SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

CHRISTOPHER GAHN and DOREEN GAHN,

Plaintiffs,

- against -

COMMUNITY PROPERTIES, DONALD A. PIUS, ALIYIA McREYNOLDS, by her father and natural guardian, MICHAEL McREYNOLDS, and MICHAEL McREYNOLDS, Individually,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 26746/09
Motion Seq. No.: 02
Motion Date: 07/28/11

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

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

Defendants Community Properties ("Properties") and Donald A. Pius ("Pius") move, pursuant to CPLR § 3212, for an order granting them summary judgment and dismissing plaintiffs' Verified Complaint in its entirety, as well as any cross-claims asserted against them. Plaintiffs oppose the motion.

This is an action for personal injuries allegedly sustained by plaintiff Christopher Gahn ("C. Gahn") on August 11, 2008, at the premises, owned by defendant Properties, located at 6

East 2nd Street, Huntington Station, New York. The incident occurred when plaintiff C. Gahn, in his capacity as a Suffolk County Police Officer, was responding to and assisting with a missing child call (for infant defendant Aliyia McReynolds). Upon locating missing infant defendant Aliyia McReynolds, plaintiff C. Gahn, who was lawfully on the aforementioned premises, was caused to be injured. Plaintiff C. Gahn tripped and fell off of the stoop/landing situated directly outside of the front door entrance into said premises when infant defendant Aliyia McReynolds pushed, shoved and flailed in and attempt to escape and elude the police as they attempted to return her to her father, defendant Michael McReynolds. Plaintiffs commenced this action by serving a Summons and Verified Complaint on or about January 12, 2010 and January 18, 2010. Issue was joined by defendants Properties and Pius on or about February 23, 2010.

Defendants Properties and Pius state that "[a] review of the plaintiffs' Verified Complaint, in conjunction with the plaintiffs' Verified Bill of Particulars and Supplemental Bill of Particulars, reveals that the plaintiffs are alleging two separate causes of action against defendants Community Properties and Donald A. Pius: 1) a common-law negligence claim based upon the defective condition of the front/stoop landing as authorized by General Obligations Law § 11-1-6; and 2) a claim based upon the General Municipal Law § 205-e. As it relates to the plaintiff's § 205-e claim, it is alleged in the plaintiff's Verified Complaint and Supplemental Bill of Particulars that the defendants violated Huntington Town Code Chapter 156, §§ 44-50, which sets forth general maintenance rules for properties in the Town of Huntington. The plaintiffs have also alleged violations of New York State Building Code §§ 765.4a-10 and C212-4.1(i)."

According to the Examination Before Trial ("EBT") testimony of defendant Pius,

defendant Properties is a limited partnership in which he is a limited partner and Pad Properties, Inc. is the general partner. Defendant Pius testified that defendant Properties is the legal owner of the premises located at 6 East 2nd Street, Huntington Station, New York, but that on the date of plaintiff C. Gahn's accident, the subject residence was leased to a person named Christine Seavers. Pursuant to the lease, defendant Properties was responsible for any structural repairs to the stoop/landing, but the tenant was responsible for keeping the stoop/landing clean and free from any debris. *See* Defendants Properties and Pius's Affirmation in Support Exhibit I ¶ 51. In this regard, defendant Pius testified that he never had to make any repairs to the front stoop/landing of the subject premises. Defendant Pius further testified that neither he nor anyone associated with defendant Properties ever received any complaints as to the exterior of the subject premises, in general, or any complaints concerning any debris located on the front/stoop landing, in particular.

With respect to plaintiffs' General Municipal Law § 205-e claim, defendants Properties and Pius argue that "this statue creates a right of recovery for police officers where the '...neglect, omission, willful or culpable negligence of any person or persons 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...' directly or indirectly caused the police officer's injury or death during the discharge of his or her duties....In order for a plaintiff to establish a prima facie case of liability under the statute, the pleadings must identify the statutes, ordinances, codes, rule and/or regulations with which the defendant failed to comply, describe the manner in which the police officer was injured, and set forth those facts from which it may be inferred that the defendant's

negligence directly or indirectly caused the harm to the police officer....In this regard, in order to establish a violation of General Municipal Law § 205-e, the plaintiff must prove that the defendant violated a rule or requirement that is part of a well developed body of law and regulations with positive commands that mandate the performance or non-performance of specific acts." As previously mentioned, plaintiffs allege in their Verified Complaint, Verified Bill of Particulars and Supplemental Verified Bill of Particulars that defendants Properties and Pius violated Huntington Town Code Chapter 156, §§ 44-50 and New York State Building Code §§ 765.4a-10 and C212-4.1(i).

Defendants Properties and Pius argue that, in reviewing the sections of the Huntington Town Code Chapter cited by plaintiffs, "it is evident that none of them apply to the facts of the case, with the arguable exception of § 156-45, subsection C, which speaks in the most generalized terms of not permitting '[a]ny unhealthy, unwholesome or unsanitary condition...' to exist on a parcel of property situated on the Town of Huntington. This code provision, however, is clearly not part of a well-developed body of law with positive commands that mandate the performance or non-performance of specific acts. Stated differently, it is not part of 'a well developed body of law containing particularized mandates imposing a clear legal duty.'"

In further support of their motion, defendant Properties and Pius submit the Affidavit of licensed engineer, Paul Angelides, to demonstrate that the New York State Building Code §§ 765.4a-10 and C212-4.1(i), as cited by plaintiffs, do not apply to the facts of this case as neither provision was in effect when this particular structure was built.

Accordingly, defendants Properties and Pius contend that neither Huntington Town Code Chapter 156, §§ 44-50 nor New York State Building Code §§ 765.4a-10 and C212-4.1(i) can serve as the predicate statutory basis for plaintiffs' General Municipal Law § 205-e claim.

Defendants Properties and Pius additionally contend that, even if it were assumed that plaintiffs did plead a predicate statutory violation, there is still no evidence that plaintiff C. Gahn's injuries resulted from anything more than the risks generally associated with and inherent to police work. They add that, "[i]n this case, there is absolutely no evidence which tends to show that the plaintiff's injury was practically or reasonably related to any alleged statutory violation as the plaintiff clearly testified during his examination before trial that 'I don't know why I fell.'...Moreover, the evidence clearly demonstrates that the plaintiff's injury occurred while he was in the process of trying to apprehend the defendant McReynolds, and that he fell off of the stoop/landing in the process. As such, it is evident that the plaintiff's injury was not related to anything more than the normal risks associated with police work."

Defendants Properties and Pius also argue that they are entitled to summary judgment with respect to plaintiffs' General Municipal Law § 205-e claim as there is no evidence that they either created or were aware of any condition which allegedly constituted a predicate violation.

With respect to plaintiffs' common-law negligence claim, defendants Properties and Pius argue that they are "entitled to summary judgment as a matter of law with respect to the plaintiff's claim based upon common-law negligence as 1) the plaintiff's claim is barred since the injury sustained is related to the particular dangers a police officer is expected to assume as part of his duties, 2) there is no evidence that the defendants either created any alleged defect with respect to the premises, or had actual or constructive notice of a defect, and 3) the defendants' alleged negligence was not the proximate cause of the plaintiff's injury."

Defendants Properties and Pius submit that "it is evident that the plaintiff's injuries occurred while he was in the process of trying to apprehend the defendant McReynolds. As such, his injury occurred while he was performing an act taken in furtherance of a specific

police function 'which exposed him to a heightened risk of sustaining particular injury.'...Stated differently, being on duty was not the mere occasion for the plaintiff's accident, but, rather, the performance of his hazardous duties as a police officer."

Defendants Properties and Pius also argue that there is absolutely no evidence to demonstrate that they created or had any notice of any alleged defect concerning the subject stoop/landing. The evidence reflects that they did not construct the stoop/landing and defendant Pius testified that he never caused any repairs to be made to said stoop/landing. As to any claim that the stoop/landing was covered by debris or sand, this condition was caused and/or allowed to exist by the tenant who occupied the premises. With respect to the issue of notice, defendant Pius testified at his EBT that neither he nor anyone associated with defendant Properties ever received any complaints as to the exterior of the subject premises, in general. or any complaints concerning any debris located on the front stoop/landing, in particular. They further submit the fact that they had the right to enter the premises to inspect and/or perform repairs pursuant to the terms of the lease is unavailing.

Defendant Pius argues that he is entitled to summary judgment dismissing both plaintiffs' General Municipal Law § 205-e claim and General Obligations Law § 11-106 common-law negligence claims as asserted against him in his individual capacity as he was not the owner of the subject premises and he cannot be held liable in his capacity as a limited partner. He submits that New York State Partnership Law § 26(b) provides, "no partner of a partnership which is a registered limited liability partnership is liable or accountable, directly or indirectly (including by way of indemnification, contribution or otherwise) for any debts, obligations or liabilities of, or chargeable to, the registered limited partnership or each other, whether arising in tort, contract or otherwise...."

In opposition to defendants Properties and Pius' motion, plaintiffs first indicate that the action against defendant Pius has been voluntarily discontinued by plaintiffs and therefore there is no need to address the portions of the summary judgment motion as they relate to him. With respect to the claim as against defendant Properties, plaintiffs states, "[t]he claim as against the remaining defendant, Community Properties relates as to the defective stoop off of which plaintiff, Christopher Gahn fell. It is alleged that the defendant, Community Properties violated the American Society of Testing Material Code F1637-95 section 6.2.1 for safe walking surfaces, which violation directly or indirectly led to plaintiff's injuries."

Plaintiffs submit that, "[i]n an action based on GML § 205-e, traditional standards of negligence and proximate cause do not apply. Rather, 'to make out a valid claim under GML § 205-e and survive a motion to dismiss, a plaintiff must (1) identify the statute or ordinance with which the defendant failed to comply, (2) describe the manner in which the police officer was injured, and (3) set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused harm to the police officer.' Since the traditional notions of proximate cause are inapplicable, Plaintiff need only show a reasonable or practical connection between defendant's violation(s) and plaintiff's injuries."

Plaintiffs argue that, in the case at bar, plaintiff C. Gahn's injuries were caused by defendant Properties' violation of a well established safety code - the American Society of Testing Material Code F1637-95 section 6.2.1 which relates to the standard for sale walking surfaces. Plaintiffs contend that the relevant portions of said Code state in general terms that a short flight of stairs (three or fewer) without a handrail or tactile cues shall be avoided where possible. In support of this argument, plaintiffs offer the Affidavit of Stanley H. Fein, a civil engineer. Mr. Fein offers his opinion that, within a reasonable degree of engineering certainty,

the accident and injuries sustained by plaintiff C. Gahn were caused by the negligence of defendant Properties for providing and maintaining a single step platform that was dangerous and hazardous and that the single step creates the optical illusion as if it does not exist and it comes upon pedestrians as a dangerous and unexpected trap.

Plaintiffs further argue that, "[i]t is apparent from the testimony herein that defendant, Community Properties was the owner of said premises, there was a single stoop leading to the front entrance and said stoop had no handrails or tactile cues such as edging and/or painting on said stoop in violation of the American Society of Testing Material Code F1637-95 section 6.2.1 for standard practice for safe walking surfaces. Based on the above, liability begins and originates with defendant Community Properties because had they not violated the above safety code, plaintiff's injuries would not have occurred."

Plaintiffs add that plaintiff C. Gahn's EBT testimony as to how he was injured is "apparent and uncontroverted." They submit that plaintiff C. Gahn testified that he was injured while attempting to apprehend the infant defendant, Aliyia McReynolds and that he fell off the front stoop in an attempt to apprehend her.

Plaintiffs argue that "[d]efendant cannot reasonably argue that as a matter of law the plaintiffs (*sic*) injury would not be a foreseeable result of defendant, Community Properties negligence in failing to delineate the front stoop. Absent defendant Community Properties failure to abide by the aforementioned safety code, none of the events which led to plaintiffs injuries would have been triggered. Thus, the conduct of defendant is reasonably connected, directly or otherwise to the injuries sustained by the plaintiff. The connection between the violation of the American Society of Testing Material Code F1637-95 section 6.2.1 and plaintiff (*sic*) injuries is an obvious one. The very purpose of the American Society of Testing Material is

to avoid falls off an unidentified step. If not for defendant, Community Properties (*sic*) disregard for the safety code on this issue plaintiff would not have found himself falling off said step and would likely have avoided injury. Defendants' negligence need only indirectly cause harm to the police officer plaintiff."

In reply to plaintiffs' opposition, defendants Properties and Pius argue that plaintiffs have failed to submit any proof or evidence sufficient to create a question of fact that would warrant a denial of defendants Properties and Pius' motion. First, said defendants state that "counsel for the plaintiffs states at paragraph six (6) of his affirmation that with respect to that part of the motion seeking summary judgment against defendant Donald A. Pius, because the plaintiff has voluntarily discontinued the action against Mr. Pius individually that part of the defendants' motion should be denied as moot. A review of the stipulation attached to Mr. Greenberg's affirmation as Exhibit "1" reveals, however, that the stipulation was never signed by counsel for the co-defendant (*sic*) Aliyia McReynolds and Michael McReynolds. As a result, the cross-claims asserted by co-defendants McReynolds remain and, therefore, this Court should grant summary judgment to defendant Donald A. Pius on the basis set forth in the defendants' motion."

With respect to plaintiffs' assertion that plaintiff C. Gahn's injuries were caused by defendant Properties' violation of a well established safety code, defendants Properties and Pius state, "counsel relies upon the affidavit of Stanley H. Fein, P.E., sworn to the 15th day of August, 2011, wherein Mr. Fein refers to 'American Society of Testing Material Code' [sic] F1637-95 section 6.2.1 relating to safe walking surfaces. Contrary to Mr. Fein's mischaracterization, however, as properly referred to the American Society for Testing and Materials... is not a 'code', but a compilation of reference standards. Moreover, the plaintiffs are precluded from

relying upon the cited reference standard because it is not set forth and/or referred anywhere in the plaintiffs' Complaint, Bill of Particulars or Supplemental Bill of Particulars."

Defendants Properties and Pius argue that plaintiffs must have realized that they could not demonstrate an question of fact as to the applicability of the codes they had relied on - Huntington Town Code Chapter 156, §§ 44-50 and New York State Building Code §§ 765.4a-10 and C212-4.1(i)- so they simply abandoned them for purposes of the summary judgment motion and relied solely upon the American Society for Testing and Materials standard cited by they expert, Mr. Fein. Defendants Properties and Pius state, "[a]s the plaintiffs have failed to plead the [American Society for Testing and Materials] reference standard relied upon by Mr. Fein, and have otherwise failed to move to amend their pleadings, they are now precluded from relying upon it in opposition to the defendants' motion. Further, the plaintiffs cannot rely upon the [American Society for Testing and Materials] standard cited by Mr. Fein to defeat the defendants' motion since, as stated previously, the [American Society for Testing and Materials] is not a 'code' but merely a set of reference standards to be used on conjunction with applicable building codes....These standards, in and of themselves, are merely guidelines and are not mandatory, and, as such, are insufficient to raise an issue of fact as to the defendants' alleged negligence."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept.

1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

As previously mentioned, to make out a valid claim under General Municipal Law § 205-e where a police officer is injured by another's failure to comply with the requirements of any of the statutes, ordinances, rules or orders, a plaintiff must (1) identify the statute or

ordinance with which the defendant failed to comply, (2) describe the manner in which the police officer was injured, and (3) set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused harm to the police officer. *See Williams v. City of New York*, 2 N.Y.3d 352, 779 N.Y.S.2d 449 (2004); *Link v. City of New York*, 34 A.D.3d 757, 825 N.Y.S.2d 518 (2d Dept. 2008); *Casella v. City of New York*, 69 A.D.3d 549, 893 N.Y.S.2d 556 (2d Dept. 2010).

The Court finds that plaintiffs have failed to satisfy the first prong of the requirements listed above. As argued by defendants Properties and Pius, plaintiffs identified Huntington Town Code Chapter 156, §§ 44-50 and New York State Building Code §§ 765.4a-10 and C212-4.1(i) as the applicable "statute or ordinance with which the defendant failed to comply." However, nowhere in plaintiff's opposition papers do they address, or even mention said codes. Instead, plaintiffs rely on the American Society for Testing and Materials standard cited by they expert, Stanley H. Fein. First, the American Society for Testing and Materials standard does not constitute a "statute or ordinance" within the meaning of General Municipal Law § 205-e. The American Society for Testing and Materials standard a set of reference standards to be used on conjunction with applicable building codes and are merely guidelines and not mandatory. Second, as noted by defendants Properties and Pius, defendants failed to plead the American Society for Testing and Materials standard in either their Verified Complaint, their Verified Bill of Particulars or their Supplemental Verified Bill of Particulars, therefore rendering the cause of action legally insufficient. *See Sclafani v. City of New York*, 271 A.D.2d 430, 706 N.Y.S.2d 129 (2d Dept. 2000).

The Court also finds plaintiffs' arguments that, "[i]f not for defendant, Community Properties disregard for the safety code on this issue plaintiff would not have found himself

falling off said step and would likely have avoided injury. Defendants' negligence need only indirectly cause harm to the police officer plaintiff, " and "[a]bsent defendant Community Properties failure to abide by the aforementioned safety code, none of the events which led to plaintiffs injuries would have been triggered" to be not only conclusory and speculative, but statements not based in reason nor appreciation for the entire events surrounding plaintiff C. Gahn's alleged injuries. By making such statements, plaintiffs seem to be completely disregarding the fact that plaintiff C. Gahn was allegedly struggling with defendant Aliyia Reynolds when he was injured. The Court fails to follow plaintiffs' logic that, if defendants Properties and Pius had installed a handrail or painted the subject step with yellow caution paint, plaintiff C. Gahn would not have fallen off said step. Such an argument defies reason. Additionally, the Court cannot disregard plaintiff C. Gahn's own testimony, "I don't know why I fell." *See* Defendants Properties and Pius' Affirmation in Support Exhibit E.

With respect to plaintiffs' cause of action based upon General Obligations Law § 11-106, plaintiffs have failed to offer any opposition to defendants Properties and Pius' motion as it relates to this claim.

With respect to plaintiffs' common law negligence cause of action, "[t]o impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it." *See Leary v. Leisure Glen Home Owners Ass'n, Inc.*, 82 A.D.3d 1169, 920 N.Y.S.2d 193 (2d Dept. 2011); *Williams v. SNS Realty of Long Island, Inc.*, 70 A.D.3d 1034, 895 N.Y.S.2d 528 (2d Dept. 2010); *Dennehy-Murphy v. Nor-Topia Serv. Center, Inc.*, 61 A.D.3d 629, 876 N.Y.S.2d 512 (2d Dept. 2009). *See also Denker v. Century 21 Dept. Stores, LLC*, 55 A.D.3d 527, 866 N.Y.S.2d 681 (2d Dept. 2008); *Rubin v. Cryder House*, 39 A.D.3d

840, 834 N.Y.S.2d 316 (2d Dept. 2007).

The Court finds that plaintiffs failed to demonstrate that defendants Properties and Pius either created or had actual or constructive notice of the alleged defect.

Based upon the arguments presented in the papers before it, and even construing the evidence in a light most favorable to plaintiffs, the Court finds that plaintiffs failed to submit any proof or evidence sufficient to create a question of fact that would warrant a denial of defendants Properties and Pius' instant motion.

Accordingly, defendants Properties and Pius' motion, pursuant to CPLR § 3212, for an order granting them summary judgment and dismissing plaintiffs' Verified Complaint in its entirety, as well as any cross-claims asserted against them is hereby **GRANTED**.

The remaining parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on October 19, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

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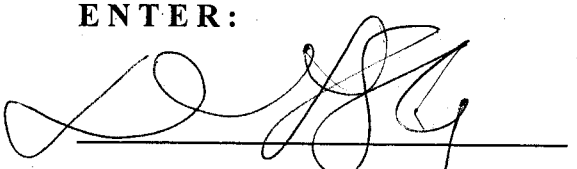

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
October 17, 2011