NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

RICHARD BAKER,

Plaintiff,

-against-

CHG HOUSING L.P.,

Defendant.

Index No.: 154110/14
DECISION/ORDER
Motion Seq. No. 002

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant's motion for summary judgment.

Papers	**Numbered**
Defendant's Notice of Motion	1
Defendant's Memorandum of Law	2
Plaintiff's Affirmation in Opposition	3
Plaintiff's Memorandum of Law in Opposition	4
Defendant's Reply Affirmation in Support of Motion	5

Decolator, Cohen & Diprisco, LLP, Garden City (Joseph L. Decolator of counsel), for plaintiff.
Milber Makris Plousadis & Seiden, LLP, Woodbury (Lynsay A. Satriano of counsel), for defendant.

Gerald Lebovits, J.

Defendant CHG Housing L.P. (CHG) moves for summary judgment.

This is a personal-injury action. The complaint alleges the following: on March 28, 2014, at approximately 6:20 a.m., plaintiff Richard Baker, a police officer on duty, entered defendant's premises, a private multiple dwelling located at 163 West 145th Street, in New York County. He was conducting a no-knock search. While entering an apartment using a battering ram, he injured his hand when it went through a glass panel of an interior door next to the building vestibule. Plaintiff sues CHG for common-law negligence and for violating RPL § 231 (1), (2), Administrative Code of the City of New York (Administrative Code) § 28-301.1, and MDL § 78 under General Municipal Law (GML) § 205-e.

Plaintiff's complaint alleges that defendant was negligent in causing and allowing criminals to control or possess the premises and to conduct illegal activities — involving narcotics — and that defendant should have foreseen plaintiff's injuries. The complaint also alleges that defendant violated statutes that allow landlords to evict tenants who engage in illegal trade or manufacture on leased property.

On summary judgment, defendant argues that it had no duty to plaintiff because it had actively worked with the New York City Police Department (NYPD) and the District Attorney's Office to prevent crime through the Trespass Affidavit Program. Defendant also argues that it was not negligent because it did not create a dangerous or defective condition on the premises or and had no notice of any condition. Defendant argues that it did not violate any statute and that plaintiff lacks a viable GML § 205-e claim (*see* Defendant's Notice of Motion & affirmation in support, exhibit 1).

Defendant relies on the examination before trial (EBT) testimony of plaintiff and Kenneth Morrison, who is identified as a general partner of CHG and the owner and president of Lemor Realty Corporation, CHG's managing agent. Plaintiff testified that he is involved in the NYPD's Organized Crime Control Bureau. As part of his training, he attended a two-week course on how to execute a search warrant, including how to use a battering ram. Plaintiff testified that before the incident he had used a battering ram over a dozen times. Plaintiff stated that on the date of the incident, he wore a vest and helmet but no gloves or eye protection. He stated that the premises' exterior door was made of a metal frame with two glass windows and a metal divider between the two windows. The glass was clear and not cracked; the door had a lock on the left side of the exterior door. The door did not have a handle, but it would open when it was pushed.

Plaintiff asserted that he attempted to push the door open before using the ram, but the door was locked. Plaintiff testified that his superior on the scene took the ram and broke the door's glass. Plaintiff then used the ram to strike the door and enter the vestibule, where a second interior door was located. This second door had a metal frame, two windows, and a piece of metal separating the windows. This door was also locked. In his attempt to open this door with the ram, plaintiff testified that he broke the bottom glass window in the left-hand corner and injured his hand when it contacted a thin wire located inside the glass (*see* EBT tr of Plaintiff, exhibit 3).

At his EBT, Morrison described the premises' interior door. He stated that the door's glass panels had wire in them and that the wire was visible through the glass. Morrison believed that the wire prevented the glass from shattering. Morrison stated that at the time of the incident, the door was not defective. Morrison also stated that complaints about illegal activities involving narcotics had been brought to his attention; these complaints were reported to the District Attorney's Office and the NYPD's 32nd Police Precinct. Morrison discussed the Trespass Affidavit Program: The program permitted the precinct to enter the premises with a key and arrest any individual for trespassing. Morrison assumed that the March 28, 2014, incident arose from CHG's complaints about narcotics (*see* EBT tr of Kenneth Morrison, exhibit 4).

CHG contends that absent a dangerous or defective condition on the premises, it is not liable for negligence. CHG also contends that it had no duty to plaintiff and that no evidence exists that it permitted criminal activities on its premises. Regarding the alleged statutory violations, CHG argues that plaintiff did not establish a reasonable connection between the violations and his injuries (*see* Defendant's Memorandum of Law in Support, exhibit 2).

In opposition, plaintiff contends that defendant's claim that it is an active participant of the Trespass Affidavit Program is irrelevant because that program is directed at deterring individuals unlawfully on the premises; the program is not directed at tenants. Plaintiff alleges that tenants were engaged in illegal drug activities on the premises and that defendant knew about the activities. Plaintiff alleges that defendant chose to ignore the illegal activities. Plaintiff argues that he has a cause of action under GML § 205-e. He contends that this claim is predicated on defendant's liability for damages arising out of tenants' illegal use of the premises. According to plaintiff, to show that defendant violated this section plaintiff need not show proof of notice, but only proof of defendant's neglect, omission, willful, or culpable negligence on defendant's part — a low standard of proof (*see* Plaintiff's affirmation in Opposition, exhibit 6).

Summary judgment is a drastic remedy. If a court has any doubt that factual issues exist, the court must deny the summary judgment (*Birnbaum v Hyman,* 43 AD3d 374, 375 [1st Dept 2007]). Factual disputes preclude summary judgment (*People v Grasso,* 50 AD3d 535, 545 [1st Dept 2008]). The movant on a summary-judgment motion "must provide evidentiary proof in admissible form . . . to warrant . . . [a court's granting] summary judgment" (*Kershaw v Hospital for Special Surgery,* 114 AD3d 75, 81 [1st Dept 2013]). Once the movant meets this burden, the burden shifts to the opposing party to submit proof in admissible form of issues of fact requiring a trial (*id.* at 82).

I. Negligence Cause of Action

To be entitled to summary judgment in a premises-liability action, a property owner must establish that it maintained its premises in a reasonably safe manner and that it did not create a dangerous condition that posed a foreseeable risk of injury to the individual expected to be present on the premises (*see Westbrook v WR Activities-Cabrera Mkts.,* 5 AD3d 69, 71 [1st Dept 2004]). An owner may be liable for negligence if it had actual or constructive notice of a dangerous condition (*see Kelly v Berberich,* 36 AD3d 475, 476 [1st Dept 2007]).

Defendant's arguments on its summary-judgment motion are as follows: The interior door that caused plaintiff's injuries was not defective or dangerous at the time of the incident; the door was in proper working condition, fit for its intended purpose; no evidence exists that defendant allowed any allegedly criminal activity on the premises when the incident occurred; and defendant participated in the Trespass Affidavit Program. Defendant relies on *Kivlehan v 2220 Adams Place Realty Corp.* (2 Misc3d 851 [Sup Ct, Bronx County 2003]), in which the court applied the Firefighters Rule to a case similar to this one.

Plaintiff, in opposition, accurately notes that the Firefighters Rule has been largely abolished as of 1996 by the enactment of GOL § 11-106. The Firefighters Rule, which also applies to police officers, precludes only negligence suits brought against other police officers or their employers. Also, plaintiff accurately points out that defendant's participation in the Trespass Affidavit Program is irrelevant in a situation where tenants, not outsiders on the premises, are allegedly involved in criminal activities.

Nonetheless, plaintiff does not address the issue of the door's condition that caused his hand injuries. His primary argument on negligence is that defendant permitted its tenants to conduct illegal activities on the premises and that defendant's conduct was responsible for his injuries. Plaintiff does not address Morrison's testimony, who testified that he was aware of complaints about the illegal activities on the premises and that the complaints were brought to the NYPD's and the District Attorney's Office's attention. Although plaintiff argues that tenants were involved in illegal activities on the premises because of defendant's permissive conduct, plaintiff offers only conclusory evidence.

Plaintiff has failed to sustain a claim for negligence. The door in question was not defective; it was properly locked at the time of the NYPD's search. Plaintiff has not established that defendant allowed its tenants a forum for illegal activities resulting in plaintiff's injuries. Plainiff's negligence claim is dismissed.

II. Violations of Statutory Laws

Plaintiff sues defendant under GML § 205-e — a claim that plaintiff may bring against a property owner predicated on a statutory violation, namely, RPL § 231 (1), (2). According to plaintiff, the standard of proof under this claim is less demanding than that under a negligence claim. Defendant contends that plaintiff cannot prove that defendant allowed the premises to be used for illegal purposes in violation of RPL § 231 (1), (2).

Plaintiff argues that GML § 205-e imposes strict liability when a police officer is injured in the line of duty. Defendant would be liable for violating a statute if plaintiff shows that defendant failed to comply because of neglect, omission, or willful or culpable negligence (*see Campbell v City of New York*, 31 AD3d 594, 595 [2d Dept 2006]). It is unnecessary for plaintiff to show that defendant's statutory violation "exposed him to additional hazards immediately causing his injury" (*Driscoll v Tower Assoc.*, 16 AD3d 311, 312 [1st Dept 2005]). A reasonable or practical connection must exist between defendant's statutory violation and plaintiff's injuries for plaintiff to have a viable cause of action (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). Plaintiff believes that he has viable cause of action.

The other ordinances or statutes that plaintiff states defendant allegedly violated, as cited in the complaint, are § 28-301.1 of the New York City Administrative Code and MDL § 78. Both refer to maintaining safe conditions on premises, including all structures and parts. MDL § 78 refers to multiple dwellings — like defendant's premises.

In its reply papers, defendant argues that plaintiff failed to address these two laws in his papers. According to defendant, plaintiff devoted all his time to demonstrating that RPL § 231 (1), (2) applies to this case. Defendant argues that because plaintiff failed to address the two statutes, plaintiff has conceded that these statutes are inapplicable and thus should be dismissed (*see* Defendant's Reply affirmation in Support of Motion, exhibit 9).

The court finds that plaintiff has failed to contest defendant's arguments about the applicability of § 28-301.1 of the Administrative Code and MDL § 78. Unopposed arguments are deemed admitted (*see Arteaga v 231/249 W39 St. Corp.*, 45 AD3d 320, 321 [1st Dept 2007]). Defendant has not violated these statutes.

RPL § 231 (1), (2) provides:

> "1. Whenever the lessee or occupant other than the owner of any building or premises, shall use or occupy the same, or any part thereof, for any illegal trade, manufacture or other business, the lease or agreement for the letting or occupancy of such building or premises, or any part thereof shall thereupon become void, and the landlord of such lessee or occupant may enter upon the premises so let or occupied.
> "2. The owner of real property, knowingly leasing or giving possession of the same to be used or occupied, wholly or partly, for any unlawful trade, manufacture or business, or knowingly permitting the same to be so used, is liable severally, and also jointly with one or more of the tenants or occupants thereof, for any damage resulting from such unlawful use, occupancy, trade, manufacture or business."

Plaintiff argues that defendant, by allowing the premises to be used for illegal purposes, violated RPL and that applying GML 205-e, defendant is indirectly liable for his injuries.

Although defendant knew from complaints about the illegal activities on its premises, no evidence exists that defendant allowed any illegal activity to occur. Based on defendant's evidence, defendant notified the proper authorities about the illegal activities. No proof exists of a continuous relationship between defendant and the police. Defendant, as a participant in the Trespass Affidavit Program, provided the police with a key to the premises, allowing the police access to the premises. If defendant sought to permit illegal activities, it would not have notified the authorities before this incident.

As for the tenants allegedly involved in the activities, the law does differentiate between a tenant or an occupant involved in illegal conduct. In any event, the only evidence concerning the police's search is contained in Morrison's EBT. Morrison testified that the police arrested a non-tenant on the date of the incident. Morrison also testified that he did not receive a "Redback" from the District Attorney's Office — necessary for an owner to commence an eviction proceeding (*see* EBT tr of Kenneth Morrison, exhibit 4).

Plaintiff has not raised a material issue of fact regarding defendant's violation of RPL § 231 (1), (2) or a reasonable connection between the violation and the injuries he suffered. Thus, the court grants defendant's motion for summary judgment and dismisses plaintiff's complaint.

Accordingly, it is

ORDERED that defendant CHG Housing L.P.'s motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon a submission of an appropriate bill of costs; and it is further

ORDERED that defendant CHG Housing L.P. must serve a copy of this decision and order on all parties and on the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: January 19, 2017

J.S.C.
HON. GERALD LEBOVITS
J.S.C.