Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

----------X

Jon O'Shaughnessy,

Plaintiff,

- against -

The City of New York,

Defendant.

----------X

Index Number: 31848/10

Motion Date: 08/28/12

Motion Cal. Number: 36

Motion Seq. No.: 1

The following papers numbered 1 to 10 read on this motion by the City for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply.....	8-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City for summary judgment dismissing the complaint is denied.

Plaintiff, an FDNY Fire Marshal at the time of his alleged accident, allegedly sustained injuries when closing a cell door at Queens Central Booking on June 7, 2010. He testified in his statutory 50-h hearing and his deposition that he and his partner, one Peter Clinton, arrested an individual for attempted arson and transported him to Central Booking in Queens County. Plaintiff testified that he was opening a holding cell door to place the prisoner inside when the door became stuck after it had slid open a few inches. He managed to get past the "stuck point" and got the door to open. It took him only a split second to get the door open despite its having become stuck because he had to place the prisoner in the cell quickly. After he placed the prisoner in the cell, he closed the cell door, which was also difficult to do.

Plaintiff alleges that he injured his shoulder as a result of the effort he used to open and close the door.

Plaintiff asserts causes of action against the City for common law negligence and pursuant to General Municipal Law (GML) 205-a. The City contends that it is entitled to summary judgment dismissing the complaint upon the grounds that plaintiff's common law negligence cause of action is barred by the firefighter's rule, that his GML 205-a claim is barred because it does not have a proper statutory foundation, and that even if it did have a proper statutory foundation, plaintiff cannot prove that the City had actual or constructive notice of the defective cell door.

With respect to the so-called "firefighter's rule", that phrase was coined to refer to the common law rule followed in New York which barred firefighters from maintaining negligence actions for injuries sustained in the line of duty related to the risks they are expected to assume as part of their job (see Santangelo v State of New York, 71 NY2d 393 [1988]). That rule was later applied to police officers as well as firefighters (see id.; Cooper v City of New York (81 NY2d 584 [1993]). The City contends that the common-law negligence claim asserted against the City by plaintiff is defeated by the "firefighter's rule" since plaintiff's injuries were caused by a specific risk associated with his job as a Fire Marshal, namely, the placing of a prisoner in a holding cell and the associated risk, to which an ordinary civilian would not be exposed, of opening and closing a heavy jail door. In this regard, plaintiff does not dispute that the activity that he was engaged in presented a hazard uniquely faced by Fire Marshals and that the alleged injury was sustained as the result of an increased risk attendant to the performance of his official duties.

However, the Court takes judicial notice that the common law "firefighter's rule" was statutorily superceded in 1996 by General Obligations Law § 11-106 which gives firefighters and police officers a negligence cause of action for line of duty injuries against any person or entity except the firefighters' or police officers' employer or co-employee (see L 1996, ch 703, § 5).

Since it is undisputed, and indeed plaintiff admits, that he was acting within the scope and course of his employment as Fire Marshal, performing his official duties at the time of the accident, his common law negligence cause of action is barred by GOL §11-106 as a matter of law (see Giuffrida v Citibank Corp., 100 NY2d 72 [2003]; Link v City of New York, 34 AD 3d 757 [2nd Dept 2006]).

With respect to plaintiff's statutory cause of action under

General Municipal Law § 205-a, as a prerequisite to recovery under that section for the negligent failure to comply with a statute, ordinance, rule, order or governmental requirement, a firefighter (or, in this case, a Fire Marshal) must demonstrate an injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties (see Galapo v City of New York, 95 NY2d 568 [2000]; Desmond v City of New York, 88 NY2d 455 [1996];Link v City of New York, supra). To support a claim under GOL § 205-a, a plaintiff must identify the statute or ordinance with which the defendant failed to comply (see Williams v City of New York,2 NY3d 352, 363 [2004]).

As a predicate to his claim under GML 205-a, plaintiff alleges violation of §27(a) of the Labor Law. The City contends that "[n]either LL §27-a generally, nor any of its subsections, including its 'general duty' clause relating to employers, subsection (3)(a)(1), may serve as a proper statutory predicate for a GML §205-a action." The City's contention is without merit. It is firmly established in the Second Department that Labor Law §27-a, including, in particular, subsection (3) thereof, may serve as a proper predicate to a cause of action under GML §205-a, or its sister provision relating to police officers, §205-e (see Norman v City of New York, 60 AD 3d 830 [2nd Dept 2009]; Campbell v City of New York, 31 AD 3d 594 [2nd Dept 2006]; Balsamo v City of New York, 287 AD 2d 22 [2nd Dept 2001]).

The City's argument that the afore-cited cases are not binding upon this Court because they are merely intermediate appellate decisions and the Court of Appeals has not directly decided the issue of whether Labor Law §27(a) is a proper statutory predicate to a GML 205-a/205-e cause of action, and because these decision are, in any event, in error is without merit, as such argument ignores the cornerstone principle of stare decisis wherein this Court is bound by the precedents set by the Appellate Division, Second Department, or, absent the pronouncement of a rule by the Second Department, by the Appellate Division of another Department, until the Court of Appeals pronounces a contrary rule (see Mountain View Coach Lines v Storms, 102 AD 2d 663 [2nd Dept 1984]). The City's counsel cites no authority, and this Court is unaware of any, in support of his assertion that a trial court may pronounce a decision of the Appellate Division of its own Department as being in error and ignore said decision.

With respect to Labor Law §27-a(3), said section states, in relevant part, "Every employer shall: (1) furnish to each of its employees, employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide

reasonable and adequate protection to the lives, safety or health of its employees; and (2) comply with the safety and health standards promulgated under this section." The Court notes that the City does not argue that a defective jail cell door does not present a recognized hazard to a Fire Marshal within the meaning of Labor Law §27-a(3) or that there was no reasonable connection between the City's allegedly improper maintenance of the cell door and plaintiff's injuries. The City merely contends that if Labor Law §27-a is a proper predicate for a GML §205-a claim, plaintiff cannot prove that the City had either actual or constructive notice of the defective condition of the cell door.

The City, as the movant for summary judgment, had the initial burden of establishing its lack of actual or constructive notice by proffering affirmative proof in admissible form (see Park v. Caesar Chemists, Inc., 245 AD 2d 425 [2nd Dept 1997]). It has failed to meet its initial burden. In support of the motion, the City annexes the deposition transcript of its witness, Ravi Jamindar, a police officer who, on the date of plaintiff's accident, was working as a records witness for the New York City Law Department. Also annexed to the moving papers is a copy of a work order summary prepared by Jaminder, which was marked as Plaintiff's Exhibit "1" at the deposition.

Jaminder testified that the only record he examined was the work order summary which he had prepared and which he describes as reflective of a two-year search for all work orders related to the subject Court building. He testified that according to the summary there was only one record reflecting the maintenance of the holding cells, and that record is a work order for the power washing of an unidentified cell. The only other records were a work order for the repair of a door closure on November 6, 2009 and one for the repair of a door lock on January 19, 2010. Both items were marked "closed", which, according to Jaminder, signifies that the repairs were completed. He did not know whether these door repairs related to the subject cell door or to a cell door at all. When asked, "Now, according to your records and the two years preceding the date of the accident here, June 7, 2010, the only work that was done – the only maintenance that was done for the cells would be the power washing, is that correct?" he responded, "Yes." Counsel for the City contends that Jaminder's testimony proves that the City lacked actual notice.

Jaminder's testimony and accompanying work order summary are not probative and constitute inadmissible hearsay. Moreover, no foundation has been laid for the admission of the work order summary under any exception to the hearsay rule. Jaminder merely testified as to what the summary, which he prepared, says concerning certain

work orders which are not annexed to the moving papers and are therefore not in evidence. Moreover, Jaminder fails to state what were the parameters of the two-year search he stated that the summary represented, failed to state whether he himself, or any other specific individual performed the search and failed to otherwise state whether and to what extent he had any personal knowledge of the search. Moreover, the Court notes that, contrary to Jaminder's representation that the work order summary was for a two-year search, the work order summary itself indicates that the requested dates were from "6/7/2009 to 6/7/2010", which is only a one-year period. Therefore, the City has failed to proffer evidence that it did not have actual notice of the allegedly defective condition of the subject cell door so as to meet its initial burden on summary judgment.

The City has also failed to proffer any evidence that it lacked constructive notice of the condition of the cell door by showing that the defect was not visible or apparent for a sufficient period of time to have reasonably allowed it, in the exercise of reasonable care, to remedy the defect (see Gjoni v. 108 Rego Developers Corp., 48 AD 3d 514 [2nd Dept 2008]; Scala v. Port Jefferson Free Library, 255 AD 2d 574 [2nd Dept 1998]; see also Danielson v. Jameco Operating Corp., 20 AD 3d 446 [2nd Dept 2005]). The City's contention that plaintiff failed to proffer any evidence that the City had constructive notice is without merit. As heretofore stated, it was the burden of the City, as the movant for summary judgment, to set forth sufficient evidence of its lack of constructive notice. It has failed to do so.

Finally, the City's contention that there is no evidence that the City caused or created the defective condition is moot since plaintiff does not allege in his complaint that the City created the condition.

Accordingly, the motion is denied.

Dated: August 30, 2012

KEVIN J. KERRIGAN, J.S.C.