NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 27

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

----------X

JOHNSON,DAVID Index №. **0302010/2010**

-against- Hon..**JULIA RODRIGUEZ** ,

WYTHE PLACE,LLC Justice.

----------X

The following papers numbered 1 to _____ Read on this motion, **REARGUE/RENEW/RESETTLE/RECONSI**
Noticed on **March 25 2014** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed Volumes 1 & 2	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law by Plaintiff	2A	

Upon the foregoing papers this

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Motion for reargument by Defendant **Wythe Place, LLC** of this Court's Order dated January 6, 2014, which denied its motion for summary judgment seeking dismissal of the complaint, is **granted** on ground that Court's Order dated January 6, 2014 failed to address that branch of motion seeking to dismiss Plaintiff's causes of action pursuant to GML 205-e, and upon reargument, this Court's Order dated January 6, 2014 is recalled and vacated and Defendant's underlying motion for summary judgment is **granted** as follows:

Plaintiff commenced this action seeking damages for injury sustained on January 13, 2010 when he slipped and fell in a building owned by Defendant. Plaintiff, a police officer employed by NYPD, was called to the premises to respond to an assault in progress in one of

apartments. Plaintiff claims that while descending a flight of stairs, "he slipped on a marble step which was extensively worn and which was not equipped with skid resistant material as required by law" [¶5 of Decolator Affirmation dated 4/9/14].

Plaintiff alleges that this action is predicated upon General Municipal Law ("GML") §205-e because the condition which caused him to fall was in violation of various sections of the N.Y.C. Building Code. Defendant contends that the premises were in a reasonably condition and not in violation of any statutory provisions, and that instead, Plaintiff's conduct in pursuing a suspect was the sole proximate cause of his accident. In addition, Defendant contends that it neither caused or created a dangerous condition or had actual and/or constructive notice of it.

After discovery Defendant moves for summary judgment dismissing the complaint on the grounds that (1) at his deposition Plaintiff testified that he fell because his knee "gave way" or he "felt a pop" rather than because of a defective condition; (2) common law negligence does not lie because Defendant did not cause or create a defective condition and had no notice of it; and (3) Plaintiff's fall was not related to any violation of an applicable statute, and therefore, Plaintiff cannot sustain a claim pursuant GML 205-e.

In support of its motion, Defendant submitted the affidavit of **Bernard Lorenz**, a Professional Engineer, who inspected the subject stairway and opined that "the stairway system elements were in good condition and were structurally sound" with no "visible or apparent defects that caused a trip or tripping/slipping hazard" [¶6]. Mr. Lorenz cited each statutory violation identified by Plaintiff and concluded that Defendant was not in breach of any violation and/or that the cited violation was simply not applicable to the subject building.

In opposition to the motion for summary judgment, Plaintiff submitted, *inter alia,* the affidavit of its expert, **Thomas R. Turkel, AIA,** a certified registered architect. Mr. Turkel reviewed photographs of the staircase and visited the accident scene on July 9, 2010. Mr. Turkel concluded that Defendant violated various statutory and code provisions in the

maintenance of the building's stairs. The Bill of Particulars dated January 4, 2011 ("the BOP") states that the occurrence took place in the main building stairway between the 2nd and 1st floor on the fifth tread up from the first floor. Specifically, Mr. Tukel opined that the fifth tread up from the ground was extremely worn as it had worn down 7/16th inch from its original surface; that the fifth tread flexed down slightly when stepped on, and that the flexing, along with the thinning of the marble tread due to wear, caused a crack in the step; and that the left to right slopes were destabilizing due to the tread causing a slope from the riser at the back of the tread down towards the front of the tread, making the subject tread more slippery than the other treads.

* * * * * * * * * *

In a premises liability action, Defendant must submit evidence that it maintained its premises in a reasonably safe condition as a matter of law, that it neither created the allegedly dangerous condition nor had actual or constructive notice thereof. *Boodie v. Town Hall Foundation,* 5 A.D.3d 210 (1st Dept. 2004); *Schmidt v. Barstow Associates*, 276 A.D.2d 784 (2d Dept. 2000). Here, Defendant submitted the deposition testimony of its Building Superintendent, **Ismael Soto**. Mr. Soto has been the superintendent since 1996. He was responsible for sweeping, mopping, maintaining the building and doing minor repairs as requested by tenants. Mr. Soto worked seven days a week from 8 a.m. to 4 p.m.: he swept the building on a daily basis and mopped three times a week; he stripped the floors and subject staircase twice a month. He testified that since 1996 through January 13, 2010 no changes or repairs had been made to the stairs in question, and he knew of no complaints made by any persons regarding the stairs. According to Mr. Soto, he swept the stairs on the date of Plaintiff's incident and noticed no defect on the subject stairs, and did not know why the step sloped as claimed by Plaintiff or how long said slope condition existed.

Defendant also submitted an affidavit by **Harley Friedman**, the managing member of the building's property manager, **Cygnet Realt I LLC.** Cygnet became the property manager in October 2010, ten months after Plaintiff's incident. Mr. Friedman stated that he was not aware of any defect or defective condition regarding the subject step since October 2010, or

prior to October 2010. Mr. Friedman stated that in October 2010 he received the maintenance records and work orders pertaining to the building from the previous property manager; Friedman stated he personally reviewed said records and that no documents indicated that any complaint, violation or work order pertained to the subject stairs or steps.

Based upon the testimony of Mr. Soto and Mr. Friedman, the Court finds that Defendant met its initial burden of proof that it maintained its premises in a reasonably safe condition as a matter of law, that it neither created the allegedly dangerous condition nor had actual or constructive notice thereof. Next, to establish entitlement to judgment as a matter of law on a §205-e claim, Defendant must show either that it did not violate any relevant government provision or that, if it did, the violation did not directly or indirectly cause Plaintiff's injuries. See Pattern Jury Instructions, commentaries PJI 2:215, pg. 272, citing: *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 790 N.E.2d 772, 760 N.Y.S.2d 397 (2003).

In the BOP Plaintiff claimed Defendant violated sections 28-310.1, 27-375-(e)(2)(f), 27-2005, 29-109.5 and 27-369 of the New York City Administrative Code. Mr. Lorenz submits that Section 28-310.1 went into effect July 1, 2008 and does not bring the subject premises under the jurisdiction of the 1968 Code; rather, 28-310.1 permits the building to be "maintained in a safe condition" in accordance with the provisions of the code "that were required by law when the building was erected", *to wit*: the Tenement Act of 1901. Mr. Lorenz submits that §28-310.1 must be read in conjunction with sections 28-101.4 and 28-102.4: §28-101.4 states that Title 28 of the Administrative Code become effective on the date of "this code", i.e., July 1, 2008. §28-102.4 states that the "lawful use . . . of any existing building . . . may be continued . . . *unless* a retroactive change is specifically required by the provisions of this code or other applicable law." Defendant contends that no retroactive change of the premises has ever taken place to change the building's status.

Here, it is undisputed that the premises at issue were constructed in 1924, and that the building is classified as a "New Law Tenement," i.e., a multiple dwelling built between 1901

and 1929. Consequently, the premises are subject to the Tenement Act of 1901 and not the 1968 New York City Building Code, unless the building underwent alterations pursuant to §27-115 and/or §27-118.

Section 27-115 of the Code states that the "entire building shall be made to comply with the requirements of the [1968] code" where the cost of making alterations in any twelve-month period shall exceed sixty percent of the value of the building. Section 27-118 of the Code states that buildings existing prior to 1968 shall be made to comply with the 1968 code "if the alteration of a building or space results in a change of occupancy group classification." Here, Mr. Lorenz submits that his search of records at the Department of Buildings did not reveal work permits for the subject staircase, and the work permits on file were not for significant work at the building which would trigger the applicability of §27-115 or 27-118. Consequently, the subject building was "grandfathered" in pursuant to §27-111, which provides that the "lawful occupancy and use" of the building . . . existing on the effective date of this code [i.e., 1968]. . . may be continued unless a retroactive change is specifically required by the provisions of this code."

Mr. Turkel also submits that the irregularity of the riser heights of the stairs violates §27-375-(e)(2)(f) of the NYCBC. As an initial matter, Defendant points out that Plaintiff never attributed his fall to defective or uneven riser lengths, and thus, §27-375-(e)(2)(f) of the NYCBC may not serve as a predicate to Plaintiff's 205-e claim. More importantly, Defendant argues that §27-375-(e)(2)(f) is inapplicable to the premises for the same reasons that Title 28 of the Administrative Code is not applicable, which is that unless the building underwent substantial alterations pursuant to §27-115, the building remained within the purview of the Tenement House Act of 1901 and did not meld to the authority of Title 27 of the 1968 Building Code. The Court agrees with Defendant's assessment herein, and therefore, since sections 27-2005, 27-369, 27-127 & 27-128 contained in Title 27 of the Code are not applicable for the same reasons, these sections may not sustain Plaintiff's 205-e claim and are hereby dismissed. Inasmuch as section 29-109.5 was alleged in the BOP, this section was not invoked by Plaintiff in his opposition to Defendant's instant motion, and is also

dismissed.

The BOP also alleged violations of sections 78(1) and 52(1) of the Multiple Dwelling Law. Section 78(a) provides *in pertinent part* that "every multiple dwelling law . . . and every part thereof . . . shall be kept in good repair." Defendant submits that §78(1) cannot sustain Plaintiff's 205-e cause of action because Defendant had no prior notice of the condition which Plaintiff claimed caused him to fall, and the stairs were in compliance with §78(a) which requires simply that the stairs "be kept in good repair."

Section 52(1) (stairs) provides: "1. In every multiple dwelling erected after April 18, nineteen hundred twenty-nine, every interior stair, fire stair and fire-tower and every exterior stair in connection with any dwelling altered or erected after January first, nineteen hundred fifty-one, shall be provided with proper balustrades or railing and all such interior and exterior stairs shall be kept in good repair and free from any encumbrance."

In his opposition to summary judgment, Plaintiff argues that sections 78(1) and 52(1) are applicable to Defendant's building pursuant to section 25 of the MDL, Article Three which includes buildings erected before April 18, 1929. However, contrary to Plaintiff's contention that section 25 renders 78(a) and 52(1) applicable herein, section 25 of Article 3 of the MDL explicitly states that

> Except as otherwise expressly provided, all provisions of this article shall apply to every multiple dwelling *erected after April eighteenth, nine hundred twenty-nine*. . . only the following enumerated sections to this article . . . shall apply to multiple dwellings . . .§52. . . [emphasis added]

Section 52, titled *Stairs* is cited above and concerns interior stairs in "multiple dwellings *erected after April eighteenth, nine-teen hundred twenty nine*" and "treads and risers of every stair . . . constructed *after April eighteenth, nine-teen hundred twenty nine* . . . " [emphasis added].

Plaintiff's Supplemental BOP dated March 26, 2012 alleged that Defendant further violated the New Code of Ordinances of the City of NY, 1916 E., section 153(c) which reads:

> *Interior Stairs* - 1. *Construction.* a. *Strength.* All stairs, platforms, landings

and stair halls shall be of sufficient strength to safely sustain a live load of not less than 100 pounds per square foot.

c. *Support for treads and landings.* When treads or landings are of slate, marble, stone or composition, they shall be supported for their entire length and width by a solid steel plate at least 1-8 of an inch thick, securely fastened. When stairs are of fireproof construction, the treads and landings may be solidly supported for their entire length and width by the materials of which such stairs are constructed. The treads and landings shall be constructed and maintained in such manner as to prevent persons from slipping thereon.

However, Section 151 titled *Applicability of article* states that "[u]nless otherwise specifically stated in this article, the provisions thereof shall apply to buildings, hereinafter erected, ***except tenement houses coming under the provisions of the Tenement House Law. . .*** " [emphasis added].

Based upon the foregoing discussion, the Court finds that Defendant met its burden of proof that the statutory violations alleged by Plaintiff to have caused his fall are not applicable to the subject building, and even if applicable, Defendant established that it did not have actual or constructive notice of any alleged violation prior to Plaintiff's fall, and that any cited violation did not directly or indirectly cause Plaintiff's injuries. See *Fernandez v. City of New York*, 84 A.D.3d 595, 924 N.Y.S.2d 43 (1st Dept. 2011) (where defective drawer had never before malfunctioned, Defendants established lack of notice of any defective or unsafe condition necessary to sustain either a GML 205-e claim or a common-law negligence claim); Cf. *Mulham v. City of New York*, 110 A.D.3d 856, 973 N.Y.S.2d 314 (2d Dept. 2013) (where vacant city lot was strewn with litter and police officer was injured when he jumped on piece of plywood in lot, Plaintiff able to identify Defendant's negligent non-compliance of sanitation code as predicate to 205-e claim); *Gleason v. City of New York*, 68 A.D.3d 1054, 892 N.Y.S.2d 161 (2d Dep't 2009) (where police officer injured his hand due to a defective

window, then City is held as owner of property and must establish that it neither created the condition or had notice thereof).

The Court agrees with Defendant that MDL §78(1) may not serve as a predicate to Plaintiff's 205-e cause of action because it never received notice of a defective condition on the stairs. Plaintiff must identify the statute or ordinance with which the defendant failed to comply which statute is found in a 'well-developed body of law and regulation' that 'imposes clear duties', and that his "injuries were practically and reasonably connected to the Defendant's violation." *Mulham v. City of New York*, 110 A.D.3d 856, 973 N.Y.S.2d 314 (2d Dep't 2013); *Byrne v. Nicosia*, 104 A.D.3d 717, 719, 961 N.Y.S.2d 261, 263 (2d Dept. 2013). Here, Defendant established that the stairs were reasonably maintained and "kept in good repair" in accordance with MDL 78(1), and that Plaintiff's injury cannot be "practically and reasonably connected" to a violation of 78(1).

The Court further finds that Plaintiff failed to meet his burden of rebuttal, for failure to raise an issue of fact that Defendant had actual or constructive notice that the subject stairs were not reasonably maintained and/or were not in a reasonably safe condition, and for failure to identify a specific ordinance or statute violated by Defendant which was the proximate cause of his injuries. See *Fernandez v. City of New York*, 84 A.D.3d 595, 924 N.Y.S.2d 43 (1st Dept' 2011); *Ferriolo v. City of New York*, 72 A.D.3d 490, 899 N.Y.S.2d 172 (1st Dep't 2010); *Cerati v. Berrios*, 61 A.D.3d 915, 878 N.Y.S.2d 160 (2d Dep't 2009); *Norman v. City of New York*, 60 A.D.3d 830, 875 N.Y.S.2d 232 (2d Dep't 2009).

In his BOP Plaintiff claimed Defendant violated sections 28-310.1, 27-375-(e)(2)(f), 27-2005, 29-109.5 and 27-369 of the New York City Administrative Code. As discussed hereinbefore, none of these statutory provisions are applicable to the subject building, and Plaintiff failed to raise an issue of fact that the building underwent substantial renovations as defined in §§27-115, 27-116 and 27-118 to bring the building under the jurisdiction of the 1968 or 2008 Building Code. Plaintiff's argument that the search of the building's permits was insufficient to eliminate all questions of fact regarding whether the building was

substantially altered in its 88- year history is speculative and unpersuasive, as the evidence either exists or not; at this juncture, no evidence was presented to the court in opposition to the instant motion by Defendants that the building was ever "substantially altered."

It remains that Plaintiff failed in his burden of rebuttal to establish that his incident falls outside the rubric bar of the "firefighter's rule" and that his injury was unrelated to "the assumed risks of police duty."

For the foregoing reasons, Defendant's Motion for summary judgment seeking dismissal of Plaintiff's common-law negligence and 205(e) causes of action is **granted,** and therefore it is **ORDERED** that the Complaint is dismissed.

Dated: Bronx, New York
July 28, 2014

Hon. Julia I. Rodriguez, J.S.C.