SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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MARILE DOWNEY,

Plaintiff,

Part C-2
Present:
Hon. Thomas P. Aliotta

-against-

THE CITY OF NEW YORK, KEYSPAN ENERGY DELIVERY NYC, ALEX FIGIOLIA CONTRACTING INC. and RICHMOND PLUMBING & HEATING CO., INC.,

Decision and Order

Index No. 11582/02
Motion No. 3889-004

Defendants.

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The following papers numbered 1 to 2 were marked fully submitted on the 21st day of November, 2007:

	Pages Numbered
Notice of Motion for Summary Judgment by Defendant The City of New York, with Supporting Papers and Exhibits (dated December 13, 2006)	1
Affirmation in Opposition by Plaintiff Marile Downey, with Exhibits (dated September 25, 2007)	2

Upon the foregoing papers, the motion for summary judgment by the defendant City of New York is decided as indicated.

Defendant the City of New York (hereafter "City"), moves by notice of motion for an order pursuant to CPLR 3211 (a) (7) and/or 3212 granting it summary judgment and dismissing the complaint as against it. Plaintiff Marile Downey opposes the motion in its entirety.

This action arises from personal injuries allegedly sustained by plaintiff, an on-duty police officer at the time of the accident, on October 23, 2001, at 1:30 p.m., when she tripped upon exiting her patrol car and fell into a hole approximately four feet wide and four inches deep. The hole was located in the street in front of 33 Hudson Street on Staten Island. The complaint, sounding in common-law negligence, alleges that the City negligently owned, operated, maintained, possessed, controlled, inspected and repaired the subject roadway. Plaintiff filed her notice of claim on or about January 10, 2002, and commenced this action by the filing and service of a summons with complaint on or about May 9, 2002. Issue was joined by the City's service of an answer on or about June 30,

2002. A note of issue was filed on November 8, 2006.

In support of its motion, the City relies upon four principal grounds for dismissal. First, that the common-law negligence action is barred by the so-called "Firefighter's Rule". Second, that plaintiff has failed to comply with the prior written notice requirement in §7-201(c)(2) of the New York City Administrative Code. Third, that the City did not cause or create the condition which caused plaintiff to fall. Fourth, that a cause of action under General Municipal Law §205-e has not been pleaded.

In opposition, plaintiff relies, in part, upon the deposition testimony of Walkman Wong, a licensed professional engineer and employee of the City, to raise a triable issue of fact as to whether defendant City created the condition which caused plaintiff's accident. In addition, plaintiff seeks leave to interpose a proposed amended complaint (Plaintiff's Exhibit "C") asserting a General Municipal Law §205-e cause of action based on the City's alleged failure to properly maintain, inspect and repair the roadway where the accident occurred (citing New York City Charter §§2903 [b][3]; 2904 and Administrative Code §§7-201[c][2]; 19-152).

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see* Rotuba Extruders v. Ceppos, 46 NY2d 223; Herrin v. Airborne Freight Corp., 301 AD2d 500). On a motion for summary judgment, the function of the court is issue finding, not issue determination (*see* Weiner v. Ga-Ro Die Cutting, 104 AD2d 331, *affd* 65 NY2d 732). In conducting such an inquiry, the Court is enjoined to scrutinize the proof carefully in the light most favorable to the party opposing the motion (*see* Glennon v. Mayo, 148 AD2d 580). To prevail on the motion, the moving party must present *prima facie* evidence of its entitlement to judgment as a matter of law (Alvarez v. Prospect Hosp., 68 NY2d 320, 324), and upon its failure to do so, the motion will be denied. Once a *prima facie* showing has been made, however, the burden shifts to the party opposing the motion to produce competent evidence demonstrating the existence of triable issues of fact (Zuckerman v. City of New York, 49 NY2d 557, 562). In this regard, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a triable issue (*id*. at 562). Thus, summary judgment, which operates to deprive a party of his or her day in court, is only appropriate where the movant's initial burden of proof has been satisfied, and the opposing party has failed to adduce competent evidence demonstrating the presence of a genuine issue of material fact (Persaud v. Darbeau, 13 AD3d 347).

With these criteria in mind, the Court will examine the City's arguments and plaintiff's opposition.

Initially, the Court takes note of the long standing common-law doctrine known as the "Firefighter's Rule", a doctrine that is equally applicable to police officers and bars any personal injury actions related to the risks such individuals are expected to assume as part of their jobs (*see* Galapo v. City of New York, 95 NY2d 568, 573; *see also* Simons v. City of New York, 252 AD2d 451). To ameliorate the harshness of this rule, the legislature acted long ago to carve out a limited exception for injuries that occur in the line of duty which result from either the negligent non-compliance with statutes, ordinances, rules or regulations imposing affirmative duties (*see* General Municipal Law §§205-a, 205-e) or the neglect, wilful omission or intentional, wilful or culpable conduct of any person or entity other than another police officer or firefighter (*see* General Obligations Law §11-106[1]).

In the instant case, it is undisputed that plaintiff tripped and fell while performing her duties as a police officer, and although she has already amended her complaint at least once, she has yet to plead a General Municipal Law §205-e cause of action. Moreover, instead of cross-moving to amend her complaint, plaintiff merely seeks leave to do so in her opposing papers, and has attached thereto a proposed "Third Amended Complaint" incorporating the statutory cause of action. Since the City is under no obligation to respond to plaintiff's opposition papers, it is not surprising that there is no formal opposition to plaintiff's request. In any event, this Court, in the interest of judicial economy, will treat plaintiff's opposition papers as if they contained a cross motion (*but see* CPLR 2215).

Generally, leave to amend pleadings is freely granted, absent surprise or prejudice (CPLR 3025[b]; Edenwald Contr Co. v. City of New York, 60 NY2d 957, 959). Where, however, leave to amend is sought after a long delay and the case has been certified as ready for trial, the exercise of judicial discretion in allowing such amendments should be circumspect, prudent and cautious (*see* Countrywide Funding Corp. v. Reynolds, 41 AD3d 524, 525). Here, plaintiff filed her note of issue on November 8, 2006, nearly a year before she informally sought leave to amend her complaint in response to the City's dismissal motion. Since it is well settled that leave will be denied if the proposed amendment lacks merit (*see* Dionisio v. George De Rue Contrs, 38 AD3d 1172, 1174), the viability of plaintiff's proposed General Municipal Law §205-e cause of action must first be examined. In this case, plaintiff purports to rely upon the City's alleged violation of Charter §§2903(b)(2) and 2904, and Administrative Code §§7-201(c) (2) and 19-152.

In Gonzalez v. Iocovello (93 NY2d 539, 552, 553), the Court of Appeals, reflecting an evolving interpretation of General Municipal Law §205-e, held that while the purported violation of City Charter §2904 and Administrative Code §19-152 may *not* underpin a viable claim under General Municipal Law §205-e, the statutory cause of action *can* be predicated on a purported violation of City Charter §2903(b)(2) for failing to keep the City's streets in good repair (*see also* Hayes v. City of New York, 264 AD2d 610, 611; Simons v. City of New York, 252 AD2d at 452).

As a result, it cannot be said that plaintiff's proposed amended complaint is devoid of merit.

In view of the foregoing, it is the opinion of this Court that the absence of any obvious need to conduct further discovery militates in favor of allowing plaintiff to amend her complaint.

The Court passes upon no further issue.

Accordingly, it is

ORDERED that plaintiff is granted leave to amend the complaint in the form annexed to her opposition papers; and it is further

ORDERED that plaintiff's Third Amended Complaint will be deemed served with the service upon defendants of a copy of this decision and order with notice of entry; and it is further

ORDERED that said defendants will have 30 days within which to serve an amended answer; and it is further

ORDERED that the caption of the action be amended to reflect the earlier dismissals in favor of defendants Keyspan Energy Delivery NYC and Alex Figiolia Contracting Corp., to read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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MARILE DOWNEY,

Plaintiff, Index No. 11582/02

-against-

THE CITY OF NEW YORK and
RICHMOND PLUMBING & HEATING CO., INC.,

Defendants,

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And it is further

ORDERED that the City's motion for summary judgment is denied with leave to renew following the joinder of issue to the Third Amended Complaint.

The foregoing constitutes the Decision and Order of the Court.

DATED: FEB 05, 2008

/s/
HON. THOMAS P. ALIOTTA, J.S.C.