

Miller v New York City Hous. Auth.

2010 NY Slip Op 30663(U)

March 22, 2010

Supreme Court, Kings County

Docket Number: 13412/08

Judge: Bruce M. Balter

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of March, 2010.

P R E S E N T:

HON. BRUCE M. BALTER,
Justice.

-----X
MICHAEL MILLER AND EUNICE MILLER,

Plaintiffs,

- against -

Index No. 13412/08

NEW YORK CITY HOUSING AUTHORITY,
Defendant.

-----X

The following papers numbered 1 to 6 read on these motions:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 3-4 _____
Opposing Affidavits (Affirmations) _____	4 5 _____
Reply Affidavits (Affirmations) _____	5 6 _____
_____ Affidavit (Affirmation) _____	_____ _____
Other Papers _____	_____ _____

Upon the foregoing papers, plaintiffs Michael Miller (Miller) and Eunice Miller (Eunice) (collectively, the Millers) move for an order, pursuant to CPLR 3212, granting them summary judgment on the issue of liability in this personal injury action.¹

¹ Although plaintiffs seek summary judgment regarding liability, generally, according to plaintiffs' notice of motion, the affirmation by plaintiffs' counsel advocates summary judgment on the basis of General Municipal Law § 205 (e), only.

Defendant New York City Housing Authority (NYCHA) cross-moves for an order, pursuant to CPLR 3212, granting leave to file the instant cross-motion for summary judgment for good cause shown and granting summary judgment dismissing the Complaint.

FACTS AND PROCEDURAL HISTORY

This action involves an accident which took place at around 10:58 p.m. on January 2, 2008 on the pedestrian walkway approximately ten feet from the rear doorway of the building and premises (the subject premises) located at 953 Dekalb Avenue in Brooklyn, New York. The subject premises is owned and operated by NYCHA. Miller, a New York City police officer, was performing anti-crime patrol at and around the subject premises when an accumulation of ice on the pedestrian walkway allegedly caused him to slip and fall. Plaintiffs allege that the ice condition was the result of ponding water which accumulated on the walkway and froze due to structural defects on the walkway and adjoining curb.

At the time of the accident, Miller and two fellow officers were engaged in pursuit of a suspicious individual who ran towards the rear doorway of the building on the subject premises. While chasing him, Miller slipped. Although he testified that he could not see the ice on the pavement before he fell, afterwards he realized that he was lying on a “sheet of ice.” Fellow officers Raymond Gonzalez and William Waldron confirmed that plaintiff had slipped on a patch of ice. Miller testified that he was wearing sneakers at the time of the accident. He also testified that the temperature was below 32 degrees that day and there was no snow, but he could not recall the weather conditions of the previous day.

After the accident, Miller was transported to Long Island College Hospital via ambulance, where he was diagnosed with a left ankle injury. Plaintiff underwent surgery on his left ankle on January 9, 2008 and did not return to work until May 7, 2008, under light duty. Plaintiff returned to full active duty on June 11, 2008.

Plaintiffs served a Notice of Claim upon NYCHA on February 6, 2008, within 90 days of the alleged accident² and subsequently commenced this action on May 2, 2008. The Millers allege one cause of action sounding in negligence and another cause of action pursuant to General Municipal Law § 205 (e). Miller's claim under General Municipal Law § 205 (e) is predicated on violations of the Administrative Code of City of New York, including §§ 27-580 (Scope and General Requirements for subchapter on structural work), 27-597 (Questionable Construction of structures), P110.2 (Disposal of Storm Water)³, 26-228 (General Safety Requirements),⁴ 27-127 (Building Maintenance Requirements), 27-128 (Owner Responsibility),⁵ 27-292.1 (Scope for subarticle on facilities for people with physical disabilities), 27-292.2 (Standards for same), 27-292.4 (General Requirements for same), and

² Plaintiffs also served Amended Notices of Claim on March 5, 2008 and August 15, 2008, alleging additional claims and statutory violations as predicates for the General Municipal Law § 205 (e) cause of action, and updating facts in the original Notice.

³ This provision is part of subsection P110 (storm drainage piping) of Reference Standard 16 (plumbing and gas piping) in the Appendix to Title 27 of the New York City Administrative Code.

⁴ Section 26-228 of the Administrative Code was repealed as per Local Law 33/2007 § 7, effective July 1, 2008.

⁵ Sections 27-127 and 27-128 have since been repealed and transferred to Title 28 as Administrative Code § 28-301.1, as per Local Law 33/2007 § 7, effective July 1, 2008.

27-292.5 (Accessibility). His wife, Eunice, alleges a third cause of action for loss of consortium. Miller's statutory hearing pursuant to General Municipal Law § 50-h took place on April 23, 2008.

THE PARTIES' CONTENTIONS

Plaintiffs move for summary judgment, arguing that they are entitled to recover for defendant's negligence as a matter of law. They contend that defendants are liable under General Municipal Law § 205 (e), which provides a cause of action for police officers when an injury occurs directly or indirectly from another party's failure to comply with applicable statutes, ordinances, or rules. They also maintain that, assuming *arguendo* that notice was required to establish the violations of the cited statutes, NYCHA's building inspections and groundskeeper inspections of the subject premises were sufficient to provide actual and constructive notice. Lastly, they note that courts have consistently held that comparative fault is not a valid defense in an action brought by a police officer pursuant to General Municipal Law § 205 (e). In support of their motion, they submit the affidavit of engineer Peter Pomeranz (Pomeranz), who found multiple violations of the aforementioned statutes and testified that the ponding water would freeze and create a slippery obstruction to safe use of the walkway, which was the proximate cause of Miller's accident.

In support of its own cross motion and in opposition to plaintiffs' motion, NYCHA argues that it should be granted leave to file this cross motion for summary judgment, despite its untimely filing, because plaintiffs did not serve their CPLR 3101 (d) exchange identifying their engineering expert and the sum and substance of that expert's testimony until after they

filed their the Note of Issue. Even if the court declines to consider the cross motion, however, defendant insists that the court should search the record and grant summary judgment in its favor. Substantively, defendant contends that it did not create any defective conditions which proximately caused Miller's injuries, nor did it have any notice of such conditions. NYCHA moreover asserts that the Administrative Code provisions on which plaintiff relies for his General Municipal Law § 205 (e) claim (1) do not apply to the subject walkway or to plaintiff's accident (with the exception of sections 27-127 and 27-128); (2) were not violated; and (3) were not proximate causes of plaintiff's injuries.

Plaintiffs oppose defendant's cross motion and reply to defendant's papers in opposition to their own motion, by arguing that NYCHA fails to make the requisite showing of good cause for its delay in moving for summary judgment. Plaintiffs also maintain that if the Court decides to search the record regarding summary judgment, it should not grant such relief to defendant because the issues are not identical to that discussed in plaintiffs' own timely summary judgment motion. Moreover, they claim that NYCHA has failed to meet its burden in establishing entitlement to summary judgment as a matter of law. Specifically, they contend that, contrary to defendant's reliance on 1938 Building Code, the 1968 Building Code⁶ applies to the subject premises; that the Administrative Code provisions they cited in their summary judgment motion are indeed applicable to the instant facts; and that they are not required to prove notice for purposes of their General Municipal Law

⁶ The 1968 Building Code comprises the first chapter of Title 27 of the New York City Administrative Code.

§ 205 (e) claim, which they aver also carries a lower standard for establishing proximate cause between the alleged injury and the violation of a statute.

In support of its cross motion, defendant's reply argues that plaintiffs' claims regarding negligent snow/ice removal procedures are meritless and should be dismissed, given that plaintiffs have purportedly conceded that their summary judgment motion was not premised on those claims. Furthermore, they aver, plaintiffs do not dispute NYCHA's showing in its cross motion that it was not negligent in its removal of snow and ice. Defendant also challenges the qualifications of plaintiffs' expert, Pomeranz, and asserts that his testimony is speculative.

DISCUSSION

Summary judgment should only be granted where there are no triable issues of fact (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The moving party on a motion for summary judgment has the burden of demonstrating "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" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]). Once the movant has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The evidence presented on summary judgment must be scrutinized in the light most

favorable to the party opposing the motion (*Goldstein v Monroe County*, 77 AD2d 232, 236 [1980]). Accordingly, “[i]f there is any doubt about the existence of a triable issue of fact, or a material issue of fact is arguable, summary judgment should be denied” (*Celardo v Bell*, 222 AD2d 547, 547 [1995]).

Plaintiffs’ Motion for Summary Judgment

Plaintiffs seek summary judgment under General Municipal Law § 205 (e), citing violations of various statutes relating to NYCHA’s improper construction and maintenance of the walkway as a predicate for liability. General Municipal Law § 205 (e) provides that a police officer has a right to recover for injuries or death caused by the “neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state . . . or city governments or of any and all of their departments, divisions and bureaus.” Thus, 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*, 88 NY2d 455, 464 [1996]). In order “[t]o make out a claim under section 205-e, a plaintiff must [1] identify the statute or ordinance with which the defendant failed to comply, [2] describe the manner in which the [police officer] 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” (*Williams v City of New York*, 2 NY3d 352, 363 [2004], quoting *Giuffrida v Citibank Corp.*, 100 NY2d 72, 79 [2003]).

With respect to the first prong of the claim, plaintiffs rely on violations of the same Administrative Code provisions cited in their Complaint in seeking summary judgment: sections 27-580, 27-597, P110.2, 26-228, 28-301.1 (replacing sections 27-127 and 27-128), 27-292.1, 27-292.2, 27-292.4, and 27-292.5.⁷ They also rely on Pomeranz’s affidavits (annexed as Exhibit H to plaintiffs’ moving papers and as Exhibit E to plaintiff’s opposition papers), which conclude that the ponding water which collected on the walkway was the result of improper construction of the sidewalk and the curb, failure to properly dispose of storm water, and failure to provide a safe, obstruction-free path to the apartment building, all of which proximately caused Miller’s fall on the slippery frozen water on the walkway. Specifically, Pomeranz states that:

“[the walkway where Miller slipped on the subject premises] is on a 5.8% down slope to a point located about 10 feet north of the rear door of the apartment building. The sidewalk from the rear door of the apartment building is on a 3.1% down slope towards this same point located about 10 feet north of the rear door. There is an angle break in the sidewalk . . . [which is] at a low point in the sidewalk” (Pomeranz Affidavit at 2-3).

He further opines that he “would expect that water would collect at this location on the sidewalk,” as allegedly evidenced by his observation of dirt and debris at the angle break that had been deposited by storm water flowing there which had not seeped away or evaporated

⁷ Although defendant contends that plaintiffs did not raise any alleged violations of these provisions in their Notice of Claim or Amended Notices of Claim, except sections 27-127 and 27-128, “there is no requirement that the notice of claim specify the particular legal theory under which recovery is sought” (*Kondek v City of New York*, 271, AD2d 493, 493 [2000]; see also *Reilly v City of New York*, 271 AD2d 425 [2000]; *Simons v City of New York*, 252 AD2d 451 [1998]).

(*id.*). Moreover, Pomeranz found multiple violations of the Administrative Code relating to the walkway in question, as discussed further below.

At the outset, the Court determines that the 1968 Building Code, rather than the 1938 Building Code, applies to the instant building. Although defendant argues that the older set of rules should apply because the subject building was constructed sometime between 1961 and 1964, before the 1968 Building Code was enacted, the most recent version of section 27-103 (Scope) of the Building Code states, “On and after July 1, 2008 this code shall apply to the construction, alteration, repair, occupancy and use of new and *existing buildings* in the city of New York . . .” (emphasis added). Thus, the premises in question, regardless of when the building was constructed, is subject to provisions of the 1968 Building Code.

(a) Administrative Code §§ 27-580 and 27-597

Turning to section 27-580 of the Administrative Code, which “establish[es] minimum requirements for materials, designs, and construction to be used for all structural elements in buildings,” NYCHA argues that the provision is inapplicable because the rear walkway at issue is not a “structural element” of the building and the provision deals with questionable construction. However, the instant building was constructed over 40 years ago. Similarly, NYCHA contends that section 27-597,⁸ which deals with questionable construction, is also inapplicable to the instant facts because the statute refers only to construction, and not

⁸ This statute provides: “If, upon inspection, it is found that a construction or any part thereof, as built, shows open cracks, spallings, or other signs of distress . . . or [s]hould the adequacy of construction not be verified within a reasonable time, such construction shall be rejected and shall be demolished or reinforced or rebuilt to be made safe in conformance with the requirements of this code.”

maintenance. According to plaintiffs and their expert, however, sidewalks and curbs are considered “structures” for purposes of the Building Code under the term’s expansive definition in section 27-232 (Definitions).⁹ Plaintiffs also maintain that defendant’s faulty construction of the walkway is exactly what sections 27-580 and 27-597 are meant to cover.

The Court finds that, contrary to plaintiff’s assertions, sections 27-580 and 27-597 are inapplicable to the subject walkway where Miller allegedly fell. The Court agrees with defendant that the walkway is not a “structural element” under section 27-580 because the proper definition of “structural element” can be found under section 27-585 (not under section 27-232, as plaintiff asserts), and such definition does not include walkways outside of the building. As a matter of statutory interpretation, the Court must give full effect to the plain meaning of section 27-585, which reads: “[T]he structural elements of a building shall normally include all floor, roof, and wall framing members and slabs (but not including slabs-on-grade) . . .” (*see generally Smith v Donovan*, 61 AD3d 505, 508 [2009]). Moreover, section 27-232, cited by plaintiffs, defines “structures” rather than “structural elements.” Similarly, Plaintiffs’ contentions regarding the applicability of section 27-597 fail because the definition of “construction” in section 27-232 is limited to work on and incidental to the

⁹ Plaintiffs cited section 27-132, which has been repealed by Local Law 33/2007 § 7, effective as of July 1, 2008. Instead, section 27-372 defines “structure” as “[a]n assembly of materials forming a construction for occupancy or use, including among others: buildings, stadia, tents, reviewing stands, platforms, stagings, observation towers, radio towers, tanks, trestles, open sheds, coal pockets, shelters, fences, and display signs.”

building itself.¹⁰ Plaintiffs thus fail to set forth a prima facie case for summary judgment under General Municipal Law § 205 (e), as predicated on violations of Administrative Code §§ 27-580 and 27-597, and this part of their motion should be denied.

(b) Administrative Code, Appendix, Reference Standard RS 16, P110.2

Plaintiffs also move for summary judgment on their General Municipal Law § 205 (e) claim based on a violation of P110.2 of the Administrative Code, Appendix, Reference Standard RS 16, which provides that “the owner shall ensure that all storm water falling or coming to rest on all impervious surfaces within [the premises] will be discharged.” They allege that the dam-like structure of the walkway prevented proper disposal of water in contravention of this Reference Standard. In opposition, defendant argues that the subject premises is not a new construction and that there is no proof that the ice patch on which Miller allegedly slipped was created by an accumulation of storm water.

The Court agrees that P110.2 refers only to storm water, which means rain water or surface water, according to the definitions in P110.1 (16). Plaintiffs have submitted no evidence that the alleged ice on the walkway was caused by storm water and fail to show that this statute is applicable to the Miller’s accident. Accordingly, plaintiffs fail to set forth a prima facie case for summary judgment under General Municipal Law § 205 (e), as

¹⁰ In section 27-232, “construction” is defined as “[a]ny or all work or operations necessary or incidental to the erection, demolition, assembling, installing, or equipping of *buildings*, or any alterations and operations incidental thereto” (emphasis added).

predicated on a violation of Administrative Code, Appendix, Reference Standard RS 16, P110.2, and this portion of their motion should be denied.

(c) Administrative Code § 28-301.1

Defendant concedes that Administrative Code § 28-301.1¹¹ (replacing sections 27-127 and 27-128) is applicable to the circumstances of Miller’s alleged accident, but argues that it sets forth very generalized, non-specific requirements of maintenance, imposing a standard of ordinary negligence and necessitating a showing of notice and a reasonable opportunity to cure the condition. It further maintains that it did not have sufficient notice of the allegedly unsafe condition for which it would be held liable. In contrast, plaintiffs aver that no showing of actual or constructive notice is required for a claim under General Municipal Law § 205 (e) based on this provision.

Courts have held that violations of the statute’s predecessors, Administrative Code §§ 27-127 and 27-128, are sufficient predicates for a cause of action under General Municipal Law § 205 (e) (*see Rabinowitz v City of New York*, 286 AD2d 724 [2001]; *Farrington v City of New York*, 240 AD2d 697 [1997]). Administrative Code § 27-127

¹¹ Section 23-301.1 provides, “All buildings and all parts thereof and all other structures shall be maintained in a safe condition. All service equipment, means of egress, materials, devices, and safeguards that are required in a building by the provisions of this code, the 1968 building code or other applicable laws or rules, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working condition. Whenever persons engaged in building operations have reason to believe in the course of such operations that any building or other structure is dangerous or unsafe, such person shall forthwith report such belief in writing to the department. The owner shall be responsible at all times to maintain the building and its facilities and all other structures regulated by this code in a safe and code-compliant manner and shall comply with the inspection and maintenance requirements of this chapter.”

requires that buildings and their parts be maintained safely, while section 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]). Similarly, Administrative Code § 28-301.1 provides sufficient support for plaintiffs' General Municipal Law § 205 (e) claim.

With regard to the requirement of notice, neither plaintiffs nor defendant are completely accurate in how they construe the precedent. As stated in *Lusenskas v Axelrod* (183 AD2d 244, 248 [1992]):

“The statute is not . . . merely a codification of common-law negligence principles . . . [N]otice is material to recovery under General Municipal Law § 205-a. However, to be sufficient under the statute, it is not necessary that the plaintiff prove such notice as he would be required to demonstrate in order to recover under a theory of common-law negligence, viz., actual or constructive notice of the particular defect on the premises causing injury.”¹²

Rather, this “relaxed notice” standard requires only that “the circumstances surrounding the failure to comply indicate that the failure was a result of any neglect, omission, willful or culpable negligence on the defendant's part” (*Terranova v New York City Tr. Auth.*, 49 AD3d 10, 17 [2009] [internal citation omitted]). Plaintiffs need only demonstrate a “practical or

¹² Although *Lusenskas v Axelrod* involved a claim brought under General Municipal Law § 205 (a), that statute pertaining to firefighters' rights of action requires the same predicate violation as the policemen's rights of action in the instant statute, General Municipal Law § 205 (e), and provides guidance analogously.

reasonable connection between the injury sustained and the violation of a statute or regulation” (*Lusenskas*, 183 AD2d at 248; *Terranova*, 49 AD3d at 18).

Here, in satisfaction of their prima facie burden, plaintiffs present uncontradicted testimony that Miller slipped and fell on an unsafe icy condition present on the walkway of the subject premises in violation of section 28-301.1. Furthermore, in support of their argument that defendant had either actual or constructive notice of the unsafe condition, they submit Pomeranz’s affidavit stating that (1) the ponding water was a result of “improper construction of the sidewalk and curb” and (2) that the varying colors and textures of the concrete indicated repair work on the subject walkway after its initial construction.¹³ They also highlight NYCHA’s Building Inspection Reports for December 5, 2007 and September 4, 2007, which reflect that the walkways at the subject premises were in “good” condition, and the groundskeeper log, maintained and signed by Gwendolyn Bell, which showed that the premises had been inspected at 2:40 p.m. on the day of the accident, as well as two times the day before. Such evidence is sufficient to infer that defendant knew or should have known about either the presence of an icy hazard or a poorly installed concrete walkway which would result in icy hazards.

¹³ Although defendant challenges Pomeranz’s affidavit as speculative and avers that it should be rejected, the Court notes that allegedly “noncommittal language” such as “I would expect that water would collect” and “in freezing weather I would expect the ponding water to freeze” does not “destroy the probative force of the testimony” (*Miller v Nat’l Cabinet Co.*, 8 NY2d 277, 282-283 [1960]). Here, it is “reasonably apparent that the [expert] intends to signify a probability supported by some rational basis” considering Pomeranz’s detailed explanation of how the allegedly improper construction of the sidewalk created a low point in the concrete.

However, defendant's submission of meteorologist Barry Grossman's affidavit (annexed as Exhibit Q to defendant's cross motion papers) attesting that no snow, precipitation-related ice, or precipitation-related moisture could be present on exposed outdoor surfaces at the time of plaintiff's accident leaves a triable issue of fact to be resolved by a jury regarding notice. Additionally, defendant indicates plaintiffs' failure to present proof that the unsafe condition at issue had existed for a period of time sufficient for defendant to remedy it (*see Rabinowitz*, 286 AD2d at 724; *Regina v Ogden Aviation Servs.*, 258 AD2d 584, 575 [1999]). Thus, the part of plaintiffs' motion seeking summary judgment under General Municipal Law § 205 (e), as predicated on a violation of Administrative Code § 28-301.1, should be denied.

(d) Administrative Code § 26-228

Administrative Code § 26-228 was repealed as per Local Law 33/2007 § 7, which took effect on July 1, 2008, the day before Miller's alleged accident.¹⁴ Unlike other provisions from the former Title 26 of the Administrative Code, which were transferred to the new Title 28, the former section 26-228 was not recreated in the updated Administrative Code. Plaintiffs may not recover under an outdated statute and they have not set forth any current statute in the Administrative Code under which they may otherwise establish a predicate violation on the same grounds. Accordingly, plaintiffs' motion for summary

¹⁴ The former Administrative Code § 26-228, entitled "General safety requirements," provided that "[p]ersons engaged in building operations shall provide reasonable and adequate protection for the safety of all persons and property affected thereby . . ." (*see Rodriguez v E & P Assoc.*, 20 Misc 3d 1129[A] [2008]).

judgment under General Municipal Law § 205 (e), based on a violation of Administrative Code § 26-228, should be denied.

(e) Administrative Code §§ 27-292.1, 27-292.2, 27-292.4 and 27-292.5

Plaintiffs also allege predicate violations of Administrative Code §§ 27-292.1, 27-292.2, 27-292.4, and 27-292.5, which mandate accessible routes and paths of travel for persons with physical disabilities, arguing that defendant did not provide “unobstructed safe access” to the premises as required by 27-292.5. Defendant opposes on the ground that these provisions are inapplicable because Miller was not an individual with a physical disability at the time of the alleged accident and is not within the class these provisions are intended to protect. Plaintiffs reply that this standard takes precedence over every other part of the Code, regardless of Miller’s status.

Contrary to plaintiffs’ assertions, Miller lacks standing to base his General Municipal Law § 205 (e) claim on an alleged violation of Administrative Code §§ 27-292.1, 27-292.2, 27-292.4, and 27-292.5. Although it is true that these provisions set forth the standard with which all constructions must comply, Miller is not a member of this class protected by law and cannot recover under these statutes (*see Lugo v St. Nicholas Assoc.*, 2 Misc 3d 212, 218 [2003] [home health aide who was allegedly injured when she slipped and fell while lowering disabled individual in wheelchair down two steps in building lobby was not a member of the protected class under Administrative Code § 292.1 *et seq.*, and could not bring a claim for her injuries under that statute]). Plaintiffs thus fail to show how these provisions are applicable to Miller. Accordingly, the part of plaintiffs’ motion seeking summary

judgment under General Municipal Law § 205 (e), as predicated on violations of Administrative Code §§ 27-292.1, 27-292.2, 27-292.4, and 27-292.5, should be denied.

Timeliness of Defendant's Cross Motion for Summary Judgment

The Court now addresses the timeliness of defendant's cross motion for summary judgment. In the absence of a court order or rule to the contrary, a motion for summary judgment must be made "no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (CPLR 3212 [a]). The local rule, Rule 13 of the Uniform Civil Trial Rules of the Supreme Court, Kings County (now Rule 6 of Part C, amended Jan. 14, 2010), additionally provides that "[n]o motion for summary judgment may be made more than 60 days after filing a Note of Issue . . . except with leave of the Court on good cause shown" (*see e.g. Weitzner v Elazarov*, 189 Misc 2d 646 [2001]). A motion is deemed "made" when the motion is served (*see Perez v City of New York*, 2009 NY Slip Op 51196[U], *1 [2009], *citing Rivera v Glen Oaks Village Owners, Inc.*, 29 AD3d 560 [2006]; *see also* CPLR 2211). Trial courts have broad discretion to determine whether good cause exists (*see Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 283 [2006]; *see also Goodman v Gudi*, 264 AD2d 758, 758 [1999] ["a court is afforded latitude with respect to determining whether good cause exists for permitting late motions for summary judgment"]). However, unless there is a showing of good cause, courts thus have no discretion to entertain non-prejudicial, meritorious, post-note of issue motions (*see Corchado v City of New York*, 64 AD3d 429, 429 [2009], *citing Brill v City of New York*, 2 NY3d 648 [2004]; *Glasser v Abramovitz*, 37 AD3d 194 [2007]). Good cause requires "a

satisfactory explanation for the untimeliness-rather than simply permitting meritorious, nonprejudicial filings, however tardy” (*Brill*, 2 NY3d at 652).

Here, plaintiffs filed their Note of Issue and Certificate of Readiness on June 17, 2009 and the 60-day deadline for filing summary judgment motions in accordance with Rule 13 of the Kings County Supreme Court Uniform Civil Trial Rules was August 17, 2009. NYCHA did not cross-move for summary judgment until October 22, 2009, over two months after the deadline.

NYCHA asserts that plaintiffs’ improper service of an additional expert exchange, regarding the testimony of engineer Pomeranz, after filing the Note of Issue on June 17, 2009 caused its delay in cross-moving for summary judgment. It avers that it has shown good cause, given the time required to select and retain its own expert, who then had to schedule and conduct multiple inspections of the subject premises, a task which could not be accomplished within a reasonable time prior to the August 17, 2009 deadline. Additionally, NYCHA’s then-counsel, Sandra Bonnick (Bonnick), was out of the office, on vacation, and unavailable for approximately three weeks during the month of July. Her absence delayed the authorization and hiring of NYCHA’s expert, Dr. Mark Marpet (Marpet) until about July 30, 2009. Marpet was unable to schedule and complete his initial and additional inspections of the subject premises until August 14, 2009. The case was then transferred to current counsel during the interim between August 17, 2009 and the time the cross motion was made because defendant’s then-counsel, Krez & Peisner LLP, was going out of business. Defendant adds that there is ample time for the court to now hear its cross motion, as trial is

not imminent and plaintiff's own motion for summary judgment is returnable on the same date as defendant's cross motion.

First, the Court notes that plaintiffs timely served defendant with the CPLR 3101 (d) exchange identifying Pomeranz as their expert on June 16, 2009 (*see* Antoinette Bellantuono's Affidavit of Service, dated June 16, 2009, annexed as Exhibit B to plaintiffs' opposition papers), before they filed their Note of Issue on June 17, 2009 (*see* plaintiffs' Note of Issue, annexed as Exhibit A to plaintiffs' opposition papers). Although plaintiffs' Note of Issue is dated June 15, 2009, they did not, as NYCHA avers, improperly serve defendant with the exchange after filing the Note of Issue.¹⁵ Moreover, defendant fails to explain why it took six weeks (from when plaintiffs served their exchange) to hire expert Marpet, even though Bonnick, its then-counsel, was out of the office for only three weeks (*cf. Stimson v E.M. Cahill Co., Inc.*, 8 AD3d 1004 [2004] [where court found good cause for minor delay due to attorney and secretary's absence from work due to family emergency]). Defendant also does not provide a satisfactory reason why, after Marpet completed his inspections in mid-August, it did not move for summary judgment until nearly the end of October. The fact that NYCHA was in the process of changing legal representation does not constitute good cause for such a two-month delay, especially given defendant's vagueness in specifying exactly when during that interim the case file was transferred to new counsel.

¹⁵ NYCHA initially alleges in its cross motion that plaintiffs did not serve their expert exchange until June 18, 2009, but concedes in its reply that the exchange was served on June 16, 2009. Defendant then instead avers that the Note of Issue, dated June 15, 2009 but filed on June 17, 2009, misleadingly represented that all discovery had been completed as June 15th.

Although courts have considered untimely cross motions where relevant discovery requests or depositions were outstanding (*see e.g. Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124 [2000] [depositions of two key fact witnesses]; *Kunz v Gleeson*, 9 AD3d 480 [2004] [independent medical examinations of plaintiff]); *see also Butt v Bovis Lend Lease LMB, Inc.*, 47 AD3d 338 [2007]; *Pena v Women's Outreach Network, Inc.*, 35 AD3d 104 [2006]). this is not a case in which the Court had ordered further discovery or had been apprised by the parties of such outstanding discovery. Notably, defendant made no effort to inform the court of its need for more time; it did not move to vacate or strike the Note of Issue or request leave of court to make its motion late (*see generally Buckner v City of New York*, 9 Misc 3d 510, 514 [2005]). Accordingly, as no “good cause” was demonstrated by NYCHA for its untimely cross motion, its cross motion seeking leave to move for summary judgment should be denied, even in the absence of any prejudice against plaintiffs (*see Gonzalez v Zam Apt. Corp.*, 11 AD3d 657 [2005]; *Gibbs v McRide Cab Co.*, 10 AD3d 671 [2004]).

Searching the Record Regarding Summary Judgment for Defendant

Regardless, a cross motion for summary judgment made after the expiration of the statutory 120-day period or a shorter period imposed by court rule may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds (*see Grande v Peteroy*, 39 AD3d 590, 591-592 [2007]). In such circumstances, the issues raised by the untimely motion or cross motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause (*see*

CPLR 3212 [a]) to review the untimely motion on the merits (*see Id.* at 592). The court, in the course of deciding the timely motion, may search the record and award summary judgment to a non-moving party (*see id.*; CPLR 3212 [b]). The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion (*see Filannino*, 34 AD3d at 281; *Costello v Hapco Realty, Inc.*, 305 AD2d 445, 446 [2003]).

The Court, upon searching the record, grants summary judgment to NYCHA dismissing liability under General Municipal Law § 205 (e), based only on alleged violations of Administrative Code §§ 26-228, 27-292.1, 27-292.2, 27-292.4, 27-292.5, 27-580, 27-597, and P110.2 (Appendix, Reference Standard RS 16). These are the statutory provisions deemed either non-existent in the current Administrative Code or inapplicable to the instant facts. Even in the interest of judicial economy, however, the Court declines to entertain the remaining causes of action and predicate violations for which defendant seeks summary judgment dismissal in its cross motion. As they are not identical to those claims raised in plaintiff's motion for summary judgment, they may not be considered upon the Court's search of the record and must instead be resolved at trial (*see Filannino*, 34 AD3d at 281; *Costello*, 305 AD2d at 446).¹⁶

Accordingly, it is

¹⁶ These causes of action and predicate violations include: General Obligations Law § 11-106; Administrative Code §§ 7-210, 16-123, 27-101 through 27-129 (except 27-127 and 27-128), 27-381; New York City Health Code § 153.19; ANSI 117.1-1986; Real Property Law § 234; and New York City Health Code § 135.17.


ORDERED that plaintiffs' motion for summary judgment for liability under General Municipal Law § 205 (e) based on alleged violations of Administrative Code §§ 26-228, 27-292.1, 27-292.2, 27-292.4, 27-292.5, 27-580, 27-597, 28-301.1, and P110.2 (Appendix, Reference Standard RS 16) is denied; and it is further

ORDERED that defendant's cross motion for leave to move for summary judgment is denied; and it is further

ORDERED that, upon searching the record, summary judgment for liability under General Municipal Code § 205 (e) is granted to defendant with respect to alleged violations predicated on Administrative Code §§ 26-228, 27-292.1, 27-292.2, 27-292.4, 27-292.5, 27-580, 27-597, and P110.2 (Appendix, Reference Standard RS 16).

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

E N T E R,



J. S. C.

Bruce M. Balter