Proscia v 50 E. 78 L.P.
2019 NY Slip Op 30845(U)
March 28, 2019
Supreme Court, New York County
Docket Number: 150940/2015
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 47EFM

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JOSEPH PROSCIA, DEBORAH PROSCIA,	INDEX NO.	150940/2015
Plaintiff,	MOTION DATE	12/06/2018
- v -		
50 EAST 78 L.P., SIBA MGT. INC.,SIBA CORP.	MOTION SEQ. NO.	004
Defendant.		

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 104, 105, 106, 107, 108
were read on this motion to/for DISMISS.

HON. PAUL A. GOETZ:

In this personal injury action, defendants 50 East 78 L.P. and SIBA Mgt. Inc. move, pursuant to CPLR 3212, for an order dismissing the complaint filed by plaintiffs, Joseph Proscia (plaintiff) and Deborah Proscia (plaintiff Deborah Proscia). Plaintiffs oppose the motion.

- **Background**

Plaintiff, Joseph Proscia, a firefighter with the New York City Fire Department, responded to a call, along with four other firefighters, that was received from a tenant located at 50 East 78th Street, New York, NY (the building) at or around 9:30 p.m. on October 22, 2014 (plaintiff tr at 15-16, 20, 25). Plaintiff had been to the building on many occasions while in the course of his employment for various emergency calls (*id.* at 16-17). The building is a 10-story residential building with a set of doors leading to a marble foyer (*id.* at 17-19). Upon entering,

there is approximately 10 feet of space before meeting four marble steps that lead down to a marble landing (*id.* at 18-19). Plaintiff testified that there was no handrail for the staircase (*id.* at 19).

It had been raining intermittently that day; however, plaintiff could not recall if it was raining exactly before the accident (plaintiff tr at 22). Captain Paul Geoghan entered the building first and plaintiff followed (*id.* at 20). Firefighter Mastropietro was the third to enter, following plaintiff (plaintiff tr at 24-25; Mastropietro aff, ¶ 6).

Plaintiff was wearing rubber boots and carrying an oxygen bag over his right arm (*id.* at 22, 34). According to plaintiff, there was no carpet covering the lobby of the building (plaintiff tr at 22). At the time plaintiff fell, he did not notice any treads or mats on the stairs nor were there any warning signs (*id.*).

Captain Geoghan had no issues descending the stairs (*id.* at 20). Upon entering he building, plaintiff took approximately seven or eight steps. Plaintiff did not notice any wet substance on the landing of the stairs when his right foot slipped and he fell down the four marble steps (*id.* at 24-25). After he fell, plaintiff noticed that the floor was wet at the bottom of the stairs (*id.* at 26). According to defendants, plaintiff never noticed any liquid or wet substance at the top of the stairs (*id.*). However, plaintiff testified that after he fell, a food deliveryman lost his step when descending the stairs, at which point, plaintiff noticed a wet sheen at the top of the stairs (plaintiff tr at 60-61). When plaintiff touched the area, he realized it was water.

After plaintiff fell, the doorman, Jay Vargas, apologized and said he had been mopping all day (plaintiff tr at 34).

Vargas testified that he knew the floor was wet when plaintiff and his fellow firefighters entered the building because he claims he warned them the "floor is wet, be careful" (Vargas tr at 101). Vargas also placed wet floor warning signs in the area (*id.*). Vargas also testified that the last time he dry mopped the floor was at 8:30 p.m., one hour before the accident (*id.* at 86, 99).

Discussion

It is well-established that "[t]he proponent of a summary judgment motion must make 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" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 89 AD3d 561, 563 [1st Dep't 2011], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*O'Brien v. Port Auth. of N.Y. and N.J.*, 29 NY3d 27, 37 [2017], citing *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Defendants argue that pursuant to what is commonly known as the "firefighter's rule," "police and firefighters may not recover in common-law negligence for line-of-duty injuries resulting from risks associated with the particular dangers inherent in that type of employment" (*Zanghi v Niagra Frontier Transp. Commn.*, 85 NY2d 423, 436 [1995]). Citing *Wadler v City of New York*, 14 NY3d 192 [2010], *Norman v City of New York*, 60 AD3d 830 [2d Dept 2009] and *Sexton v City of New York*, 32 AD3d 535 [2d Dept 2006] among others cases, Defendants claim that the determining factor is not the exigency of the situation giving rise to the injury, but the fact that the risk-inducing situation arose from the plaintiff's work. Defendants assert that since

plaintiff fell while running into the building in connection with his work as a firefighter, he may not recover damages for common-law negligence, and, therefore, all claims against defendants must be dismissed (*Ferriolo v City of New York*, 72 AD3d 490 [1st Dept 2010]; *Foley v City of New York*, 43 AD3d 702 [1st Dept 2007]).

Plaintiffs counter that the passage of General Obligations Law (GOL) § 11-106 lifts the restriction and permits recovery for common-law negligence claims brought by firefighters against private parties such as defendants. Specifically GOL § 11-106 provides:

> "In addition to any other right of action or recovery . . . whenever any police officer or firefighter suffers any injury . . . while in the lawful discharge of his official duties and that injury . . . is proximately caused by the neglect . . . of any person or entity, other than that police officer's or fighter's employer or co-employee . . ., the police officer or firefighter suffering that injury . . . may seek recovery and damages from the person or entity whose neglect, willful omission . . . or culpable conduct resulted in that injury . . .."

Since neither defendant was plaintiff's employer, plaintiffs correctly contend that such claims are permissible (*see Palladino v Monadnock Constr., Inc.*, 163 AD3d 698 [2d Dept 2018]; *Johnson v Wythe Place, LLC*, 134 AD3d 569 [1st Dept 2015] [holding that the plaintiff-police officer's negligence action against owner was not barred by the companion statute to the "firefighter's rule" since defendant was neither plaintiff's employer nor co-employee]; *Parkman v 149-151 Essex St. Assoc., LLC*, 122 AD3d 439 [1st Dept 2014]).

The question then becomes whether defendants had actual or constructive notice of the condition which caused plaintiff to fall (*id.*). Specifically, in order to establish a prima facie case of negligence in a slip and fall accident, a plaintiff must establish that the defendant either created the hazardous condition or had actual or constructive notice of its existence and therefore had an opportunity to remedy the condition and failed to do so (*Gordon v American Museum of*

Natural History, 67 NY2d 836 [1986]; *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). Where, as here, in the case of actual or constructive notice, a plaintiff must also show that the owner had sufficient opportunity, with the exercise of reasonable care, to remedy the situation (*Aquino v Kuczinski, Vila & Assoc., P.C.*, 39 AD3d 216, 219 [1st Dept 2007]).

"To demonstrate lack of constructive notice, a defendant must 'produce evidence of its maintenance activities on the day of the accident, and specifically that the dangerous condition did not exist when the area was last inspected or cleaned'" (*Barrett v Aero Snow Removal Corp.*, 167 AD3d 519, 520 [1st Dept 2018] [citation omitted]). "Mere notice of a general or unrelated problem is not enough; the particular defect that caused the damage must have been apparent" (*Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 500 [1st Dept 2007]). "A general awareness that water was likely to be tracked on the lobby floor in rainy weather is insufficient, without more, to establish constructive notice of the particular wet condition that allegedly caused the plaintiff to slip" (*Rogers v Rockefeller Group Intl., Inc.*, 38 AD3d 747, 750 [2d Dept 2007]; *see also Rosario v Bronx Park S. III Assoc., L.P.*, 90 AD3d 421, 421 [1st Dept 2011] ["general awareness that the floor became wet during inclement weather . . . is insufficient to establish constructive notice of the specific condition causing . . . injury"]).

Defendants contend that plaintiff's testimony reflects that the only time plaintiff noticed water on the floor was after he had fallen down the stairs and came to rest in what he claimed was water negating plaintiff's claim that he slipped and fell at the top of the steps. However, defendants do not mention that plaintiff testified that he also observed the floor at the top of the lobby staircase to be wet after he fell (*Signorelli v Great Atl. & Pac. Tea Co., Inc.*, 70 AD3d 439, 440 [1st Dept 2010] [holding the plaintiff's testimony identifying "the wet and slippery fall as the

reason for this fall . . . cannot be dismissed as mere speculation regarding causation"]). Plaintiffs contend therefore, that there is an issue of fact as to whether defendants had actual notice.

Defendants assert that there is no evidence that defendants created the alleged wet condition or were aware of the alleged wet condition prior to the accident. However, with respect to actual notice, defendants fail to acknowledge Vargas's testimony that he warned plaintiff and the other firefighters "Floor is wet, be careful" as they entered the building (Vargas tr at 101). Therefore, he knew that the floor in the lobby was wet moments before plaintiff slipped and fell down the stairs. Moreover, Vargas's testimony reflects that he placed a 'wet floor' warning in the lobby, which raises an issue of fact with respect to defendants' actual notice (*see Hamilton v 3339 Park Dev. LLC*, 158 AD3d 440, 441 [1st Dept 2018]; [*Geffs v City of New York*, 105 AD3d 681, 681-682 [1st Dept 2013] ["the presence of at least one warning sign is sufficient evidence to raise an issue of fact as to whether a defendant had actual notice of a hazardous condition"]; *Felix v Sears, Roebuck & Co.*, 64 AD3d 499, 500 [1st Dept 2009] ["presence of at least one warning sign" sufficient to raise issue of fact that the defendant had actual notice of dangerous condition that caused the plaintiff to slip and fall]).

Therefore, there is a triable question of fact as to whether defendants had notice of the hazardous condition on the floor at the time plaintiff fell. Accordingly, the branch of defendants' motion seeking dismissal of the common-law negligence claim must be denied.

Defendants next argue that plaintiffs' cause of action alleging a violation under General Municipal Law (GML) § 205-a must be dismissed because defendants had no notice or knowledge of the alleged code violations. GML§ 205–a imposes an absolute liability where there is a practical or reasonable connection between a statutory or code violation and the

firefighter's injury or death (*Walsh v Michelson*, 156 AD3d 449, 450 [1st Dept 2017]; *Johnson*, 134 AD3d at 569). GML § 205-a provides:

> "In addition to any other right of action or recovery under any other provision of law, in the event any accident causing injury, . . . occurs directly or indirectly as a result of any 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, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury or death shall be liable to pay any officer, member, agent or employee of any fire department injured or whose life may be lost while in the discharge or performance at any time or place of any duty imposed by the fire commissioner, fire chief or other superior officer of the fire department, or to pay to the wife and children or to pay to the parents, or to pay to the brothers and sisters, being the surviving heirs-at-law of any deceased person thus having lost his life, a sum of money, in case of injury to person, not less than ten thousand dollars, and in the case of death not less than forty thousand dollars, such liability to be determined and such sums recovered in an action to be instituted by any person injured . . .."

To establish a GML § 205-a claim, plaintiffs must "[1] identify the statue 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]). When moving for summary judgment, defendants must demonstrate that they either did not negligently violate a relevant statute or ordinance, or that the violation did not directly or indirectly cause the plaintiff's injuries (*id.* at 82).

Here, plaintiffs allege that defendants violated the following statutory provisions: New York Administrative Code §§ 27-375 (f), 27-375 (h), and 28-301.1; Title 29 of the Administrative Code of the City of New York §§ 1003.4, 1006.1, 1006.3, 1205.1, 1205.3.3, 1205.3.4, and 107.5; Title 27 of the Administrative Code §§ 2005 and 2006; Multiple Dwelling

Law §§ 52, 78, 187; New York City Health Code § 153.19; Housing Maintenance Code of the City of New York § 27-2005; and Building Code §§ 28-1003.4, 28-1009.5 and 28-1009.11.

Defendants contend that a number of the provisions set forth by plaintiffs are inapplicable to the instant case as they deal with duties not relevant to the allegations raised by plaintiffs. For example, Title 29 of the Administrative Code of the City of New York §§1006.1, 1006.3, 1205.1, 1205.3.3, 1205.3.4 all deal with lighting, and the record is devoid of any allegation that defendants failed to provide adequate lighting at the premises. Additionally, New York City Health Code § 153.19 states "owners of a building are liable for keeping the sidewalk area free from garbage and litter," which is also inapplicable as the accident does not involve a sidewalk. Likewise, to the extent that plaintiffs claim a violation of New York City Housing Maintenance Code § 27-2006, the section is inapplicable as it deals with the duties of a tenant. Defendants also contend that Building Code §§ 28-1009.5, 1009.5.1 and 1009.11 are also inapplicable as they apply to the maintenance of stairs and treads, and plaintiff's testimony reflects that he slipped and fell prior to descending the stairs (defendant exhibit E at 24-25), and Benhken's expert report confirms that defendants were in compliance with all applicable Building Code 28 sections (defendant exhibit K at ¶ 17).

Plaintiffs do not dispute that these provisions are inapplicable but rather contend that Administrative Code § 28-301.1 and New York City Housing Maintenance Code § 27-2005, as well as Fire Code § 29-107.5 of the Fire Code and Multiple Dwelling Law § 78 (1) are statutory predicates for liability under General Municipal Law § 205-a.

New York City Administrative Code § 28-301.1 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 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 engage in building operations have reason to believe in the course of operations that any building or structure is danger on, 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."

Defendants argue that it is well-established that § 28-301.1 applies to structural or design defects and not transient conditions such as slipping on water. Defendants therefore contend that it is not sufficient to support plaintiffs' General Municipal Law § 205-a cause of action. However, as plaintiffs argue "[t]he prevailing weight of authority establishes that Building Code (New York City Admin. Code) §§ 27–127 and 27–128 [now § 28-301.1 and Fire Code § 29-107.5] are proper statutory predicates for liability under General Municipal Law § 205–a" (*Pirraglia v CCC Realty NY Corp.*, 35 AD3d 234, 235 [1st Dept 2006]; *see also O'Grady v New York City Hous. Auth.*, 259 AD2d 442 [1st Dept 1999]). As the Court of Appeals has stated, precedent led the Court to "'apply this provision [i.e., section 205-a] expansively so as to favor recovery by [firefighters] whenever possible'" (*Cusumano v City of New York*, 15 NY3d 319, 327 [2010], quoting *Williams v City of New York*, 2 NY3d 352, 364 [2004]). Therefore, Administrative Code § 28-301.1 is a valid statutory predicate for liability under GML § 205-a.

Moreover, plaintiffs met their burden of establishing that plaintiff slipped and fell on a watery substance at the top of the stairs of the subject premises in violation of section 28-301.1 (*see e.g., Miller v New York City Hous. Auth.*, 2010 NY Slip Op 30663[U] [Sup Ct, Kings County 2010]). Jay Vargas's testimony supports this.

In a similar vein, New York City Housing Maintenance Code § 27-2005 provides that "[t]he owner of a multiple dwelling shall keep the premises in good repair." While defendants attempt to disqualify this provision on the basis of lack of notice of the alleged defect, GML §

205-a does not require the same elements of proof as under common-law negligence, and such notice considerations are not applicable (*Alcade v Riley*, 73 AD3d 1101 [2d Dept 2010]). Additionally, Multiple Dwelling Law § 78 (1) is a general code pertaining to the maintenance of the subject premises, which reads

> "[e]very multiple dwelling, . . . and every part thereof and the lot upon which it is situated shall be kept in good repair. The owner shall be responsible for compliance with the provisions of this section . . .. Any such persons who shall wilfully violate or assist in violating any provision of this section shall also jointly and severally be subject to the civil penalties provided in section three hundred four."

However, defendants fail to address plaintiffs' allegations concerning this provision.

Plaintiffs contend that theses codes alone are considered provisions that impose a clear legal duty and are sufficient predicates for liability. Plaintiffs are correct that an attempt to defeat the liberal interpretation and purpose of GML § 205-a must fail in light of the legislative intent that firefighters recover where there is a violation of a Code provision respecting the safe maintenance of a premises (*see Cusumano v City of New York*, 15 NY3d 319; *Brennan v New York Hous. Auth.*, 302 AD2d 483, 484 [2d Dept 2003] ["(t)he 1996 amendments to (GML) § 205–a added a new subdivision (3) which provides injured firefighters with a right of recovery 'regardless of whether the injury . . . is caused by the violation of a provision which codifies a common-law duty and regardless of whether the injury . . . is caused by the violation of a provision prohibiting activities or conditions which increase the dangers already inherent in the work of any officer, member, agent or employee of any fire department"]).

Plaintiff Debra Proscia's Loss of Consortium Claim

Defendants argue that plaintiff Debra Proscia's loss of consortium cause of action must be dismissed because it is derivative of the negligence cause of action. While plaintiffs do not oppose this branch of the motion, an unopposed summary judgment motion will be denied upon

a movant's failure to establish prima facie entitlement to summary judgment or where the evidence creates a question of fact (*Yonkers Ave. Dodge, Inc. v BZ Results, LLC*, 95 AD3d 774, 774-775 [1st Dept 2012]). Such is the case here. Defendants do not address the sufficiency of plaintiff Debra Proscia's claims but rather limit their argument to the fact that the claim is a derivative one (*see e.g., Lustenring v 98-100 Realty, LLC*, 1 AD3d 574 [2d Dept 2003]). Since this argument assumes that plaintiffs' negligence claims would be dismissed, and, as discussed above, they are not, this branch of defendants' motion is also denied.

Conclusion

Accordingly, it is

ORDERED that the motion by defendants 50 East 78 L.P. and SIBA Mgt., Inc. for summary judgment dismissal of the complaint is denied except as to plaintiffs' General Municipal Law § 205-a cause of action insofar as it is predicated on violations of Title 29 of the Administrative Code of the City of New York §§1006.1, 1006.3, 1205.1, 1205.3.3, 1205.3.4; New York City Health Code § 153.19; New York City Housing Maintenance Code § 27-2006; and Building Code §§ 28-1009.5, 1009.5.1 and 1009.11.

Dated: March 28, 2019

ENTER:

Hon. Paul A. Goetz, JSC

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION	
APPLICATION:	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER
	☐ SETTLE ORDER		☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT	☐ REFERENCE