step from the top. (***Id.*** at pgs. 23:3-15 and pg. 26:6-18.)

12. In addition, plaintiff also testified that in all of the time she had been ascending or descending these particular stairs over the past 26 years, her hand or fingers never got stuck. (***Id.*** at pg. 40:17:23.) Plaintiff also stated that she never made any complaints to any building personnel concerning the condition of the banister that leads form the second to the first floor. (***Id.*** at pg. 41:6-11.)

13. Essentially, it is plaintiff's own claim that the alleged accident occurred because plaintiff's fingers got stuck in between the banister and the balustrades of the ascending portion of the staircase. The accident is not alleged to have occurred because the banister was loose, broken, wobbly or otherwise defective. In other words, plaintiff simply maintains that there was an insufficient amount of finger clearance space. Such allegation, even if true, does not establish a prima facie claim of liability against the moving defendants.

Defendants' testimony by Angelo Colon

14. Testifying on behalf of defendants, Mr. Angelo Colon stated that he has been employed by Perry Gault for the last 20 years as the manager of the building known as 325 and 327 East 206th Street. (***Exhibit "E"***, at pgs. 7-9.) Indeed, Mr. Colon, who also resided at the same address, identified the plaintiff at the deposition as a tenant in apartment 55. (***Id.*** at pg. 12.)

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[1] Note, the photographs identified by plaintiff at her deposition were never provided to defense counsel either before or after plaintiff's deposition. Defendant is not in possession of the marked photographs.

15. Mr. Colon testified that the subject handrail is on the right-hand side of the staircase as one descends the staircase. (***Id.*** at pg. 25:9-10.) Mr. Colon also testified that the stairs "were never broken." (***Id.*** at pg. 25:24.) Aside from painting the handrails in the building staircases, nothing else was ever done to the stairs during the time Mr. Colon has lived and worked in the building. (***Id.*** at pg. 28:20-22, ["**Q.** Was there anything else done on the handrail other than painting? **A.** No."]) Indeed, there were never any complaints concerning the handrail, (***id.*** at pg. 30:10-12), and the handrail and any part of it were never replaced. (***Id.*** at pg. 31:15-20.) In fact, Mr. Colon specifically testified that there was nothing wrong with stairs. (***Id.*** at pg. 37:5-7.) And finally, Mr. Colon also testified that he never received any complaints concerning whether a person's finger could get stuck because of finger clearance on the handrail. (***Id.*** at pgs. 43-45.)

Affidavits of Engineer: Vincent Ettari (Exhibits "G")

16. According to expert engineer Vincent Ettari's Affidavit (annexed hereto as ***Exhibit "G"***, with its annexed exhibits numbered ***"1"*** through ***"12"***), the building and the subject stairs/handrail were constructed and in use by 1922. "That is, the building and that stairway are subject to the New Construction Standards which were in effect during that period of time (i.e., in 1921)." (*See*, ***Exhibit "G"*** at ¶10.) Moreover, the exterior steps/stoop are original to the building and were never changed. (***Id.*** at ¶15.) Mr. Ettari further attests that not only is the subject stairway and handrail not subject to the 1968 Building Code; but it was also not subject to the 1938 Building Code either. (***Id.*** at ¶¶16-20.)

17. In rendering and offering his professional assessment, Mr. Ettari drew the following conclusions from the facts:

> Based upon the foregoing data and my own inspection of the subject stairway, and its handrail, I am of the following opinions, which I hold to a reasonable degree of engineering certainty:

- The stairway in question, along with its handrail, is exempt from, and not subject to, the requirements of the 1938 Edition of the New York City Building Code (which is currently called "The Old Code").
- The stairway in question, along with its handrail, is exempt from, and not subject to, the requirements of the 1968 Edition of the New York City Building Code (which is currently called "The New Code").
- The stairway in question, along with its handrail, is not required by the New York City Housing Maintenance Code to have been retrofitted with handrails or otherwise have its existing handrail reconstructed.
- P & E REALTY CO., LLC, and PERRY GAULT MANAGEMENT CO., INC., properly maintained the premises and, in particular, the subject stairway and its handrail in conformity with the requirements of the New York City Housing Maintenance Code.
- The subject stairway, and its handrail, affords a reasonable degree of safety to all those who enter, or exit, or otherwise use the stairway and handrail of the building located at 327 East 206th Street. [***Exhibit "G"*** ¶27.]

ARGUMENT

18. As previously noted, based upon the testimony of plaintiff, it is clear that the sole theory of her claim herein is that the subject staircase and its handrail did not have sufficient finger clearance, thus causing plaintiff's fall. However, as demonstrated above through the affidavit of expert engineer Mr. Ettari, the subject staircase and handrail was not subject to any finger clearance requirement by dint of the year in which the building was built. In other words, none of the present and past Building Code requirements required a finger clearance different than what existed at the time of the accident. Moreover, there is zero evidence that there was anything wrong with the subject staircase or its handrail, or that the finger clearance that does exist at the accident site violated any statute that applies to the subject building and its appurtenances.

19. In Ryan v. KRT Property Holdings, LLC, 45 A.D.3d 663, 845 N.Y.S.2d 431 (2d Dept. 2007), the Court affirmed the dismissal of the plaintiff's Complaint on the evidence submitted by the defendants establishing "through the injured plaintiff's deposition testimony and an expert's affidavit, that there was no defect at the accident site which proximately caused the injuries."

20. In the instant matter, defendants had no notice of any alleged defect in the stairs or its handrail. Defendants never received any complaints about the claimed defect and no other accident occurred in the building relative to the use of the staircase or its handrail. And, since the subject staircase and its handrail are original to the building and have never been replaced or modified, negligence for the failure to have sufficient finger clearance cannot be imputed to defendants. There was no general awareness of a dangerous or defective condition and there was no actual notice of a dangerous or defective condition either. In the absence of any awareness of any untoward condition, negligence cannot be imputed to defendants warranting summary dismissal of plaintiff's complaint in its entirety. (*See*, Reid v. Schalmont School Dist., 50 A.D.3d 1323, 856 N.Y.S.2d 691, 232 Ed. Law Rep. 291 (3d Dept. 2008); DeRosa v. City of New York, 30 A.D.3d 323, 817 N.Y.S.2d 282 (1st Dept. 2006); McKinney v. Ardee Plaza, LLC, 36 A.D.3d 868, 827 N.Y.S.2d 873 (2d Dept. 2007); *and see generally*, Cruz v. New York City Transit Authority, 190 A.D.2d 651, 593 N.Y.S.2d 69 (2d Dept. 1993))

21. The unassailable facts demonstrate that there was nothing wrong with the handrail or the stairs and that there was no defect altogether. Indeed, as demonstrated, (even though the pleadings and the Bill of Particulars contains no allegation of a Code violation anywhere), there still was no Code violation in the construction, erection or maintenance of the subject stairs of its handrails. Based upon these facts, there is not one iota of a permissible inference imputing a question of fact or negligence attributable to defendants. Hence, summary dismissal is warranted in favor of defendants.

22. In addition, since the subject staircase and its handrail are original to the building, and the original owner who was issued a Certificate of Occupancy was another non-party named Mortiz Realty Co., Inc., allegations of a design defect, if any are to be alleged herein, cannot be

attributable to them. (*See*, ***exhibit*** *#7*) Moreover, as demonstrated by the Affidavit of Mr. Ettari, there was never any Building Code requirement to modify the staircase and its handrail to provide a finger clearance different than that which already existed. In the absence of any statutory requirement, and in the complete absence of any other applicable standard of care allegedly violated, buttressed by the absence of any notice, whether actual or constructive, negligence cannot be imputed to defendants.

WHEREFORE, it is respectfully requested that the Court issue an Order granting the instant motion for Summary Judgment in favor of defendants and thereby dismiss plaintiff's Complaint *in toto*; together with such other and further relief as this Court deems just and proper.

Dated: New York, New York
June 16, 2009

Yours, etc.

JEFFREY SAMEL & PARTNERS

By:
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