

Thompson v Elias Props. Inc.

2008 NY Slip Op 30293(U)

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Supreme Court, Suffolk County

Docket Number: 0014890/2003

Judge: Robert W. Doyle

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violation of the Babylon Town Code Article I-§191-1, Article I-§191-1.25, Article XXIX §213-367, Article XXV §213-342, and Article XXV § 191-18.

The complaint dated November 12, 2004 has been brought against Elias Properties Babylon, LLC, and asserts a first cause of action sounding in negligence wherein plaintiff claims defendant was negligent in maintaining the premises in a dangerous and defective condition, causing plaintiff to sustain serious injury; a second cause of action premised upon General Municipal Law 205-a sounding in negligence wherein plaintiff asserts that while responding to an emergency call as a fire fighter he was caused to sustain injury due to defendants' violation of the Babylon Town Code Article I-§191-1, Article I-§191-1.25, Article XXIX §213-367, Article XXV §213-342, and Article XXV § 191-18; and a third cause of action on behalf of Patrice Thompson, spouse of Jeffrey Thompson, premised upon a derivative claim.

These two actions were consolidated under Index No. 14890-2003 by order dated August 15, 2005 (Pitts, J.) .

Defendants now seek summary judgment dismissing the complaints on the basis there is no such entity as Elias Properties, Inc. Defendants seek dismissal of the first cause of action asserting it is barred by the firefighter's rule, defendant did not have notice of the condition complained of, that plaintiff cannot identify where the accident occurred, and that defendant was an out of possession landlord who was not responsible for the location where the incident occurred. Defendants further seek dismissal of the second cause of action on the basis that none of the statutes cited by plaintiffs support recovery, defendant was an out of possession landlord who was not responsible for the location where the incident occurred, plaintiff cannot identify the place where the accident occurred, and defendant did not have notice of the defect claimed herein. Defendants further seek dismissal of the derivative cause of action asserted on behalf of Patrice Thompson.

In support of the motion, defendants submit, inter alia, an attorney's affirmation; copies of the pleadings and defendant's answer; plaintiffs' bill of particulars and supplemental bill of particulars; affidavit of Anthony Stimatz, the then Operation's Manager for the K Mart shopping center at the subject premises; affidavit of William Hollwedel, former store manager for K Mart at the subject premises; affidavit of Martin Elias of Elias Properties Babylon LLC; a copy of the summons and complaint and defendants' answer for both actions; plaintiffs' bill of particulars dated January 5, 2004 which predates the second action; a copy of the lease agreement between Elota Realty Company and the Times Square Stores Corporation dated February 20, 1963; a copy of a lease agreement between Elota Realty and TSS Seedmans, Inc. dated November 3, 1989; a copy of an Agreement of Lease between Elota Realty Company and Times Square Stores with Eastern Savings Bank, dated February 9, 1976; a copy of an Assignment and Assumption of the Lease from TSS Seedmans, Inc. to Ike Elias dated April 24, 1990; a copy of an Assignment and Assumption of Contract dated April 24, 1990 by and between Babylon Breskin Associates, Limited Partnership and the K Mart Corporation, which sets forth that Retail Stores Credit Corp, an affiliate of the Assignor by letter agreement dated January 16, 1990 with TSS Seeman's, Inc. in the acquisition by RSC of the Babylon lease, with such transfer of the Babylon Lease approved in the United States Bankruptcy Court by Judge Prudence B. Abram, dated January 24, 1990 and wherein by agreement dated February 9, 1990 K Mart, as assignee, accepted assignment of the agreement; a copy of a Term Agreement dated January 15, 1990 between Elias Properties, a partnership, and K Mart Corporation, and which lease expires December 31, 2010; a copy of the Management Agreement dated

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January 1, 2000 between Elias Properties Babylon, LLC and Elias Properties Management, Inc. wherein Elias Properties Management, Inc. was to operate, maintain, manage the subject premises; copies of the transcripts of the examinations before trial of Jeffrey Thompson and Martin Elias; and a partial copy of the Property Maintenance Code of New York State.

Plaintiff opposes this motion and has submitted, inter alia, an attorney's affirmation; a copy of the bill of particulars dated December 18, 2003; a copy of the Management Agreement dated January 1, 2000 between Elias Properties Babylon, LLC and Elias Properties Management, Inc. wherein Elias Properties Management, Inc. was to operate, maintain, manage the subject premises; a copy of the report dated October 23, 2003 of ParMar Engineering, P.C., a copy of Section 765.1 of the Subtitle S of the Housing and Community Renewal Law; and a copy of Article XXIX for Building and Landscape Maintenance sections 213-365, 213-366, 213-367, and 213-368.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. If, defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (*Spiegel v Fine Paint Co.* 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]). Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*see, Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 746 NYS2d 120 [2002]; *Darby v Compagnie Natl. Air France*, 96 NY2d 343, 728 NYS2d 731[2001]).

To prove a prima facie case of negligence in a slip/trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or

constructive notice of the condition (*Bradish v Tank Tech Corp.*, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; *Gaeta v City of New York*, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Bykofsky v Waldbaum's Supermarkets, Inc.*, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]).

William Hollwedel set forth in his affidavit dated July 20, 2007 that he was the store manager for the K Mart at 1000 W. Montauk Highway, West Babylon in November, 2001 since June, 2001. Mr. Hollwedel sets forth that K Mart was solely and exclusively responsible for inspecting, maintaining and repairing the common areas of the shopping center at the premises, including the curbs around K Mart and that the landlord, Elias Properties Babylon did not have that responsibility, or ever took steps to inspect, repair or maintain the shopping center. He stated that each morning, either he or Anthony Stimatz would walk across the front of the building to unlock the main doors and would inspect the sidewalk and curbs adjacent to the building at 6:30 a.m., then reinspect the curbs adjacent to K Mart between 12:00 p.m. and 1:00 p.m. when they left for lunch and again at 5:45 p.m. when they left for the day. If any problem were noted with the sidewalks or the curbs, the area would have been marked off with tape and a contractor would have been called to make the necessary repairs. He also states that a K Mart associate inspected and swept the parking lot and curbs adjacent to the store at two hour intervals every day between 8:00 a.m. and 8:00 p.m., and if any of the curbs were noted to be in disrepair, either he or Mr. Stimatz would have been contacted and the appropriate contractor contacted to make the repair. Mr. Hollwedel further stated that neither he nor anyone at K Mart observed any broken or damaged curbs anywhere in the shopping center at any time prior to plaintiff's accident; no one complained about any broken or damaged curbs prior to that date; and neither he nor any one at K Mart was aware of or observed any debris in the parking lot of the shopping center prior to plaintiff's accident.

Anthony Stimatz has set forth in his affidavit that he is the current store manager at the K Mart in Westwood, New Jersey, and the former operations manager for the K Mart in West Babylon in November, 2001. He states that in November, 2001, K Mart was solely and exclusively responsible for inspecting, maintaining and repairing the common areas of the shopping center in West Babylon, including the curbs around the K Mart. He stated that each morning either he or Mr. Hollwedel would walk across the front of the building to unlock the main doors at approximately 6:00 a.m. and would inspect the curbs adjacent to the building and the parking lot and re-inspect between 12:00 p.m. and 1:00 p.m. and again at 5:45 p.m. He further stated that K Mart associates inspected and swept the parking lot and curbs adjacent to K Mart at two hour intervals every day between 8 a.m and 8 p.m., and that neither he nor anyone at K Mart was aware of or observed any broken or damaged curbs or debris anywhere in the shopping center at any time prior to plaintiff's accident.

Martin Elias set forth in his affidavit dated July 20, 2007 that he is a member of Elias Properties Babylon, LLC and president of Elias Properties Management, Inc., and that Elias Properties Babylon is and was the owner of the shopping center located at 1000 W. Montauk Highway, West Babylon, New York in November, 2001. He states that prior to Elias Properties Babylon LLC owning the shopping center, Elota Realty Company was the owner who entered into a lease with Times Square Stores

Corporation on or about February 20, 1963. On February 9, 1976, Elota Realty Company and Times Square Stores entered into a lease for a bank on the premises. On or about November 3, 1989, Elota Realty and Times Square Stores modified the lease agreement which was in effect in November, 2001, making the tenant K Mart responsible for the inspection, repair and maintenance of the common areas, including the parking lot. Mr. Elias states that the owner no longer had any responsibilities for the inspection, repair or maintenance of any of the common areas, including the parking lot or curbs surrounding K Mart. He further states that at no time between the enactment of the 1989 lease and November, 2001 did anyone from Elias LLC or its predecessor inspect, maintain or repair the common areas, including the curbs and parking lot where plaintiff's accident took place. Mr. Elias also sets forth that an Agreement and Assumption of the Lease was entered into between Elias and TSS Seedman's on or about February 24, 1990 wherein Elias assumed TSS Seedman's rights, title and interest in the bank lease, but it did not in any way change the fact that K Mart was solely and exclusively responsible for the inspection, repair and maintenance of the parking lot and curbs. Thereafter, he states, on April 24, 1990 the Agreement and Assumption of Contract was entered into between K Mart Corporation and Babylon Breskin Associates Limited permitting K Mart to assume the responsibilities and obligations that had belonged to Times Square Stores Corporation pursuant to the 1963 lease. He stated the 1963 lease, the 1989 lease and the bank lease were modified by K Mart and Elias Properties on or about April 21, 1995 wherein K Mart was solely responsible for inspecting, maintaining, and repairing all of the common areas of the shopping center, which included the parking lot and curb where plaintiff's accident took place. Mr. Elias states a management agreement was entered into January 1, 2000 between Elias LLC and Elias Management and was in effect in November, 2001, and that no one from Elias Management inspected, repaired or maintained the curbs or parking lot adjacent to the West Babylon K Mart, as, he states, this obligation belonged to K Mart. He further states that no one from Elias LLC was aware of any complaints of, or problems with, debris in the parking lot, or problems with the curb, immediately adjacent to K Mart prior to plaintiff's accident. Mr. Elias states that Elias LLC has never given written notice under any of the leases of any intention to re-enter and inspect the shopping center; it did not build or construct any of the curbs in the shopping center; and no notices, violations or orders were issued by any entity, including the Town of Babylon, or received by Elias LLC or Elias Management, with respect to the curbs or the parking lot.

WHETHER ELIAS PROPERTIES, INC. IS A LEGAL ENTITY

Martin Elias testified at his examination before trial that his business address is 500 North Broadway, Jericho, New York and that he is the only member of the LLC known as Elias Properties Babylon. He testified that Elias Properties Babylon, LLC owned only one property on November 18, 2001, the premises located at 1000 W. Montauk Highway, West Babylon, which it owned since 1999. At the time of the within incident, he testified that Elias Properties Babylon did not have any employees, but that it had a management company which they pay him to manage. That management company, he testified, is known as Elias Properties Management Co. and manages shopping centers and strip centers. He described the types of services provided by the management company as billing the tenant for the rent, taxes and any items that would arise, such as cleaning up what someone dumped by making the calls to take care of it, such as calling the tenant and having them take care of it. There was no particular schedule for going to the properties.

Defendant has demonstrated prima facie through testimony that the subject property is owned by Elias Properties Babylon, LLC and managed by Elias Properties Management. Plaintiff has not submitted

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any evidentiary proof to establish that Elias Properties, Inc. owned or managed the subject property, that Elias Properties, Inc. exists, or is a legal entity.

Accordingly, that part of defendant's motion which seeks dismissal of the complaint against Elias Properties, Inc. is granted and this consolidated action is severed and shall continue against Elias Properties Babylon, LLC under the present index number assigned.

LOCATION OF THE INCIDENT

Defendant seeks dismissal the first and second causes of action set forth in the complaint on the basis that plaintiff cannot identify the location of the accident.

It is noted in plaintiff's bill of particulars that the defective curb where plaintiff allegedly fell is stated to be located to the easterly side of the entrance of the K Mart store at 1000 W. Montauk Highway, West Babylon, New York. Plaintiff testified at his examination before trial that he parked in the fire zone for the fire department on previous emergency calls and on this emergency call. He testified this fire zone was located in the front of the K Mart store and that he parked perpendicular to the return wall of the building. He referred to defendant's Exhibit A at the time of his testimony, and testified that the area he parked in would be on the left side of the building where the building turns in. He also described the area where he parked as being parallel to the curb of the sidewalk in between the main building and the white building. The curb was closest to the passenger side of his vehicle. When he got out of his vehicle, he went around to the back of the vehicle, opened the left door in the back of the car, retrieved his jump bag, and closed the door. As he went to go into the building, he testified he stepped onto the curb with his left foot and fell, grabbing his knee. He saw there was a piece, or chunk, of curb and debris consisting of leaves and twigs next to the curb on the street and that he stepped on this piece of curb, twisting his ankle. Based upon the foregoing, defendant's own submissions sets forth the location where plaintiff fell and sustained injury. Therefore, defendant has not demonstrated prima facie entitlement to summary judgment on the issue that plaintiff did not know the location where he fell.

Accordingly, that part of defendant's application which seeks dismissal of the first and second causes of action set forth in the complaint on the issue that plaintiff was unable to identify the location of the incident is denied.

OUT OF POSSESSION LANDLORD

Defendant seeks dismissal of the first and second causes of action asserting that Elias Properties Babylon, LLC was an out of possession landlord and therefore was not responsible for the location where the incident occurred.

A duty to prevent negligence should not be imposed on one who does not control the tort-feasor (*Clarke v Unanue*, 97 AD2d 888, 470 NYS2d 712 [3rd Dep't 1983]). "Liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property. The existence of one or more of these elements is sufficient to give rise to a duty to exercise reasonable care. Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property (*Turrisi v Ponderosa, Inc.*, 179 AD2d 956, 578 NYS2d 724 [3rd Dep't 1992]).

Here defendant, through its own submissions, has demonstrated that it owned the premises leased by K Mart; and that Elias Properties Babylon, LLC did not, through the actions of its only member/employee, Martin Elias, or by way of Elias Property Management, conduct any scheduled inspections of the property at 1000 W. Montauk Highway. At his examination before trial, Martin Elias could not identify the K Mart in the photos.

Defendant has further demonstrated through its submissions that it retained the right to enter the premises to make inspections and/or repairs. In reviewing the lease between defendant and K Mart, it is noted that Section 13.01 of Article 13 provides, "Tenant will permit Landlord and its authorized representatives to enter the demised premises at all reasonable times for the purpose of (a) inspecting the same, or (b) making any necessary repairs thereto and performing any work therein that may be necessary by reason of Tenant's failure to make any such repairs or perform any such work or to commence the same within 10 days after written notice from Landlord. Nothing herein shall imply any duty upon the part of Landlord to do any such work; and performance thereof by Landlord shall not constitute a waiver of Tenant's default in failing to perform the same." This submission by defendant raises a factual issue concerning defendant's control over the premises and whether it is an out of possession landlord in that the lease agreement provides a right to Elias Properties Babylon to enter the premises to inspect the same or to make necessary repairs.

The lease between defendant and Eastern Savings Bank located at 1000 W. Montauk Highway, West Babylon at Section 7.01 provides that "...Fee Owner and Primary Tenant will repair and maintain the parking area." Therefore, further factual issue is raised concerning whether Elias Properties Babylon, LLC is an out of possession landlord.

Martin Elias testified that in November, 2001, K Mart was responsible for maintaining the property at 1000 W. Montauk Highway, West Babylon, including sweeping and cleaning. Elias Properties Babylon, LLC hired Elias Property Management to manage the property at 1000 W. Montauk Highway, West Babylon. Mr. Elias testified that there is no person from either Elias Properties Babylon or Elias Properties Management who visited the property at 1000 W. Montauk Highway to make sure K Mart was fulfilling its obligations in snow removal or lot sweeping. A copy of an agreement (defendant's exhibit N) reveals that it was signed by Martin Elias as member of Elias Properties Babylon, LLC and by Martin Elias as president of Elias Properties Management, Inc, authorizing himself, Martin Elias, and Elias Properties Management to make any ordinary repairs to the property and to perform such services as are advisable to operate, maintain and manage the property consistent with the standards of similar properties located in the same market as the property. There are therefore factual issues concerning whether defendant maintained control over the premises and whether it is an out of possession landlord and why Elias Properties Management, Inc. would be authorized to make ordinary repairs and maintain and manage the property when Mr. Elias claims that it was K Mart's responsibility to do so. Therefore, defendant has not demonstrated prima facie entitlement to summary judgment on the issue that it was an out of possession landlord in that defendant's own submissions raise factual issues which preclude summary judgment.

Accordingly, that portion of defendant's motion which seeks to dismiss the first and second causes of action asserting that Elias Properties Babylon, LLC was an out of possession landlord and therefore was not responsible for the location where the incident occurred is denied.

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THAT THE COMMON LAW NEGLIGENCE CAUSE OF ACTION IS BARRED BY THE
FIREFIGHTER'S RULE

The "firefighter's rule" holds that firemen injured in the line of duty are barred from recovery against their employer or fellow servants on a theory of common law negligence for injuries related to the dangers associated with performance of their duties (*McCormack v City of New York et al*, 95 NY2d 757, 712 NYS2d 448 [2002]).

General Municipal Law §205-a is a remedial statute and should be construed liberally; however, scope is limited to property owners and to maintenance of premises in safe condition for firefighters (*Kenavan v New York* 70 NY2d 558, 523 NYS2d 60 [1987]).

New York General Municipal Law §205-a creates a cause of action for firefighters who, while in the line of duty, suffer line of duty injuries directly or indirectly as a result of violations of statutes or regulations. Specifically, it provides that firefighters or representatives of deceased firefighters have a right of action in situations where the negligence of any person in failing to comply with the requirements of any of the statutes, ordinances, rules, orders, and requirements of the federal, state, or local governments directly or indirectly causes the firefighter's injury or death during the discharge of his or her duties (*Guiffrida v Citibank Corp.* 100 NY2d 72, 760 NYS2d 397 [2003]).

The statute gives an additional right of action for injury or death of a fireman as a result of the failure to comply with statutes or ordinances and is directed at property owners and those in control of property which is involved in a fire-fighting operation (*Gerhart v New York*, 56 AD2d 790, 393 NYS2d 6 [1st Dept 1977]).

General Municipal Law §205-a, which affords to firefighters statutorily created right of action for injuries suffered while combating fires, may be asserted against nonowners of premises on which the particular fire occurred when those nonowners are charged with having violated some statute, ordinance or rule respecting maintenance and safety of premises in question (*Andreaccio v Unique Parking Corp.*, 158 AD2d 222, 558 NYS2d 930 [1st Dept 1990]).

This section gives a cause of action to a fireman injured in the course of duty by failure of persons to comply with the requirements of an ordinance or statute, giving rise to a liability imposed specially and apart from any ordinary liability based upon negligence (*Healy v Rennert*, 33 Misc2d 897, 226 NYS2d 876, aff'd 20 AD2d 682, 246 NYS2d 1017 [2nd Dept 1964]).

In the instant application, defendant cites to *Jackson v City of New York*, 251 AD2d 457, 674 NYS2d 721 [2nd Dept 1998]) as the basis for dismissing the common law negligence cause of action. However, defendant's reliance upon the same is misplaced because in *Jackson v City of New York* the trial court granted summary judgment dismissing an action commenced by a police officer against his employer to recover damages for common-law negligence. In *Jackson*, the court stated that Gen. Oblig. Law §11-106, which partially abrogated the firefighter's rule, applies only where the police officer or firefighter's injury, disease or death is proximately caused by the neglect, willful omission, or intentional, willful or culpable conduct of any person or entity, other than that police officer's or firefighter's employer or co-employee. It further stated that "The firefighter's rule continues to bar a police officer or firefighter from bringing a common-law negligence cause of action against his or her employer where the

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performance of the police officer's or firefighter's duties increased the risk of the injury happening, and did not merely furnish the occasion for the injury. Thus, recovery for damages in common-law negligence may not be had where some act taken in furtherance of a specific police or firefighting function exposed the office to a heightened risk of sustaining the particular injury."

Likewise, in *Grogan v City of New York*, 259 AD2d 240, 699 NYS2d 12 [1st Dept 1999]), where a police officer who was injured while in pursuit of a suspect when he slipped and fell on an icy and broken sidewalk abutting defendant city-owned property, commenced an action against the city, not as his employer, but as the owner of the premises abutting the sidewalk on which he was injured. The appellate division concluded that New York Gen. Oblig. Law §11-106 precluded plaintiff's action against the defendant, notwithstanding the fact that the action was brought against defendant as owner of the premises at issue rather than as plaintiff's employer. The appellate division further set forth that New York Gen. Oblig. Law §11-106 partially abolishes the firefighter's rule and permits a right of action for firefighters and police officers injured in the course of their duties by the negligence or intentional conduct of persons other than their employers or co-employees. Thus, the statute specifically precludes the assertion of a common law negligence cause of action against the employee's municipal employer.

In *Simons v City of New York*, 252 AD2d 451, 675 NYS2d 597 [1st Dept 1998], an officer was asked to escort a complainant from the courthouse to the subway, and en route to the subway, the officer was injured when he fell on a depression as he was stepping off the curb. The appellate division found that the officer was performing his official duties such that the "fire fighter's rule" applied. Because the officer had asserted a common law negligence claim against the city, his employer, the common law negligence claim was barred.

The Legislature expanded the rights of police officers and firefighters by enacting New York Gen. Oblig. Law §11-106(1) which significantly limited the common-law firefighter's rule and permitted the police officer's negligence action against the owners of the property where plaintiff sustained his injury (*Sweeney v City of New York*, 171 Misc2d 62, 652 NYS2d 928, [Civil Court of the City of New York 1996]).

Here the uncontroverted testimony establishes that Jeffrey Thompson was responding to an emergency call at K Mart when he went to step on the curb and stepped onto a broken piece of concrete curbing, causing his ankle to twist and causing him to fall and sustain injury. The testimony further establishes that the subject property was owned by Elias Properties Babylon, LLC.

In that it is not asserted that Jeffrey Thompson was an employee of Elias Properties Babylon, LLC, and in that it is uncontroverted that plaintiff was injured while responding to an emergency call as a firefighter (*see, Malenczak v City of New York*, 265 AD2d 532, 697 NYS2d 138 [2nd Dept 1999]) it is determined as a matter of law that plaintiff is not precluded from maintaining a cause of action for common law negligence against the owner of the premises, defendant Elias Properties Babylon, LLC.

Accordingly, that part of defendant's application for dismissal of the common law negligence cause of action as barred by the firefighter's rule is denied.

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THAT NONE OF THE STATUTES IMPOSE LIABILITY AGAINST DEFENDANT

Defendant asserts the first and second causes of action must be dismissed in that there was no statutory violation to impose liability against Elias Properties Babylon.

To make out a valid claim under General Municipal Law §205-a and survive a motion to dismiss, a plaintiff must (1) identify the statute or ordinance with which the defendant failed to comply, (2) describe the manner in which the firefighter was injured, and (3) set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the firefighter (*Giuffrida v Citibank Corp*, supra).

Defendant asserts that plaintiff alleges Elias Properties Babylon, LLC violated Babylon Town Code §§ 89-1, 89-56, 92-1, 89-8, 89-50, 158-1, 158-2, 191-1, 191-16, 191-17, 191-18 and 213-367. However, in the supplemental bill of particulars submitted by defendant, it is determined that plaintiff has also alleged that defendant violated Sections 302 and 302.3 of the Property Maintenance Code of New York State and sections 609.1, 1242.5, 1244 and 1245.1 of the New York State Building Code. Section 89-1 of the Babylon Town Code sets forth that the Town Board shall and does hereby accept the applicability of the State Building Construction Code for the Town of Babylon in accordance with the provisions of §374-a of the Executive Law.

In support of their claim of entitlement to summary judgment on the issue of whether defendant violated any codes or statutes or laws as a predicate for this action, defendants have merely submitted an attorney's affirmation and have failed to submit any probative or admissible evidence from an engineer of someone deemed qualified to opine on whether or not the curbing and maintenance thereof complies with the aforementioned statutes. Here, the conclusive, unsupported contentions by counsel that the alleged defect did not violate any of the applicable law is deemed not to be probative or in compliance with the requirements of CPLR 3212 and does not demonstrate prima facie entitlement to summary judgment.

Accordingly, that part of defendant's motion which seeks dismissal of the first and second causes of action premised upon any alleged statutory violations and §Gen. Oblig. Law 205-a is denied.

LACK OF NOTICE

Defendant seeks dismissal of the first and second causes of action asserting that it neither created nor had actual or constructive notice of the defective condition complained of herein.

To prove a prima facie case of negligence in a slip/trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*Stumacher v Waldbaum*, 274 AD2d 572, 716 NYS2d 573 [2d Dept 2000]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant or its' employees to discover and remedy it (*Stumacher v Waldbaum*, supra; see also, *Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Bykofsky v Waldbaum's Supermarkets, Inc.*, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]).

An out of possession owner or lessor is not liable for injuries that occur on the premises unless that entity retained control of the premises or is contractually obligated to repair the unsafe condition

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(*Gibson v Bally Total Fitness Corporation*, 1 AD3d 477, 767 NYS2d 135 [2nd Dept 2003]). “An out of possession landlord’s liability for injuries caused by defective or dangerous conditions upon leased premises hinges on whether the landlord has retained sufficient control over the premises to be held to have constructive notice of the condition. Control of the premises may be established by a number of factors, including a landlord’s reservation of the right to enter and repair, which may be deemed to constitute sufficient retention of control and to provide the landlord with constructive notice of a defective condition, thereby subjecting the landlord to liability” (*Stalter v Prudential Insurance Company of America*, 220 AD2d 577, 632 NYS2d 602 [2nd Dept 1995]). In that liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property, and the existence of one or more of these elements is sufficient to give rise to a duty to exercise reasonable care (*Turrisi v Ponderosa, Inc.*, supra), this court cannot make a determination as a matter of law on the issue that there was no constructive notice or that there was no duty of care to impose actual notice.

Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [2d Dept 1994]). Defendant Martin Elias testified that he did not inspect the premises and that he did not have a regular schedule for inspecting the properties. This court has determined that there are factual issues concerning whether defendant was an out of possession landlord and whether defendant had a duty to inspect the premises based upon the management agreement and right to enter the premises and inspect and repair the same. Although defendant’s testimony and the affidavits would lead one to believe that K Mart was responsible for maintaining and repairing the premises, the management agreement and the lease with Eastern Savings Bank speak otherwise. Therefore, there are factual issues concerning actual or constructive notice which preclude summary judgment.

An out of possession landlord with a general right of reentry pursuant to a provision in the lease cannot be held liable for general maintenance defects, but only for structural failures or specific statutory violations (*Hausmann v UMK, Inc. et al*, 296 AD2d 336, 744 NYS2d 404 [1st Dept 2002]). Defendant has submitted no admissible or probative evidence from an engineer or other expert concerning the condition complained of and that the condition did not violate any statutory provisions. Therefore, factual issues exist concerning whether or not the claimed defect violates any specific statutory provisions precluding summary judgment.

Notice is material to recovery by a firefighter under General Municipal Law §205-a, however, to be sufficient under the statute, it is not necessary that a firefighter prove such notice as he would be required to demonstrate in order to recover under the theory of common law negligence, and the firefighter need show only that circumstances surrounding violation of a statute or ordinance indicate that the violation was a result of neglect, omission, or willful or culpable negligence on the part of defendant (*Lusenskas v Axelrod*, 183 AD2d 244, 592 NYS2d 685 [1st Dept 1992]). In that there are factual issues as set forth above, such determination cannot be made as a matter of law at this time.

Based upon the foregoing, defendant has failed to establish prima facie entitlement to summary judgment on the issue of whether Elias Properties Babylon, LLC had actual or constructive notice of the claimed defect, or that there was no statutory violation as a result of a neglect, omission, or willful or culpable conduct on the part of defendant.

Accordingly, that part of defendant's application which seeks dismissal of the first and second causes of action set forth in the complaint on the issue of notice is denied.

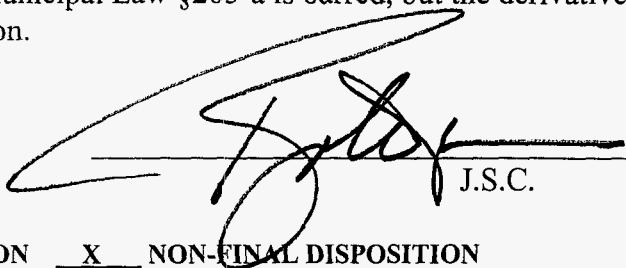
THE DERIVATIVE CAUSE OF ACTION

Defendant seeks dismissal of the derivative cause of action asserted by Patrice Thompson, spouse of plaintiff Jeffery Thompson.

General Municipal Law §205-a does not authorize recovery for loss of consortium by the spouse of a firefighter injured in the line of duty (*Korfman v Parkway Village Associates*, 110 AD2d 886, 488 NYS2d 438 [2nd Dept 1985]). Therefore, it is determined as a matter of law that Patrice Thompson's derivative claim is not viable with regard to the second cause of action brought pursuant to General Municipal Law §205-a, but may be maintained as to the first cause of action sounding in common law negligence.

Accordingly, that part of defendant's motion which seeks dismissal of the derivative cause of action set forth by Patrice Thompson is granted to the extent that any claim premised upon the second cause of action brought pursuant to General Municipal Law §205-a is barred, but the derivative claim may be maintained as to the first cause of action.

Dated: JAN 30 2008



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION