SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS KAHN, III **PART** 32

Acting Justice

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BRIAN FLOOD, JENIFER FLOOD

Plaintiff,

- v -

WEST 151 STREET ASSOCIATES LLC,PARK AVENUE SOUTH MANAGEMENT LLC,

Defendants.

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INDEX NO. 152548/2018

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is determined as follows:

This action arises out of an incident that occurred on May 19, 2015 when Plaintiff Brian Flood ("Flood") sustained injuries at a property located at 609 West 151ST New York New York, owned by the Defendant West 151 Street Associates LLC ("West 151"). Defendant Park Avenue South Management LLC ("Park Avenue") was retained by West 151 as property manager for the premises and it served in that capacity on the day of the accident. Plaintiff claims he tripped and fell on a drain cover located at the premises in the line of duty as a New York City Firefighter while responding to a call reporting a gas leak.

As to the specifics of the occurrence, Plaintiff Brian Flood testified that his company received a call at 9:00 pm on the day in question and that upon arrival at the location he proceeded to the rear of the building. He claimed the area in question was dark, but that he had a NYFD issued flashlight with him. Plaintiff averred that in accordance with established procedures, he was surveying the building when he"lost his footing" and fell to the ground. Plaintiff averred that after falling he saw the cause was a drain with its cover lying adjacent. As the mechanics of the occurrence, Plaintiff expounded that something gave way with a "tin" sound and his right foot went into a hole. He offered that from his "perspective" the drain cover was "there, but it was not properly fixed". He described the grate as metal, square and approximately 12" by 12" in size. Plaintiff identified the drain in photographs displayed at the deposition and annexed to Defendants' motion. Regarding the hole, Plaintiff claimed there was a square hole beneath where the grate was supposed to be which was 4" to 6" deep and a drainpipe 5" to 6" in diameter was located at the bottom. After the accident, Plaintiff claims he moved the grate back into place with a tool he was carrying.

Plaintiff commenced this action alleging causes of action for: [1] common-law negligence and [2] violation of General Municipal Law §205-a by reason of Defendants' violation of New York City Administrative Code §§27-118, 27-126, 27-127, 27-128, 27-217, 27-370[h], 27-371, 27-373, 27-380,

27-979, 27-980, 27-981, New York City Housing Maintenance Code §§27-2005 and 27-2045 and Multiple Dwelling Law §§53, 78, 301. In the bill of particulars, Plaintiffs claim that Defendants' negligence arose from, *inter alia*, a loose and/or improperly secured grate and a poorly or dimly lit premises. Plaintiff Jenifer Flood pled a cause of action for loss of consortium. Issue was joined by Defendants collectively.

Now, Defendants move for summary judgment dismissing Plaintiff's complaint claiming they neither created nor had notice of the alleged defective condition. Defendants also argue that General Municipal Law §205-a and the alleged supporting statutory and code violations cited by Plaintiff do not sustain a claim. As to the loss of consortium claim, Defendants posit it is not a valid claim under General Municipal Law Section §205-a. Plaintiffs oppose all aspects of the motion.

At the outset, the motion is procedurally defective since the moving and reply papers fail to comply with sections 202.8-b[c] and 202.8-g of the Uniform Rules for Trial Courts [22 NYCRR]. The Court will, in this instance only, overlook the defect since the opposition papers suffer from the same flaws.

While it is ultimately the Plaintiff's burden at trial to establish a *prima facie* against the Defendants, on a motion for summary judgment it is incumbent upon the moving party to present evidence in admissible form showing their entitlement to judgment in its favor as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557). Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposition papers (*see Alvarez v Prospect Hospital*, supra at 324; *see also Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce proof, in admissible form, which establish the existence of material issues of fact (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

It is well established that an owner of a premises has a duty to keep its property in a "reasonably safe condition, considering all of the circumstances including the purpose of the person's presence and the likelihood of injury", (*see Aberger v Camp Loyaltown Inc.,* 193 AD3d 195 [1st Dept 2021]; *Fernandez v Castillo*, 165 AD3d 1004 [2d Dept 2011]; *see also Macey v Truman*, 70 NY2d 918 [1987]). Plaintiff's case is also based on the theory that Defendants' premises was inadequately illuminated at the time of the accident. Property owners do not have a "generalized one-size-fits-all duty" to keep their premises illuminated "during all hours of darkness" (*Peralta v Henriquez*, 100 NY2d 139, 145 [2003]; *see also Miller v Consolidated Rail Corp.*, 9 NY3d 973 [2007]). "However, the Court of Appeals has held that a landowner with knowledge of a condition easily alleviated by illumination may, under some circumstances, have a duty to provide lighting" (*Taylor v Lands End Realty Corp.*, 93 AD3d 1062, 1064 [3d Dept 2012]; *see also Yacoub v 1540 Wallco, Inc.*, 104 AD3d 408 [1st Dept 2013]).

In support of its motion, therefore, Defendants were required to demonstrate *prima facie,* that one or more of the essential elements of Plaintiff's negligence claim are negated as a matter of law (*see eg Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018]; *Nunez v Chase Manhattan Bank*, 155 AD3d 641 [2d Dept 2017]). As part of that burden, Defendants were required to demonstrate either that they lacked a duty to provide lighting in the area where the accident occurred or that it fulfilled that duty at the time of the accident (*see Steed v MVA Enters., LLC*, 136 AD3d 793 [2d Dept 2016]).

In support of the motion, Defendants submitted the deposition testimony of Maurice McKenzie ("McKenzie"), the owner of Park Avenue. McKenzie testified his responsibilities included overseeing

the building, collecting rent, paying bills, complaint intake, repairs and managing the live-in superintendent. McKenzie testified he became aware of this incident when the summons and complaint were served in 2015. McKenzie averred he first inspected the building in 2009 and did so annually or biannually through the time of the accident. As to the drain, he stated that from 2009 until the accident no work was performed on the drain and it has remained in the same condition during that period. Yet, he admitted there was no written log of any of these inspections. With respect to complaints, McKenzie averred that work orders were generated for any complaints and repairs. As to physical inspections, he stated he inspected the drain cover twice in the two to three years prior to his deposition on September 13, 2019 by stepping on the drain and concluded each time that the drain cover was firm and there was no movement. He claimed that the only way to remove the cover would be to use a tool. McKenzie acknowledged that he did not remember when prior to those instances he last physically inspected the drain. As to lighting, McKenzie recognized New York City required lighting at the accident site and believed that 200 watts of illumination was the requisite standard. He claimed there were three light fixtures at the rear of the premises, but noted he was not present at the building on the day of the incident.

While this testimony establishes Defendant Park Avenue did not create the condition that caused Plaintiff to fall, as to actual or constructive notice it is insufficient since McKenzie failed to establish when prior to the accident he last inspected the drain and grate or that the condition could not have been discovered upon a reasonable inspection (*see Bessa v Anflo Indus., Inc.,* 148 AD3d 974 [2d Dept 2017]; *Colon v Bet Torah, Inc.*, 66 AD3d 731 [2d Dept 2009]). As to physical inspection in particular, McKenzie could only remember performing same after the accident. Defendants' reliance on *Alig v Parkway Parking of N.Y., Inc.*, 36 AD3d 980 [3d Dept 2007], for authority is misplaced since in that case Defendant therein submitted, among other things, an "inspection report noting that, while numerous drain covers on the roof of the parking garage were broken, the drain covers in the rest of the parking garage were plugged but not broken." Here, there are no such written records.

On the issue of illumination, McKenzie admitted Defendants had a duty to provide same under New York City requirements but proffered no affirmative proof the area was adequately illuminated on the day of the accident as McKenzie was not present that day (*see Baron v 305-323 E. Shore Rd. Corp.*, 121 AD3d 826 [2nd Dept 2014]; *Conneally v Diocese of Rockville Ctr.,* 116 AD3d 905 [2nd Dept 2014]). Absent such proof, any claim that the drain constituted an open and obvious condition fails (*id.*). Even disregarding the claim of inadequate lighting, an assertion that the drain condition was open and obvious is unavailing. Plaintiff's claim, that a drain cover moved when he stepped on it, does not constitute a condition that was not inherently dangerous (*cf. Schiavone v Bayside Fuel Oil Depot Corp.,* 94 AD3d 970 [2d Dept 2012]).

Parenthetically, the Court notes that Movants offered no evidence whatsoever regarding Defendant West 151's lack of either actual or constructive notice. No affidavit nor deposition testimony of a representative of that entity was proffered. With respect to this Defendant, its motion does little more than point to gaps in Plaintiff's proof adduced in discovery which is insufficient (*see eg Ricci v A.O. Smith Water Products*, 143 AD3d 516 [1st Dept 2016]; *Koulermos v A.O. Smith Water Prods.,* 137 AD3d 575 [1st Dept 2016]).

Accordingly, the branch of the motion for summary judgment dismissing Plaintiffs' common-law negligence claim is denied.

As to the branch of Defendants' motion dismissing Plaintiff's claims under General Municipal Law §205-a, that section creates an additional right of action for a firefighter injured in the line of duty "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 … city governments" (General Municipal Law §205-a [1]; *see also Cusumano v City of New York*, 15 NY3d 319 [2010]; *Anderson v Columbari*, 79 AD3d 679 [2d Dept 2010]). To state a cause of action pursuant to General Municipal Law § 205-a, a firefighter "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], *quoting Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423, 441 [1995]).

Despite the pronouncement in the statute that it applies to "any" statutory or code violation, this language is not limitless (*see Williams v City of New York*, 2 NY3d 352, 364 [2004]). "Rather, as a prerequisite to recovery, a [firefighter] must demonstrate injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties" (*id.*). Violations cannot be based in "the very risk that draws the safety officer to the scene", but rather must stem from a violation which "enlarges the hazard of [the firefighter's] task by diminishing fire safety or prevention" (*Cotter v Pal & Lee Inc.*, supra; *see also Meyer v Moreno,* 258 AD2d 315 [1st Dept 1999]). Nevertheless, by including the term "indirectly", "the Legislature intended to broaden" the application of the statute (*Giuffrida v Citibank Corp.*, supra at 80).

On a motion for summary judgment to dismiss a GML §205-a claim, defendant bears the burden of showing either that it did not negligently violate any relevant government provision, or, if it did, that the violation did not directly or indirectly cause plaintiff's injuries (*see Cotter v Pal & Lee Inc.*, supra).

Here, Plaintiffs alleged that Defendants violated provisions of the Administrative Code, specifically §§27-118, 27-217, 27-126, 27-127, 27-128, 27-370[h], 27-371, 27-373, 27-380, 27-979, 27-980, 27-981; New York City Housing Code §§ 27-2005 and 27-2045, as well as New York Multiple Dwelling Law §§53, 78, 301.

Defendant demonstrated that the majority of the New York City Administrative Code provisions were either inapplicable to this case (*see* Administrative Code §27-118 ["Alterations involving change in occupancy or use"]; §27-370[h] ["Exit passageways"]; §27-371 ["Doors"]; §27-373 ["Horizontal exits"]; §27-380 ["Fire escapes"]; §27-979 [" Smoke detecting devices; where required"]; §27-980 ["Power sources of smoke detecting devices"]; §27-981["General requirements for smoke detecting devices"]; §27-2045 ["Duties of owner and occupant with respect to installation and maintenance of smoke detecting devices, carbon monoxide detecting devices and natural gas detecting devices"]) or were repealed effective July 1, 2008, before Plaintiff's accident occurred (*see* Administrative Code §27-126 [Work not constituting minor alterations or ordinary repairs]; §27-127 ["Maintenance requirements"] and §27-217 ["Change in occupancy or use"]). Likewise, Multiple Dwelling Law §53 ["Fire-escapes"] and §301 ["Certificate of compliance or occupancy"] are also not pertinent to the claims herein.

In opposition, Plaintiffs failed to address the applicability of these statutes and code sections so they have abandoned any reliance thereon (*see generally Rivera v Anilesh*, 32 AD3d 202, 204-205 [1st Dept 2006], *affd* 8 NY3d 627 [2007]).

However, Defendants' assertion that NYC Administrative Code §27-2005 and Multiple Dwelling Law §78, which require a property owner to keep its premises in "good repair", are too general to be actionable is without merit in light of the expansive interpretation given GML §205-a (*see Proscia v 50 E. 78 L.P.*, ___Misc3d____, 2019 NY Slip Op 30845[U][NY Cty Sup Ct 2019]; *see also Brennan v N.Y. City Hous. Auth.*, 302 AD2d 483, 484 [2d Dept 2003][By operation of GML §205-a[3], a right of action exists "regardless of whether the injury … is caused by the violation of a provision which codifies a common-law duty"). Moreover, "recovery under General Municipal Law §205-a does not require the same proof as actual or constructive notice as would be required for a common-law negligence claim based upon an unsafe condition of the property" (*see Cusumano v New York, supra, see also Serino v Eleven Twelve Corp.*, 2017 NY Slip OP 30030[U][Sup Ct NY Cty 2017]).

Accordingly, the branch of Defendant's motion for dismissal of Plaintiffs' GML §205-a claim entirely is denied.

The branch of the motion to dismiss the loss of consortium claim is denied as Defendants' motion to dismiss the common-law negligence claim was denied.

Accordingly, based on the foregoing, it is

ORDERED that the branch of Defendants' motion for summary judgement dismissing Plaintiffs' common-law negligence cause of action is denied, and it is further

ORDERED that the branch of Defendants' motion for summary judgment dismissing Plaintiff's GML §205-a claim is denied to the extent that it is premised on NYC Administrative Code 27-2005 and Multiple Dwelling Law §78, but claims based on all other code provisions and statutes are dismissed, and it is further

ORDERED that the branch of Defendants' motion for summary judgment dismissing Plaintiff Jenifer Flood's loss of consortium claim is denied.

This matter is scheduled for a virtual status conference on **November 30, 2021 at 11:30 a.m.** with the court via Microsoft Teams. An invite will be sent the parties by the Part Clerk Tamika Wright.

10/25/2021
DATE

FRANCIS KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

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