

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA Part 14
Justice

ROBERT AUCIELLO and LISA AUCIELLO,	x	Index Number <u>22527</u>	2002
Plaintiffs,		Motion Date <u>October 19,</u>	2004
-against-			
RITA S. EUSTAQUIO and AHAMED KHABIR,		Motion Cal. Numbers <u>2 & 3</u>	
Defendants.			

The following papers numbered 1 to 15 read on this motion by defendant Ahamed Khabir for summary judgment dismissing the complaint asserted against him; this motion by plaintiffs for leave to amend their bill of particulars to allege that defendants violated New York City Administrative Code § 27-2024.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Motion - Affidavits - Exhibits	5-13
Answering Affidavits - Exhibits	14-15

Upon the foregoing papers it is ordered that the motions # 2 and #3 of the motion calendar for October 19, 2004 are determined together as follows:

Plaintiffs allege that plaintiff Robert Auciello, a former New York City firefighter, sustained personal injuries while fighting a fire on June 28, 2001, at the property known as 81-17 169th Street, Queens, New York, owned by defendants. They allege that other firefighters had already responded to a fire at the premises and were inside the house when plaintiff Robert Auciello entered the house and went up the main steps to the second floor where he performed a "secondary search" and an "overhaul" on the upstairs landing. According to plaintiff Robert Auciello, he was descending

the stairs to leave the house, when he slipped on debris and fell. Plaintiffs further allege that the origin of the fire was in an electrical junction box in a portion of the attic above the second floor landing at the top of the stairs, and that the fire was caused by the improper installation of the junction box.

Plaintiff Robert Auciello commenced this action claiming a breach of the common-law duty to maintain premises in a safe condition, and causes of action pursuant to General Obligations Law § 11-106, and General Municipal Law § 205-a. Plaintiff Lisa Auciello, the wife of Robert Auciello, asserts a derivative claim. It is alleged that defendants negligently created the unsafe electrical condition, or were on actual or constructive notice of it, but negligently failed to remedy it. Plaintiffs also allege that defendants violated various regulations and code provisions which resulted in plaintiff Robert Auciello's injuries.

Defendant Khabir served an answer denying the material allegations of the complaint, and asserted an affirmative defense and a cross claim against defendant Rita S. Eustaquio. It is unclear whether defendant Eustaquio has been joined in this action, or has appeared or answered the complaint.

Defendant Khabir seeks summary judgment dismissing the complaint asserted against him. Defendant Khabir contends that plaintiff Robert Auciello fell due to the presence of debris left on the stairs by fellow firefighters in the process of putting out the fire. He further contends that plaintiffs have failed to show he violated any statute or governmental requirement. He denies having created any defective electrical condition or having had actual or constructive notice of such condition. In support of his motion, defendant Khabir submits a copy of the pleadings, and copies of the transcripts of his deposition testimony and that of plaintiff.

Defendant Khabir testified that he and his wife purchased the property in 1994 from defendant Rita Eustaquio, and that prior to his purchasing the property, he had the townhouse inspected, including its electrical system, by an engineer, who issued a report and informed him the system was "okay." Defendant Khabir testified that he and his family moved into the premises in November 1994, and during his ownership and prior to the fire, neither he nor anyone else performed any electrical work at the property. In addition, he testified that prior to his purchase of the property, the attic had been divided into two rooms and was finished off, and that the wiring in the attic was not visible, having been covered by sheetrock. Defendant Khabir testified that the attic was equipped with one or two outlets, and that it was used for storage.

Defendant Khabir admitted that his wife had experienced some occasional problems with the electrical system. He stated that sometime during the second year they owned the property, his wife, when using an iron in a bedroom on the second floor, caused an electrical circuit for a portion of that floor to trip, and subsequently, in 1997, she caused a circuit to trip when using a microwave in the kitchen on the first floor. He further stated that he did not hire an electrician to investigate the problems. He stated the circuit no longer tripped when his wife used a downstairs outlet when ironing. Defendant Khabir testified that approximately one month before the fire, his brother-in-law, wife and two children moved into the property, but denied that anyone slept in the attic area. Defendant Khabir stated his daughter discovered the fire when she noticed smoke emanating from a ceiling light in an upstairs bedroom. Lastly, he testified that the roof was replaced after the fire.

Plaintiffs oppose defendant Khabir's motion asserting that his claim that no electrical work had been performed during that period of his ownership prior to the fire, does not comport with known facts. They contend that defendant Khabir created the defective electrical condition which caused the fire, or was on actual or constructive notice of the defect, and failed to remedy it. They also contend that the faulty wiring was performed by a person without a proper permit or license. They contend that the debris on the stairs was obscured by poor lighting and smoke conditions in the stairwell. They also move for leave to amend their bill of particulars to add an allegation that defendants violated section 27-3024 of the Administrative Code of the City of New York.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination (see Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]).

Plaintiffs seek recovery under General Municipal Law § 205-e, which creates a statutory right of action where a firefighter's injury or death is caused by a violation of certain statutes, ordinances, rules, orders and requirements of a governmental entity. To establish a valid claim under General Municipal Law § 205-a, a plaintiff must demonstrate a violation of the relevant statute, ordinance or regulation, show the manner in which the

firefighter was injured, and prove that defendant's negligence directly or indirectly caused the harm to the firefighter (see Giuffrida v Citibank Corp., 100 NY2d 72 [2003]; see also Zanghi v Niagara Frontier Transp. Commn., 85 NY2d 423, 441 [1995]). A plaintiff need not show the same degree of proximate cause as is required in a common-law negligence action (see Giuffrida v Citibank Corp., 100 NY2d at 81), but rather need only show a "practical or reasonable connection" between the statutory or regulatory violation and the claimed injury (see Mullen v Zoebe, Inc., 86 NY2d 135 [1995]; Giuffrida v Citibank, supra).

Plaintiffs predicated the claim pursuant to General Municipal Law § 205-a upon violations of the Administrative Code of the City of New York §§ 27-3017, 27-3018, 27-3020, 27-3130 through 27-3140, and the Rules of the City of New York, title 1, §§ 34-11, 34-12, 34-14, 34-15, 35-02. They now seek to amend the bill of particulars to allege a violation of the "1" section 27-3024 of the New York City Administrative Code as a basis to support the claim pursuant to section 205-a of the General Municipal Law.

Leave to amend a bill of particulars is ordinarily freely given in the absence of prejudice or surprise (see CPLR 3025[b]). Section 27-3024 of the New York City Administrative Code adopted the 2002 edition of the National Fire Protection Association NFPA 70 National Electrical Code, as the minimum requirements for the design, installation, alteration or repair of electric wires and wiring apparatus and appliances used or to be used for the transmission of electricity for electric light, heat, power, signaling, communication, alarm and data transmission in the City, subject to amendments adopted by local law. Section 27-3024, however, was included as part a subchapter added by Local Law 64/2001, and was made effective on January 1, 2003. Thus, the present version of that section is inapplicable to the facts herein. Although plaintiffs have made no request for leave to assert a violation of the former version of that section, which was in effect on the date of the accident, as a predicate for the claim pursuant to section 205-a of the General Municipal Law, the court grants plaintiffs leave to amend the bill of particulars to allege a violation of the former version of section 27-3024 of the Administrative Code, in effect on the date of the accident if they are so inclined. The motion by plaintiffs is granted only to the extent of granting plaintiffs leave to amend the bill of particulars to allege a violation of the former version of section 27-3024 of the Administrative Code within 45 days of the date of this order.

Although plaintiffs cited sections 27-3130 through 27⁶²³⁹⁶² of the New York City Administrative Code and various sections of the New York City Electrical Code Rules (1 RCNY §§ 34-11, 34-12, 34-14,

34-15, 35⁶⁵⁵³⁴³) in their bill of particulars, they have failed to demonstrate the manner in which these provisions created a duty owing to plaintiff Robert Auciello or the manner in which their violation directly or indirectly caused his injury (see Giuffrida v Citibank Corp., 100 NY2d 72, supra; see also Williams v City of New York, 2 NY3d 352 [2004]).

Former section 27))))4 is a portion of the Electrical Code and it provides that no person, partnership or corporation not the holder of a license, shall install, alter or repair any wiring or appliances for electric light, heat or power and no person, partnership or corporation shall cause any work to be done by any person, partnership or corporation not the holder of such license, unless employed by and working under the supervision of a person, partnership or corporation holding a license as defined herein. Section 27-3018(b) requires that a licensed electrician file applications for permits to perform electrical work, and to obtain certificates of electrical inspection for electrical work, other than low voltage electrical work. Section 27-3020(a) provides that no person, partnership or corporation shall supply, or cause to be supplied or used, electrical energy for light, heat or power, to any wiring or appliance or any building until a certificate of inspection, temporary or final, authorizing the use of said wiring or appliance has been issued by the commissioner.

Plaintiffs contend that defendant Khabir was aware the electrical system was not satisfactory, had electrical work done following purchase of the property, and the work was negligently performed by an unlicensed person without a permit. They offer various exhibits, including a copy of a house inspection report dated August 27, 1994, and a repair contract entered into by defendant Khabir and his wife following the fire. The house inspection report was prepared by Federated Consultant Service, Inc. (Federated) for defendant Khabir in connection with defendant Khabir's purchase of the property and contains check boxes, including boxes indicating "Satisfactory." Although other "Satisfactory" check boxes in the report are checked, and the check box indicating "Random Testing" next to the category of "Outlets and Fixtures" is checked, the "Satisfactory" check box next to such category is left unmarked. Plaintiffs also offer a copy of a repair contract dated August 6, 2001, entered into between defendant Khabir and his wife, and Century Builder's Co., Inc. (Century), whereby Century agreed to perform various repairs of the fire damage at the premises. The 11-page contract listed the work to be performed, and stated the work was to include "REPLACE 6 OUTLETS," "REPLACE 2 SWITCHES," and "REPLACE 2 CEILING FIXTURES W/WIRING-BUILDERS GRADE" in the attic. Plaintiffs contend the word "REPLACE" is indicative that outlets, switches and fixtures were added by defendant Khabir sometime after his purchase of the property.

Plaintiff also offers the affidavit of Michael McGroty, a retired fire marshal, who states that while he was employed by the New York City Fire Department, he conducted the investigation of the fire at defendant Khabir's property, and is of the opinion that the fire started in a junction box secured to a ceiling beam in the attic, due by the piercing of "BX" cable by two nails used to install the box. He further opines that the person who installed the junction box did so improperly, and that "[i]t is highly unlikely that a licensed electrician performed this work." Plaintiffs also provide copies of diagrams, apparently prepared by Mr. McGroty in connection with his affidavit, various New York City Fire Department records of the fire, and the affidavit of Thomas D'Agostino, a licensed professional engineer in an effort to establish a violation of the New York City Administrative Code and Rules of the City of New York.

Defendant Khabir opposes the court's consideration of the report by Federated and the contract with Century, arguing the statements contained therein are hearsay. Defendant Khabir further argues that the opinions of Mr. McGroty and Mr. D'Agostino are conclusory and speculative.

The report of Federated arguably contradicts plaintiff's version of the facts, and, thus, may be considered for the purpose of opposing this summary judgment motion (see Maldonado v Townsend Ave. Enterprises, 294 AD2d 207 [2002]; see also Guzman v L.M.P. Realty Corp., 262 AD2d 99 [1999]; Koren v Weihs, 201 AD2d 268, 269 [1994]). The contract with Century was signed by defendant Khabir and his wife on each page, including page 2, where the reference to the replacement of electrical outlets and switches and fixtures is made. Under such circumstances, it appears that defendant Khabir may have ratified the word "REPLACE" and such contract may be considered in opposition to the motion to raise a triable issue of material fact as to whether defendant Khabir in fact caused electrical work to have been done at the premises following his purchase of the property. In addition, the affidavit of Mr. McGroty raises issues of fact as to the cause of the fire, and whether defendant Khabir was on constructive notice of a defect with the electrical wiring in the attic.

To the extent, however, Mr. McGroty indicates it is "unlikely" that a licensed electrician installed the attic junction box, such opinion is speculative, and cannot alone form the basis for finding a code violation on the part of defendant Khabir. To the extent Mr. D'Agostino opines that defendant Khabir violated Article 370-23(c)(1) of the National Electrical Code in the manner by which the attic junction box was installed, plaintiffs also have failed to establish such code was applicable at the time of the accident (see supra at 5-6). To the extent Mr. D'Agostino states that defendant Khabir violated "Article B30-2.0," it appears his

reference is actually to section 27-3020 of the New York City Administrative Code regarding the requirement that a permit be obtained prior to the commencement of electrical work. It is undisputed that no permits for electrical work were issued for the property prior to June 28, 2001.

Under such circumstances, plaintiffs have shown questions of fact exist as to whether there was a violation of sections 27-3018 and 27-3020 of the Administrative Code of the City of New York by defendant Khabir, whether defendant Khabir was on constructive notice of any electric defect and whether the alleged violations of sections 27-3018 and 27-3020 directly or indirectly caused plaintiff Robert Auciello's injuries.

With respect to the common-law negligence claim and claim pursuant to General Obligations Law § 11-106, defendant Khabir contends that the presence of water and debris on the stairs was the cause of plaintiff Robert Auciello's slipping and falling, but that he is not responsible for the water and debris being there. He cites the deposition testimony of plaintiff Robert Auciello to support his argument that the water emanated from the fire hoses, and the debris was comprised of a ceiling fan, glass and mini blinds thrown on the stairs by the firefighters when ripping at things to reach the fire.

Common law barred a firefighter from recovering in tort for injuries sustained in the line of duty (see Zanghi v Niagara Frontier Transp. Commn., 85 NY2d 423, 429 [1995]; Santangelo v State of NY, 71 NY2d 393 [1988]). General Obligations Law § 11-106 largely abrogated such firefighter's rule and permits, inter alia, a firefighter to recover damages for common-law negligence where the firefighter's injury, disease or death "is proximately caused by the neglect, willful omission, or other intentional, willful or culpable conduct of any person or entity, other than that ... firefighter's employer or co-employee" (see, L 1996, ch 703, § 5). (See Melendez v City of New York, 271 AD2d 416 [2000]; Strahl v Dale Constr., Inc., 171 Misc 2d 330, 331-332 [1997]). In a slip and fall case, a plaintiff, to make out a prima facie case, must demonstrate that the defendant created the condition which caused the accident or had actual or constructive notice of the condition (see Sanchez-Acevedo v Mariott Health Care Service, 270 AD2d 244 [2000]; Pirillo v Longwood Associates, Inc., 179 AD2d 744 [1992]).

Plaintiffs do not dispute that the other firefighters at the premises caused the water and debris to be left on the stairs. That water and debris were produced by firefighters fighting the fire, and together create a slipping or tripping hazard, such hazard is one faced by a firefighter in the ordinary course of his or her duties (see Hally v Jericho Offices, LLC, Supreme Court, Nassau County, Jonas, J., Index No. 19740/2001, August 20, 2004).

To the extent there was a smoke condition in the stairwell, plaintiffs admit such condition was the result of the fire and the fighting of it, as opposed to a condition existing before the fire. To the extent plaintiffs assert there was insufficient lighting in the stairwell, they failed to raise lack of proper illumination in the complaint or the bill of particulars, and have made no application to amend either to add such a claim. In any event, defendant Khabir testified that a light which existed at the top of the stairwell was operational. It appears that the light was off at the time of the arrival of the firefighters because defendant Khabir shut the main electrical switch in the house to cut off electricity upon his daughter's discovery of the fire. Thus, it appears that even the lack of proper lighting was the direct result of fighting the fire, albeit by defendant.....⁵

Accordingly, the motion by defendant Khabir seeking summary judgment is granted only to the extent of granting summary judgment dismissing the claims against him pursuant to General Municipal Law § 205-a upon violations of the Administrative Code of the City of New York §§ 27-3017, 27-3130 through 27-3140, and the Rules of the City of New York, title 1, §§ 34-11, 34-12, 34-14, 34-15, 35-02, and based upon common-law negligence and General Obligations Law § 11-106.

Dated: February 2, 2005 _____

"""" mation of Martin J. Coleman, plaintiffs' attorney, dated August 20, 2004, at n 2.

62396 e provisions relate to lighting fixtures.

65534 ction 34-11 relates to installation of ground-fault circuit protection. Section 34-12 relates to appliance outlets in dining areas and kitchen units in residential occupancies. Section 34-14 relates to installation of receptacle outlets in bathrooms of residential type occupancies. Section 34-15 relates to wiring of electric appliances, equipment and cables for electric space heating and water heating. Section 35-02 provides for the payment of fees for certificates of electrical inspection.

)))) 27-3017 was amended pursuant to L.L. 64/2001 § 14, eff. Jan. 1, 2003.

..... ng to Michael McGorty, plaintiffs' witness, it is also standard practice for firefighters to turn off all circuit

breakers in a house when responding to a fire.