

**Canner v Riverside Beach, LLC**

2010 NY Slip Op 30338(U)

February 5, 2010

Supreme Court, Nassau County

Docket Number: 022138/07

Judge: Thomas P. Phelan

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. THOMAS P. PHELAN,**

*Justice*

TRIAL/IAS PART 3  
NASSAU COUNTY

\_\_\_\_\_  
JAMES CANNER and MELISSA CANNER,

Plaintiff(s),

-against-

RIVERSIDE BEACH, LLC and SUN AMERICA  
DEVELOPMENT, INC.,

Defendant(s).  
\_\_\_\_\_

ORIGINAL RETURN DATE: 10/19/09  
SUBMISSION DATE: 12/11/09  
INDEX No.: 022138/07

MOTION SEQUENCE #1

The following papers read on this motion:

Notice of Motion.....	1
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Plaintiffs' motion for an order, pursuant to CPLR 3212, awarding them summary judgment against defendants on the issue of liability is granted.

On September 13, 2007, plaintiff, James Canner, a Detective Sergeant for the City of Long Beach Police Department, tripped and fell while in the course and scope of his employment while walking on the sidewalk area in front of premises known as 125 East Broadway, Long Beach, New York. The sidewalk area consisted of "tightly packed sand or dirt." He claims that he took approximately 10 to 15 steps in this area when he stepped on chunks of concrete debris or rocks. As a result, he apparently lost his balance and stumbled forward. The front portion of his left foot then struck a four-inch raised area of a brand new concrete sidewalk causing him to fall onto the pavement with his right hand folded underneath him. There is no dispute that this property was under construction at the time of the accident.

Plaintiff claims that there was no construction fencing or other barriers located around the perimeter of the property on the date of the accident and that the sidewalk area was poorly lit. He alleges that there were no lights located in front of the property and the only lighting which was provided for this area was approximately 40 feet away. He also claims that there were no warning signs, barricades, caution tape or other devices present on the date of the accident to warn of the dangerous conditions of the sidewalk area nor was there any temporary walkway in place in the area of the sidewalk for people to use while walking on the sidewalk in front of the property.

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Defendant, Riverside Beach, LLC, is the owner of the property and defendant, Sun America Development Inc., is a general contracting company.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez v. Prospect Hosp.*, supra). However, once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve (*Id.*). Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]) even if alleged by an expert (*Alvarez v Prospect Hosp.*, supra; *Aghabi v. Sebro*, 256 AD2d 287 [2d Dept. 1998]).

A police officer injured in the line of duty seeking to recover under General Municipal Law § 205-e must "identify a statute or ordinance with which the defendant failed to comply," and must "set forth facts from which it may be inferred that the defendant's negligence directly or indirectly caused" his or her injuries (General Municipal Law §205-e[1]; *Cerati v. Berrios*, 61 AD3d 915 [2d Dept. 2009]; *Link v. City of New York*, 34 AD3d 757, 758 [2d Dept. 2006]; see also, *Giuffrida v. Citibank Corp.*, 100 NY2d 72, 79 [2003]). Proving that defendant's violation was an "indirect cause" of a police officer's injuries under the statute does not require the same amount of proof as proximate cause in a common-law negligence cause of action; rather, it requires a practical or reasonable connection between the statutory or regulatory violation and the injury (*Cerati v. Berrios*, supra). Thus, to establish a prima facie case under the statute, plaintiff must, in addition to demonstrating violation of relevant statute, ordinance, or regulation, establish practical or reasonable connection between violation and injury or death of officer (*Fahey v. Serota* 23 AD3d 335 [2d Dept. 2005]; *Campbell v. City of New York*, 31 AD3d 594 [2d Dept. 2006]; *Campagna v. Arleo*, 25 AD3d 528 [2d Dept. 2006]). This statute, providing police officers with a cause of action against property owners for injuries arising from a statutory violation imposes a form of absolute liability that omits assumption of risk and comparative negligence defenses (*Wedlock v. Troncoso*, 185 Misc.2d 432 [Sup. Ct. Richmond Co. 2000]).

In this case, as a predicate for his cause of action under General Municipal Law §205-e, plaintiff alleges that defendants violated four separate statutes, rules and ordinances. First, that defendants violated Long Beach City Charter §256 by causing and permitting an extreme tripping hazard to exist on the sidewalk and the unfinished portion of the sidewalk. Second, defendants were negligent in causing and permitting the presence of debris, chunks of concrete or rocks on the unfinished

portion of the sidewalk which constituted a violation of Long Beach Code of Ordinances, Chapter 23, Article 1, §23-8. Third, defendants were negligent in failing to have a proper barrier around the subject property during construction activities which violated section 3306.1 of the New York State Building Code and New York State Industrial Code §23-1.33(a). Lastly, defendants were negligent in failing to erect and maintain a safe and proper temporary walkway in the area of the sidewalk for use by pedestrians which constituted a violation of the New York State Industrial Code §1.33(b)(2).

In support of their motion for summary judgment, plaintiffs submit the affidavit of an expert engineer, Stanley Fein, who explains at length and sufficiently demonstrates how defendants violated each of the above noted statutes, rules and regulations.

Having demonstrated that there was an independent violation of the law by defendants and that plaintiff police officer was injured in a manner such that it can be inferred that it was as a result of defendant's negligence which caused him harm, this Court finds that plaintiffs have made their prima facie showing of entitlement to judgment as a matter of law, thereby shifting the burden to defendants to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v. Prospect Hosp.*, supra).

Defendants' sole argument in opposition to plaintiffs' prima facie showing is that there is no evidence that defendants "negligently and willfully failed to comply with any statutes, ordinances, rules or orders which directly or indirectly caused plaintiffs harm" (*Aff in Opp.*, ¶3). Defendants maintain that plaintiffs "have failed to submit any evidence that the alleged violation of the Charter and Ordinance was the result of defendant's negligent non compliance with the statute[s]" (*Id.* at ¶24). These arguments are unavailing and fall short of raising a triable issue of fact herein (*Alvarez v. Prospect Hosp.*, supra; *Zuckerman v. City of New York*, supra).

As stated above, in order to recover under General Municipal Law §205-e, plaintiffs are not required to demonstrate "negligent non compliance" on the part of defendants in violating a statute or ordinance. Rather, the burden on plaintiffs is simply to prove a violation of the statute and a "practical or reasonable" connection between the violation and his injury (*Campbell v. City of New York*, supra; *Fahey v. Serota*, supra).

Defendants also argue that "despite the broad protection of General Municipal Law 205-e it is not an absolute liability provision designed to afford a police officer greater protection than the general public" (*Aff in Opp.*, ¶27). This argument is a misunderstanding of the law. It is true that the statute was not intended to give police officers greater rights and remedies than those available to the general public; however, the overriding purpose behind the adoption of the statute was to ameliorate the effect of the common law rule that disadvantaged police officers who, unlike members of the general public, were barred from recovery for injuries resulting from risks inherent in their job (*Galapo v. City of New York*, 95 NY2d 568 [2000]; *Montalvo v. City of New York*, 46 AD3d 772 [2d Dept. 2007]). The statute is a strict liability statute (*O'Connor v. City of New York*, 280 AD2d 309 [1<sup>st</sup> Dept. 2001], *lv. to app. den.*, 96 NY2d 716 [2001]; *Singleton v. City of New York*, 13 Misc.3d 1173 [Sup. Ct. Kings Co. 2006]). It cannot be overlooked that the statute was meant to be applied expansively so as to favor recovery by police officers whenever possible (*Williams v. City of New York*, 2 NY3d 352 [2004]).

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Notably, in this case, defendants have failed to dispute or present any admissible evidence as to whether plaintiff's accident did not occur in the manner alleged. Further, defendants (as evidenced by the testimony of their own witness, Mozafar Shokrian) do not dispute that the area where plaintiff's accident occurred was the site of an ongoing construction project involving the erection of a six-story condominium building on the date of plaintiff's accident. More importantly, having failed to present any triable issues of fact as to whether they were responsible for erecting barriers, fences, and the like to protect pedestrians from walking upon their property, it cannot be overlooked by this Court that defendants have also failed to present any admissible evidence as to whether there were any barriers, barricades, fencing, signs or temporary walkways posted or erected in the sidewalk area where the accident occurred at the time of the occurrence.

In light of defendants' failure to submit sufficient proof to raise a triable issue of fact, this Court grants plaintiffs' motion for summary judgment on the issue of liability (*Alvarez v. Prospect Hosp.*, supra; *Ayotte v Gervasio*, supra).

This decision constitutes the order of the court.

Dated: 2-5-10

HON THOMAS P. PHELAN  
Thomas P. Phelan  
J.S.C.

**ENTERED**

FEB 11 2010

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

Parker Waichman Alonso LLP  
Attn: Raymond C. Silverman, Esq.  
Attorneys for Plaintiffs  
111 Great Neck Road  
Great Neck, NY 11021

Smith Mazure Director Wilkins  
Young & Yagerman, P.C.  
Attn: Ann P. Eccher, Esq.  
Attorneys for Defendants  
111 John Street, 20th Floor  
New York, NY 10038-3198