At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of March 2008.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

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RICARDO OTERO,

Index No. 32229/04

Plaintiff,

- against -

SANDY CHAO-MEI LAM,

Defendant.

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The following papers numbered 1 to 4 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, the motion by defendant Sandy Chao-Mei Lam for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint herein is granted.

On June 4, 2004, plaintiff Ricardo Otero, a New York City police officer, was allegedly injured in the rear yard of the premises at 763 - 60 Street in Brooklyn while

investigating a report of a burglary. Thereafter, he commenced this personal injury action against defendant, the owner of the subject premises. In addition to asserting a claim of common law negligence, plaintiff alleges that defendant is "absolutely liable in damages . . . pursuant to the General Municipal Law § Section 205(e)." [1]

In her motion, defendant asserts that plaintiff's common law negligence claim should be dismissed on the grounds that there is insufficient evidence that any negligence on her part proximately caused plaintiff's injuries and that plaintiff's accident was not foreseeable. With respect to plaintiff's General Municipal Law § 205-e claim, defendant contends that it should be dismissed because there is no evidence that she violated any statute, rule or regulation. At his deposition, plaintiff testified that, after searching a backyard to see if a burglar was there, he began to climb a fence that led to the yard of an adjoining property. As he did so, the fence moved back and forth. When he climbed to the top of the fence, the fence shifted some more and, as it did, he attempted to hold on to a nearby tree. As he grabbed the top of the tree, it began to fall and he toppled to the concrete below and injured himself. Apparently, five other police officers were present at the scene - - - Joseph Human, Alex

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[1] Plaintiff is apparently referring to General Municipal Law § 205-e. In his bill of particulars, plaintiff alleges that defendant violated Sections 301 and 302 of the Property Maintenance Code of the State of New York and Sections 27-509 and 27-588 of the Building Code of the City of New York and that such sections are predicates for recovery under General Municipal Law § 205-e.

Delassale, Daniel Magee, Salvatore LoPiccolo and Yi Li. According to defendant, at their respective depositions, the police officers testified, as follows:

> 1. Joseph Human testified that the Police Department Aided Report Worksheet which he filled out on the night of the accident indicated the accident occurred in the rear of 765 60 Street and that he did not recall the address of the brownstone behind which he and plaintiff were canvassing. (Defendant owns the premises at 763 60 Street);
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> 2. Alex Delassalle testified that he did not recall in which backyard the accident happened and that he never saw plaintiff make any contact with a fence; rather, plaintiff was moving along a wall and tried to grab a tree trunk which was growing on the top of the wall; (Alex Delassalle's Police Memo Book entry indicated the accident occurred at the rear of either 770 59 Street or 761 60 Street);
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> 3. Daniel McGee testified that he saw plaintiff climb a tree that was located in the backyard of 761 60 Street. (His Police Department Witness Statement did not contain any reference to a fence or to the address where the accident occurred);
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> 4. Salvatore LoPiccolo testified that he believed the accident occurred in the backyard of 770 59 Street and that plaintiff fell from a tree as he tried to gain access to the adjoining yard; and
>
> 5. Yi Li testified that he saw plaintiff fall as plaintiff was trying to get around some object on the concrete wall, possibly a tree. (In his Police Department Witness Statement, there was no reference to a fence);

In her deposition testimony, defendant denied that there were ever any trees in her backyard or that she had ever made any repairs to a fence in or adjacent to her backyard.

Given the deposition testimony herein, including plaintiff's testimony that he could not recall the address of the building to which he responded, defendant suggests that the common law negligence claim "is based on mere speculation" about the accident location. Defendant adds that it was not foreseeable that plaintiff would be injured as a result of using a tree to aid himself in climbing defendant's fence. Insofar as plaintiff alleges a cause of action pursuant to General Municipal Law § 205-e, defendant argues that the maintenance of her property was in accordance with applicable statutes and regulations and, therefore, that claim must likewise be dismissed. In her memorandum of law, defendant further asserts that she did have either actual or constructive notice of any dangerous condition on her property. She also notes that the sections of the Building Code of the City of New York upon plaintiff relies are inapplicable and that the New York State Property Maintenance Code is a general safety standard which cannot form the predicate for a General Municipal Law § 205-e claim.

In opposition to the motion, plaintiff describes how he was injured "when a dead and rotted tree he was holding broke and gave way, causing him to fall from a fence he was climbing to the ground below." He notes that, at his deposition, he identified the location of his fall in photographs and indicated that a photograph of the building at 763 60 Street was the accident location. Plaintiff also offers the testimony of his fellow police officers, as well as their "witness statements" prepared a few months after the accident, to make several salient points:

1. Joseph Human testified that the tree was rotted and that, in his accident report, he listed the location as both 765 and 763 60 Street;

2. Alex Delassalle recalled that the trunk of a tree snapped as plaintiff tried to keep his balance on the top of a wall. He also acknowledged that the departmental accident report referred to a fence;

3. Daniel Magee believed that the tree was located in the yard at 761 60 Street; however, after going to the hospital with plaintiff, he returned to the accident scene and, in a witness statement which he later completed, he identified the location as 763 60 Street;

4. Salvatore LoPiccolo indicated at his deposition that he had little independent recollection of the accident, but, in his witness statement, he stated that the tree was rotted and was located at 763 60 Street; and

5. Yi Li testified that plaintiff was holding onto a tree as he was proceeding along a wall and the tree looked "old and dead." In a witness statement, he likewise identified the accident location as 763 60 Street.

According to plaintiff, a question of fact exists as to whether the accident occurred in defendant's backyard, given the deposition testimony and witness statements of his fellow police officers. Plaintiff submits that it is not necessary for him to demonstrate that the precise manner in which the accident occurred was foreseeable, although, in this case, it should have been foreseeable that someone on defendant's property could be injured "from a visibly dead and rotted tree." In addition, plaintiff insists that the Property Maintenance Code, which requires an owner to maintain "all exterior property and premises . . . in a clean,

safe and sanitary condition," is a sufficient predicate for liability pursuant to General Municipal Law § 205-e, as is Multiple Dwelling Law § 78. [2]

In reply, defendant dismisses the five "witness statements" which were prepared by plaintiff's counsel four months after the accident as "hearsay statements" and notes that, at their respective depositions, the police officers had no recollection of completing such statements. Defendant also asserts that plaintiff did not identify any photograph as showing 763 60 Street as the location of his accident. Defendant repeats that there have never been any trees in her yard and that the accident must have occurred in a neighboring yard. Assuming that such a tree did exist in her yard and accepting that it was in a dangerous condition, defendant argues that there is absolutely no evidence as to how long such alleged condition existed. Defendant further contends that the Property Maintenance Code is not a "well-developed body of law and regulation that imposes clear duties" and, therefore, it cannot serve as a predicate for a General Municipal Law § 205-e claim. Defendant also objects to plaintiff's allegation regarding a violation of Multiple Dwelling Law § 78 since it was not asserted in plaintiff's bill of particulars. However, even if the allegation is considered, "such allegation should fail" as plaintiff has not demonstrated that his injuries were foreseeable and that defendant had notice of the allegedly defective condition.

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[2] Although Multiple Dwelling Law § 78 is not mentioned in plaintiff's bill of particulars, he suggests that it be considered by the court since "this is merely an amplification of the allegations already asserted in the pleadings."

Where injuries are sustained as a result of an alleged failure to maintain property in a reasonably safe condition, liability is governed by the "standard of reasonable care under the circumstances whereby foreseeability shall be [the] measure of liability" (*Basso v Miller*, 40 NY2d 233, 241 [1976]). Under the circumstances of this case, defendant could not, as a matter of law, reasonably foresee that plaintiff would enter her backyard in the early morning hours, climb her fence and use a nearby tree to brace himself, sustaining an injury in the process (*see Garcia v Northcrest Apartments Corp.*, 24AD3d 208 [2005]; *Addolorato v Safeguard Chemical Corp.*, 177 AD2d 680 [1991]; *Rubsam v Alexander*, 177 AD2d 484 [1991]). Moreover, there is no evidence that defendant made any repairs to the fence at issue or that she had notice that it was allegedly wobbly *(see Richardson v Simone,* 275 AD2d 576 [2000]). Although constructive notice of the decayed nature of a tree may be inferred from its rotted appearance (*see* e.g., *Jurgens v Whiteface Resort on Lake Placid, L.P.*, 293 AD2d 924 [2002]), plaintiff has not established that the subject tree was located on defendant's property. None of the deposition testimony of plaintiff's witnesses, nor the Police Department records to which they alluded, refer to the accident location as 763 - 60 Street. The belated and unsworn "Witness Report[s] of Accident" which each officer completed at the request of plaintiff's attorneys do not raise a triable issue of fact in that regard, nor does the Line of Duty Injury Report which was neither prepared nor signed by plaintiff, nor did it refer to 763 60 Street. Further, plaintiff testified that he could not recall the address of the

property to which he responded on the night of the accident or the adjoining address, that he has never returned to the accident scene, and that, although he recognized photographs of the yards from which and into which he fell, he did not state the addresses of the locations depicted in the photographs. Accordingly, since plaintiff is unable to demonstrate where the tree was located, that defendant had notice of the wobbly condition of the fence and that his accident was reasonably foreseeable, his first cause of action sounding in common law negligence is dismissed.

The common-law doctrine known as the "firefighters' rule" bars recovery by a firefighter against a property owner or occupant for injuries related to the risks firefighters are expected to assume as part of their job (*see Kenavan v City of New York*, 70 NY2d 558, 566 [1987]). The Legislature opened a narrow passageway around the common-law rule by enacting General Municipal Law § 205-a, affording firefighters and their survivors a statutory cause of action for line-of-duty injuries resulting from negligent noncompliance "with the requirements of any [governmental] statutes, ordinances, rules, orders and requirements" (*see*, L. 1935, ch. 800, § 2, as amended by L.1936, ch.251, § 1; *Desmond v City of New York,* 88 NY2d 455, 462 [1996]). In *Santangelo v State of New York* (71 NY2d 393 [1988]), the Court of Appeals recognized that the firefighters' rule applies equally to police officers. Like firefighters, police officers are "experts engaged, trained, and compensated by the public to deal on its behalf with emergencies and hazards often created

by negligence" (*Santangelo v State of New York, supra*, 71 NY2d, at 397) and they too were barred from recovering damages for on-the job, work related injuries. Soon after Santangelo, the Legislature enacted General Municipal Law § 205-e, allowing to police officers the same limited exception to the common-law rule that had been made available to firefighters (see, L.1989, ch. 346). In 1996, the Legislature added another exception to the common-law rule by authorizing a cause of action for firefighters and police officers for on-duty injuries "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" (*see* General Obligations Law § 11-106 [1]).[3]

General Municipal Law § 205-e (1) permits police officers or their survivors to recover for injuries or death caused by the negligent failure to comply "with the requirements of the statutes, ordinances, rules, and requirements of the federal, state, county, village town or city governments or of any and all of their departments, divisions and bureaus." As a prerequisite to recovery, a police officer must demonstrate injury resulting from negligent noncompliance with a requirement found in a "well -developed body of law and regulation" that "imposes clear duties" (*see, Desmond v City of New York, supra,* 88 NY2d, at 464 [1996]). Sections 301 and 302 of the New York State Property Maintenance Code, which

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[3] Because plaintiff was performing his official duties as a police officer at the time of the incident, GOL § 11-106 would bar a negligence cause of action against his employer, the City of New York (*see* e.g., Link v City of New York, 34 AD3d 757 [2006]).

provide general safety standards, do not contain "particularized mandates" (*see Gonzalez v Iocovello,* 93 NY2d 539, 550 [1999]). Section 301 provides, in pertinent part, that the owner of real property shall maintain a structure and the exterior in compliance with the requirements of the Property Maintenance Code. Section 302 requires, in general terms, that all exterior property be maintained in a clean, safe and sanitary condition, free from weeds, and that accessory structures, such as fences, be structurally sound and in good repair. While the alleged violations of New York City Administrative Code §§ 27-127 and 27-128 are sufficient predicates for a cause of action under General Municipal Law § 205-e (*see Farrington v City of New York*, 240 AD2d 697 [1997]), neither provision is applicable to the facts of this case. To the extent that they are relevant, Administrative Code § 27-127 requires that buildings and their parts be maintained safely, while § 27-128 establishes the owner's responsibility for such maintenance (*see Williams v City of New York*, 304 AD2d 562, 564 [2003]) *affd.* 2 NY3d 352 [2004]). Those sections have consistently been applied to structural or design defects (*see* e.g. *Beck v Woodward Affiliates*, 226 AD2d 328, 330 [1996]). Since a rotted tree or shaky fence is not a structural or design defect, no violation of either section can be shown to underpin plaintiff's General Municipal Law § 205-e cause of action. Equally unavailing are the alleged violations of Sections 27-588 and 27-509, which are cited by plaintiff in his bill of particulars, as they are inapplicable to the facts herein. The former section concerns the use of used or ungraded materials, while the latter prohibits the erection

of fences greater than ten feet in height. Finally, Multiple Dwelling Law § 78 is of no solace to plaintiff because he failed to raise a triable issue of fact that defendant created or had notice of the alleged defect (*see Crespi v M.E.I.T. Associate, LLC*, 18 AD3d 495, 496 [2005]). Therefore, plaintiff's second cause of action, which is predicated upon General Municipal Law § 205-e, is likewise dismissed.

The foregoing constitutes the decision, order and judgment of this court.

E N T E R,

J. S. C.

HON. DAVID L. SCHMIDT