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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **PART** _____

Index Number : 112482/2008

O'DONOGHUE, THOMAS

VS

BRK GARGAGE

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for defs' summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits defs' Memo. — in T	3

Cross-Motion: ☐ **Yes** ☒ **No**

Upon the foregoing papers, it is ordered that this motion is determined as per decision/order dated 7-8-11

FILED

JUL 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7-8-11

MARCY S. FRIEDMAN, J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

☐ **SUBMIT ORDER/ JUDG.** ☐ **SETTLE ORDER/ JUDG.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 57

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THOMAS O'DONOGHUE, LAURIE O'DONOGHUE, EDWARD USHER and ANGELA USHER,

Plaintiffs,

-against-

Index No. 112482/08

BRK GARAGE CO., LLC, PARK 15 WEST LLC, and 15 PARKING CORP.

Defendants.

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FRIEDMAN, J.:

In this action, plaintiff firefighters Thomas O'Donoghue (O'Donoghue) and Edward Usher (Usher) seek to recover for injuries sustained, on November 2, 2005, while fighting a fire that erupted at a parking garage located at 422 West 15 Street in New York City (Premises). Defendant BRK Garage Co., LLC owned the Premises. Defendants 15 Parking Corp. and Park 15 West LLC leased and/or operated the garage pursuant to a lease with BRK Garage Co. O'Donoghue and Usher assert causes of action for negligence, nuisance, and liability under section 205-a of New York General Municipal Law (GML). Plaintiffs Laurie O'Donoghue and Angela Usher, the spouses of O'Donoghue and Usher, each seek recovery for loss of services. Defendants now move for summary judgment dismissing the complaint.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d

851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])." (Zuckerman, 49 NY2d at 562.)

GML Section 205-a

Defendants argue that plaintiffs have no right of action under GML § 205-a, because no proof exists that plaintiffs' injuries were directly or indirectly caused by statutory violations at the Premises. Section 205-a (1) provides that a firefighter has a right of action where the "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 local] governments" "directly or indirectly" causes the firefighter's injury during the discharge of his or her duties. To establish a claim under section 205-a, 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., 100 NY2d 72, 79 [2003] [internal quotation marks and citation omitted].)

Defendants do not challenge the first two elements but, rather, focus their argument on the third element of causation. (Defs. Opening Brief, at 10; Hourican Reply Aff., ¶ 4 [conceding that the basis of their motion "is not that the violations did not exist"].) "'[D]irect cause' ... has traditionally been understood to mean [a] cause that directly produces an event and without which the event would not have occurred," whereas "'indirect causation' involves a somewhat less than direct and unimpeded sequence of events resulting in injury." (Giuffrida, 100 NY2d at 80 [internal quotation marks and citation omitted].) "[I]ndirect cause is simply a factor

that—though not a primary cause—plays a part in producing the result." (Id.)

Usher's claims are based upon alleged violations, among others, of Administrative Code of the City of New York (Administrative Code) sections 27-127, 27-128, and 27-375.[1] (Compl., ¶ 91, Hourican Aff., Ex. G.) Section 27-127 provides that:

> All buildings and all parts thereof shall be maintained in a safe condition. All service equipment, means of egress, devices, and safeguards that are required in a building by the provisions of this code or other applicable laws or regulations, or that were required by law when the building was erected, altered, or repaired, shall be maintained in good working order.

Section 27-128 provides that "[t]he owner shall be responsible at all times for the safe maintenance of the building and its facilities." Under section 27-375 (f) (4), "[i]nterior stairs shall comply with the following requirements: ... "Handrails shall be designed to support loads in compliance with the requirements of subchapter nine of this chapter." Subchapter nine provides, in pertinent part, that "[r]ailings and parapets around stairwells, balconies, areaways, and roofs, and other railings in similar locations other than those for places of assembly, shall be designed to resist the simultaneous application of a lateral force of forty plf and a vertical load of fifty plf, both applied to the top of the railing." (Administrative Code § 27-558 [b] [1].) Under section 27-233 of the Administrative Code, "plf" refers to "pounds per linear foot."

Defendants claim that Usher was injured when other firefighters pulled down a portion of ceiling that fell on him and knocked him down the stairs. (Defs. Opening Brief, at 11.) This claim ignores Usher's testimony that he was injured when, in an effort to avoid the falling ceiling, he attempted to grab or struck the stair railing, which collapsed, causing him to fall

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[1] Sections 27-127 and 27-128 were repealed in 2008, but in effect on November 2, 2005, at the time of the fire and plaintiffs' injuries.

approximately 10 feet to the lower stairway landing. (Usher Tr., Hourican Aff., Ex. C, at 42, 53.) This testimony is supported by that of Usher's fellow firefighters, who were opening the ceiling when Usher fell and witnessed the incident. (See Moritz Tr., Hourican Aff., Ex. H, at 31; Darcy Tr., Hourican Aff., Ex. I, at 43-44, 74, 75.) Notwithstanding this evidence, defendants fail to submit any proof that the railing was properly designed and maintained, that it was capable of resisting the required lateral force, or that Usher's injuries were unrelated to the condition of the railing and its collapse. Defendants thus do not make a prima facie showing that Usher's injury was caused by violations of sections 27-375 (f) (4) and 27-558 (b) (1) of the Administrative Code. (See e.g. Torres v Cordice, 11 Misc 3d 23, 24 [App Term, 1st Dept 2006] ["[s]tairs and protective handrailings do not generally collapse and fall apart in the absence of negligence, i.e., due to faulty installation, maintenance or repair"].) Whether Usher's injuries were directly or indirectly caused by the statutory violation remains an issue of fact. (See Derdiarian v Felix Contr. Corp., 51 NY2d 308, 312 [1980] [Generally, "the question of proximate cause is to be decided by the finder of fact"].) Accordingly, defendants' motion is denied with respect to Usher's claim under section 205-a of the GML.

O'Donoghue's claims are based upon alleged violations, among others, of Administrative Code sections 27-127, 27-128, 27-361, and 27-370. (Compl., ¶ 74, Hourican Aff., Ex. E.) Under section 27-361, "[a]ll exits and access facilities shall be located so that they are clearly visible, or their locations clearly indicated, and they shall be kept readily accessible and unobstructed at all times." Section 27-370 provides that "[e]xit passageways shall be maintained free of obstructions at all times."

None of the evidence submitted by defendants demonstrates that the fifth floor landing

was unobstructed, or that O'Donoghue's injuries were unrelated to obstruction resulting from lumber stored in violation of the Administrative Code. To the contrary, O'Donoghue testified that boxes, debris and steel drums obstructed various parts of the stairway, and that the fifth floor stairway was obstructed by 10 to 15 pieces of lumber, including 2 x 4s, 2 x 10s, and 2 x 12s, which were stacked vertically and leaning against the wall when they collapsed and fell on O'Donoghue's helmeted head. (O'Donoghue Tr., Hourican Aff., Ex. D, at 25, 26, 31, 34, 35, 38; O'Donoghue's Member Injury Report, Penson Aff., Ex. 5.) Thus, if anything, the evidence before the court shows prima facie violations of sections 27-361 and 27-370 of the Administrative Code, based upon an obstruction created by lumber. (See e.g. Cotter v Spear, 139 AD2d 555, 558 [2d Dept 1988] [flowerpots "hung from a third-floor skylight ... located directly over the staircase" established "a prima facie possible violation of the Fire Prevention Code on the basis that the pots," one of which injured the appellant firefighter when it fell on his head, constituted "an 'obstruction to *** stairs *** [or] passageways ...' and that a causal relationship existed between those violations and the appellant's injuries"].)

Defendants focus on the fact that O'Donoghue's fellow firefighters moved the lumber to the position from which it fell and struck him. (Defs. Opening Brief, at 11, 13.) However, defendants fail to explain how indirect causation is negated by the firefighters moving lumber that was illegally stored by defendants in the first instance. Thus, defendants fail to make a prima facie showing that their storage of lumber on the fifth floor landing did not "play[] a part in producing" O'Donoghue's injury, regardless of whether it was moved by other firefighters. (Guiffrida, 100 NY2d at 80.) Whether the claimed improper storage caused O'Donoghue's injury remains a question of fact. (See Derdiarian, 51 NY2d at 312.) Accordingly, defendants'

motion is denied with respect to O'Donoghue's claim under section 205-a of the GML.

Common-Law Negligence

Defendants seek dismissal of the negligence claims, arguing that they did not breach any duty owed to plaintiffs because defendants did not create the condition that caused the injuries, and because they had neither actual nor constructive knowledge of the conditions that caused plaintiffs' injuries.

Section 11-106 (1) of New York's General Obligations Law (GOL) "permits a right of action for firefighters ... injured in the course of their duties by the negligence or intentional conduct of persons other than their employers or coemployees." (Grogan v City of New York, 259 AD2d 240, 242 [1st Dept 1999].) "It is well established that a landowner is under a duty to maintain its property in a reasonably safe condition under the extant circumstances, including the likelihood of injuries to others, the potential for any such injuries to be of a serious nature and the burden of avoiding the risk." (O'Connor-Miele v Barhite & Holzinger, Inc., 234 AD2d 106, 106 [1st Dept 1996].) This duty is tempered, however, "by the necessity that a party, as a prerequisite for recovering damages, must establish that the landlord created or had either actual or constructive notice of the hazardous condition that precipitated the injury." (Id.)

Defendants' argument that they had no notice is limited to their assertions in their brief, which are conclusory and otherwise without probative value, that they did "not have actual or constructive knowledge of the conditions which allegedly caused plaintiffs' injuries," and that, "in the absence of any evidence indicating that the defendants created the defective condition or had actual or constructive notice of it," the common-law negligence claims must be dismissed. (Defs. Opening Brief, at 13,14.) However, "it is not [plaintiffs'] burden in opposing the motion[]

for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition. Rather, it is defendants' burden to establish the lack of notice as a matter of law." (Giuffrida v Metro N. Commuter R.R. Co., 279 AD2d 403, 404 [1st Dept 2001].) Thus, defendants's conclusory statements fail to make a prima facie showing that they lacked notice.

Defendants cite Auciello v Eustaquio (2005 NY Misc LEXIS 3264 [Sup Ct, Queens County 2005]) in support of their argument that they did not create the conditions that caused the injuries. In Auciello, a firefighter was injured when he slipped and fell on water and debris left on stairs. It was undisputed that "the other firefighters at the premises caused the water and debris to be left on the stairs," and the court held that the tripping hazard created was "one faced by a firefighter in the ordinary course of his or her duties." (Id. at *16.) As discussed above, the evidence indicates that the lumber was stacked on the stair landing when the firefighters arrived at the Premises. Moreover, defendants' own evidence is that the railing was not compromised by the fire (Kian Tr., at 136-37. See also Darcy Tr., at 80-81), thereby undermining defendants' argument that fellow firefighters caused plaintiffs' injuries. Therefore, Auciello is distinguishable on its facts. Defendants fail to make a prima facie showing that they did not create the condition that caused plaintiffs' injuries.[2]

Furthermore, defendants fail to explain how the firefighters moving the lumber was so extraordinary or far removed from defendants' conduct that it constituted a superseding act that broke the causal nexus. (See Derdiarian, 51 NY2d at 315 [intervening act will not be deemed a

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[2] Even assuming arguendo that defendants had made a prima facie showing, plaintiffs' evidence raises an issue of fact as to whether defendants had exclusive possession of the parking garage and therefore control over whether lumber was placed on the stairs or the handrail was properly maintained. (See Penson Aff., Ex. 3, at 8-10, 52; id., Ex. 2, at 10, 41-44, 75-76; Kian Tr., at 27, 35.)

superseding act "which breaks the causal nexus," unless it "is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct."].) The finder of fact could conclude that "the foreseeable, normal and natural result of the risk created" (id. at 316) by defendants storing the lumber on the fifth floor landing was that the lumber would fall and cause injuries, or that the lumber would be moved by firefighters in order to gain access to the stairs or the door. (Id.) As discussed above, whether the lumber stored on the fifth floor landing constituted a legal cause of O'Donoghue's injury is for the finder of fact to resolve. Accordingly, defendants' motion for summary judgment dismissing O'Donoghue's negligence claim is denied.

Citing Wedlock v Troncoso (185 Misc 2d 432 [Sup Ct, Richmond County 2000]), defendants argue that, even if Usher's injuries were partly attributable to the railing collapsing under his weight, "it is not reasonable to expect property owners to maintain a hand railing to withstand the force of an adult male wearing close to sixty (60) or seventy (70) pounds of gear and tools." (Defs. Opening Brief, at 16.) In Wedlock, the plaintiff police officer was injured when he fell off the defendant's fence, which the plaintiff officers were climbing in pursuit of a suspect. The court dismissed the officer's common-law negligence claim, finding that it was unreasonable "for property owners to maintain a fence to withstand the force of two police officers jumping and climbing on it with gear approaching 400 or more pounds." (Wedlock, 185 Misc 2d at 440-41.) The court held that the property owner did not breach a duty of care to foreseeable plaintiffs, and that the plaintiff failed to "establish[] that the defendants were negligent in maintaining their fence or that the fence was improper or dangerous or not fit for its intended purpose." (Id. at 441.) However, the Wedlock court began its discussion by stating that

"[a] fence is not a walkway, nor is it a staircase, nor is it a ladder which should be made safe for those who venture to traverse it--a fence is different--it is a barrier," the purpose of which "is to keep people 'out,' not to invite them in." (Id. at 439.) Thus, the court's analysis was framed by the nature of fences, and its express statement that "a fence is not a stairway with an invitation to climb it." (Id.) Here, conversely, defendants make no showing that the intended purpose of a handrail in a stairwell is anything other than to resist the application of force applied by people using the stairs, which is the basis of Usher's claim. Therefore, Wedlock is distinguishable on its facts and, as discussed above, causation remains a questions of fact with respect to Usher's common-law negligence claim.

Inasmuch as defendants fail to make a prima facie showing on any of their arguments concerning O'Donoghue or Usher, the court need not address the affidavit of plaintiffs' expert, Michael Cronin, and the various Administrative Code violations contained therein which are purportedly attributable to defendants. (See Wasserman v Carella, 307 AD2d 225, 226 [1st Dept 2003] ["[t]he failure to make such a prima facie showing requires the denial of the motion, and renders the sufficiency of plaintiff's opposition immaterial"].)

Defendants' motion to dismiss the fourth and eighth causes of action, asserted by Laurie O'Donoghue and Angela Usher, respectively, is granted as unopposed to the extent that these causes of action seek recovery under section 205-a of the GML. (See Korfman v Parkway Vil. Assoc., 110 AD2d 886, 887 [2d Dept 1985] [section 205-a "affords an '[a]dditional right of action to certain injured or representatives of certain deceased firemen' as prescribed therein," but "does not authorize recovery for loss of consortium, etc., by the spouse of a fire fighter injured in the line of duty"].)

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing the fourth and eighth causes of action of the complaint, but only to the extent that these causes of action seek recovery under section 205-a of New York's General Municipal Law, and the motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: New York, New York
July 8, 2011

MARCY FRIEDMAN, J.S.C.