

**Xikis v Vocational Ed. & Extension Bd. of Suffolk**

2010 NY Slip Op 30287(U)

January 28, 2010

Supreme Court, Suffolk County

Docket Number: 07-11874

Judge: Peter H. Mayer

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 7-17-09  
ADJ. DATE 8-11-09  
Mot. Seq. # 001 - MG; CASEDISP

-----X

WILLIAM XIKIS, :  
Plaintiff, :  
- against - :  
VOCATIONAL EDUCATION AND EXTENSION :  
BOARD OF SUFFOLK, SUFFOLK COUNTY :  
FIRE ACADEMY, THE SUFFOLK COUNTY :  
DEPARTMENT OF FIRE, RESCUE AND :  
EMERGENCY SERVICES and COUNTY OF :  
SUFFOLK, :  
Defendants. :

-----X

BARRY M. SWEENEY, ESQ.  
Attorney for Plaintiff  
Old Post Road Professional Building  
P.O. Box 814, 892 Route 35  
Cross River, New York 10518

CHRISTINE MALAFI, ESQ., Suffolk Cty Atty  
By: Marcia J. Lynn, Esq.  
Attorneys for Defendants  
100 Veterans Memorial Hwy., P.O. Box 6100  
Hauppauge, New York 11788-0099

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated June 12, 2009, and supporting papers (including Memorandum of Law dated \_\_\_); (2) Affirmation in Opposition by plaintiff, dated July 9, 2009, and supporting papers; (3) Reply Affirmation by defendants dated August 11, 2009, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the motion by defendants for summary judgment dismissing the complaint is granted.

On April 25, 2006, plaintiff William Xikis, a volunteer firefighter with the Selden Fire Department, allegedly sustained various personal injuries after falling from a burn building during a live-fire training exercise. The training exercise was the third of a three-evolution live training session organized for the Selden Fire Department by instructors of defendant Vocational Education and Extension Board (VEEB) of Suffolk at defendant Suffolk County Fire Academy in Yaphank, New York. The Fire Academy, which provides classroom and live training programs to both volunteer and career firefighter, is operated by defendant Suffolk County Department of Fire, Rescue and Emergency Services. Plaintiff allegedly stepped back off the roof and fell to the ground as he and another firefighter were attempting to manually vent the

*Xikis v Vocational*  
*Index No. 07-11874*  
*Page No. 2*

burn building by opening the second-story windows located above the porch. The firefighter assigned to partner with plaintiff, Darrell Zeis, also stepped off the porch roof while attempting to vent the building.

Subsequently, plaintiff commenced this negligence action against defendants (hereinafter collectively referred to as the County) to recover damages for the injuries he allegedly sustained as a result of the fall. The complaint alleges, among other things, that venting of the second-story window required plaintiff to be "near the left edge of the porch roof" and caused the release of a large amount of smoke, and that there was no barrier, safety net or other device to prevent a fall from the left side of the roof. It also alleges that the County violated Labor Law §§ 200, 240 and 241; 29 CFR 1926.650; 12 NYCRR 23-2.1, 23-1.3, 23-3.3 and 23-2.7; and "Chap. 9.1, 9.11 and Chapter 11" of the National Fire Association's NFPA 1402 Guide to Building Fire Service Training Centers. In response to a demand to identify the dangerous or defective condition that allegedly caused his injuries, plaintiff alleges in his bill of particulars that "[t]here was no barrier or net to prevent a person from falling. The condition was exacerbated by the proximity of the window to the edge and the smoky condition which was or should have been anticipated" by the County. He further alleges that the County had both actual and constructive notice of the alleged dangerous condition of the burn building. By his bill of particulars, plaintiff further asserts the County violated 29 CFR 1926.650 and 12 NYCRR 23-1.5 and 23-2.7, as well as "Chap. 9.1, 9.11 and Chapter 11" of the National Fire Association's NFPA 1402 Guide.

At an examination before trial conducted in March 2008, plaintiff testified, among other things, that he had been a volunteer member of the Selden Fire Department for approximately 23 years, and that he was the chief of the department at the time of his accident. He testified that he has received extensive training, both in the class room and in live-fire sessions, during his years as a volunteer firefighter, and that volunteer firefighters that are members of the Selden Fire Department are required to take a certain number of training courses each year. He testified that, in addition to his job as a corrections officer with the Suffolk County Sheriff Department and his membership in the Selden Fire Department, he works as a firefighting instructor for a private company, Long Island Rescue. He testified that on the day of his accident the members of the Selden Fire Department were participating in a training program at the Fire Academy that involved three evolutions. Each evolution, or training session, took place in the class A burn building at the Fire Academy, but involved a different type of fire. Plaintiff testified that the firefighters would be assigned to perform different jobs on the different evolutions. He testified he acted in his role as the chief of the fire department for the first evolution, and then took the job of interior search for the second evolution. Plaintiff testified that for the third evolution he and Darrell Zeis were assigned to vent the burn building by opening the two windows on the second floor that were situated above a porch roof. He testified that after using a ladder to access the porch roof, he took the job of opening the window located above the left side of the porch, and Zeis took the job of opening the window located on the right side. He testified the windows on the second floor of the class A burn building opened the same way as shutters covering a window would open. Plaintiff testified that after opening the right side of the left window, he heard the hose line operating and "stepped away from the front of the window." He testified he then "opened the left side [of the window] and fell." When asked about the last time plaintiff saw Zeis while on the porch roof, plaintiff testified he last saw him when they started the process of venting and that the area was "heavily covered in smoke." In addition, plaintiff testified that he received disability benefits for the injuries he suffered due to the fall from the burn building.

The County now moves for summary judgment dismissing the complaint on the grounds that the common-law negligence claim is barred by the “firefighter’s rule,” that the statutes and regulations cited by plaintiff are not applicable to the instant action, and that plaintiff’s own negligence was the sole cause of the accident. The County’s submissions in support of the motion include copies of the pleadings and the bill of particulars; copies of the transcripts of the deposition testimony of plaintiff and Richard Stockinger, deputy director of Vocational Education and Extension Board (VEEB) of Suffolk; and a copy of the transcript of the deposition testimony of a nonparty witness, Dennis Carmen; and a copy of the National Fire Association’s NFPA 1402 Guide. Plaintiff opposes the motion, arguing that his negligence claim against the County is not barred under General Obligations Law § 11-106. Plaintiff further alleges that the County failed to comply with certain guidelines contained in the NFPA 1402 Guide to Building Fire Training Centers, and that the failure to comply with such guidelines raises a triable issue as to whether the County was negligent. In addition, plaintiff contends that the County’s installation of a safety rail on the porch roof after plaintiff’s accident should be considered an admission by the County that the porch roof was in a dangerous condition at the time of his accident. Plaintiff’s opposition papers include photographs purporting to depict the burn building, and a copy of the injury report prepared by the Fire Academy after plaintiff’s accident.

As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see Dugue v 1818 Newkirk Mgt. Corp.*, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; *Millman v Citibank, N.A.*, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also Butler v Rafferty*, 100 NY2d 265, 762 NYS2d 567 [2003]). Owners and possessors of real property have a duty to maintain their property in a reasonably safe condition (*see Peralta v Henriquez*, 100 NY2d 639, 760 NYS2d 741 [2003]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]). However, they are not insurers of the safety of people on their premises (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Donohue v Seaman’s Furniture Corp.*, 270 AD2d 451, 705 NYS2d 291 [2d Dept 2000]; *Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 694 NYS2d 445 [2d Dept 1999]), and they have no duty to warn or protect against an open or obvious condition on the property which, as a matter of law, is not inherently dangerous (*see Terranova v Staten Is. Univ. Hosp.*, 57 AD3d 765, 870 NYS2d 84 [2d Dept 2008]; *Lasky v Daly*, 50 AD3d 640, 854 NYS2d 751 [2d Dept 2008]; *Cupo v Karfunkel*, 1 AD3d 48, 767 NYS2d 40 [2d Dept 2003]).

To establish liability for a dangerous or defective condition on property, a plaintiff must establish that the defendant created the condition which caused the injury or had actual or constructive notice of its existence (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Dulgov v City of New York*, 33 AD3d 584, 822 NYS2d 298 [2d Dept 2006]; *Singer v St. Francis Hosp.*, 21 AD3d 469, 799 NYS2d 742 [2d Dept 2005]; *Cappolla v City of New York*, 302 AD2d 547, 755 NYS2d 100 [2d Dept], *lv denied* 100 NY2d 511, 766 NYS2d 165 [2003]). To constitute constructive notice, the dangerous or defective condition must be visible and apparent, and must have existed for a sufficient length of time before the accident to permit the owner to discover and remedy it (*see Gordon v American Museum of Natural History, supra*; *Hayden v Waldbaum, Inc.*, 63 AD3d 679, 880 NYS2d 351 [2d Dept 2009]; *Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 436, 799 NYS2d 828 [2d Dept 2005]). Further, while proximate cause may be inferred from the facts and circumstances surrounding the injury, there must be sufficient proof in the record to permit a finding of proximate cause based not upon speculation, but upon the logical inferences to be drawn from the evidence (*see Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d

743, 500 NYS2d 95 [1986]; *Hartman v Mountain Val. Brew Pub*, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]; *Babino v City of New York*, 234 AD2d 241, 650 NYS2d 778 [2d Dept 1996]). Thus, a plaintiff may not recover damages for personal injuries when there is only a bare possibility that his or her fall was caused by the defendant's negligence (see *Constantino v Webel*, 57 AD3d 472, 869 NYS2d 179 [2d Dept 2008]; *Manning v 6638 18th Ave. Realty Corp.*, 28 AD3d 434, 814 NYS2d 178 [2d Dept 2006]; *Oettinger v Amerada Hess Corp.*, 15 AD3d 638, 790 NYS2d 693 [2d Dept 2005]; *Barland v Cryder House*, 203 AD2d 405, 610 NYS2d 554 [2d Dept], *lv denied* 84 NY2d 947, 621 NYS2d 511 [1994]).

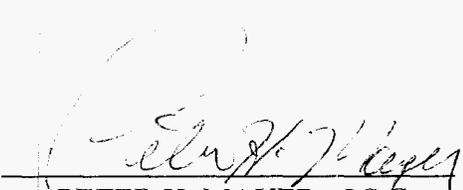
The County met its burden of establishing entitlement to summary judgment in its favor as a matter of law on the ground the accident was not due to a dangerous condition by submitting plaintiff's deposition testimony that, after hearing the hose line was operating, he stepped away from the front of the window, opened the left side of the window, and then fell from the roof (see *Przybyszewski v Wonder Works Constr.*, 303 AD2d 482, 755 NYS2d 435 [2d Dept 2003]; *Tresgallo v Danica, LLC*, 286 AD2d 326, 729 NYS2d 159 [2d Dept 2001]; *Visconti v 110 Huntington Assoc.*, 272 AD2d 320, 707 NYS2d 884 [2d Dept 2000]; see also *Constantino v Weber*, 57 AD3d 472, 869 NYS2d 179 [2d Dept 2008]). In opposition, plaintiff failed to submit evidence raising a triable issue of fact regarding the existence of a dangerous condition that proximately caused his injury. Plaintiff's allegation that the burn building did not comply with certain guidelines set forth in the National Fire Association's NFPA 1402 Guide is insufficient to raise a triable issue as to whether the absence of a railing or other safety device on the porch roof constituted a dangerous condition (see *Troiani v White Plains City School Dist.*, 64 AD3d 701, 882 NYS2d 519 [2d Dept 2009]; *Capostoso v Roman Catholic Diocese of Rockville Ctr.*, 2 AD3d 384, 767 NYS2d 857 [2d Dept 2003]; *Davidson v Sachem Cent. School Dist.*, 300 AD2d 276, 751 NYS2d 300 [2d Dept 2002]). In fact, the guidelines relied upon by plaintiff are not relevant to negligence allegations in this action. "Where the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he has failed to prove that the negligence of the defendant caused the injury" (*Ingersoll v Liberty Bank of Buffalo*, 278 NY 1, 7, 14 NE2d 828 [1938]). Here, any determination that plaintiff's fall was due to the lack of a railing, rather than a misstep or loss of balance, would be based on speculation (see *Lissauer v Shaarei Halacha, Inc.*, 37 AD3d 427, 829 NYS2d 229 [2d Dept 2007]).

Moreover, plaintiff's common-law negligence claim against the County is barred by the "firefighter's rule" (see *Norman v City of New York*, 60 AD3d 830, 875 NYS2d 232 [2d Dept 2009]; *Sexton v City of New York*, 32 AD3d 535, 819 NYS2d 838 [2d Dept 2006]). Traditionally, the "firefighter's rule" barred firefighters and police officers from recovering damages for injuries sustained in the line of duty (see *Guiffrida v Citibank Corp.*, 100 NY2d 72, 760 NYS2d 397 [2003]; *Santangelo v State of New York*, 71 NY2d 393, 526 NYS2d 812 [1988]). However, General Obligations Law § 11-106, enacted by the Legislature as part of an effort to mitigate the harsh effects of the firefighter's rule, provides that "whenever any police officer or firefighter suffers any injury, disease or death while in the lawful discharge of his [or her] official duties and that injury, disease or death is proximately caused by the neglect . . . of any person or entity, other than that police officer's or firefighter's employer or co-employee," the injured police officer or firefighter or, in the case of death, a representative of such police officer or firefighter, may seek to recover from the person whose negligence caused the injury, disease or death. Nevertheless, the firefighter's rule still precludes police officers and firefighters from recovering in common-law negligence for line-of-

*Xikis v Vocational*  
*Index No. 07-11874*  
*Page No. 5*

duty injuries that occurred while performing an act “in furtherance of a specific police or firefighting function” which exposes the police officer or firefighter to a heightened risk of sustaining the particular injury (*Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423, 439, 626 NYS2d 23 [1995]; see *Foley v City of New York*, 43 AD3d 702, 842 NYS2d 399 [1st Dept 2007]; *Sexton v City of New York*, *supra*; *Bloch v City of New York*, 278 AD2d 351, 717 NYS2d 361 [2d Dept 2000]). Here, plaintiff, who sought and received disability benefits for the injuries he sustained, was participating in a live-fire training exercise with other volunteer firefighters from the Selden Fire Department at the time of the subject accident. The injuries plaintiff sustained due to his fall from the porch roof were directly related to the heightened dangers firefighters, both professional and volunteer, assume as part of their job duties.

Dated: January 28, 2010

  
\_\_\_\_\_  
PETER H. MAYER, J.S.C.