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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 115262/2009
ROCCO, RICHARD
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10-16-13
OCT 16 2013

_____, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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RICHARD ROCCO and SUEANN ROCCO,

Plaintiffs,

-against- Index No.: 115262/09

THE CITY OF NEW YORK,

Defendant.

----------X

KATHRYN FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....1-2 (Exhs. B-L)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....3 (Exhs. A-W)
REPLYING AFFIDAVITS.....	.....5.....
EXHIBITS.....	.....
OTHER.....(Plaintiffs' memo of law).....	.....4.....

Plaintiff Richard Rocco (plaintiff), now a retired firefighter, alleges negligence and General Municipal Law (GML) § 205– causes of action against defendant the City of New York (the City), for injuries he sustained as a firefighter at a Fire Department of the City of New York (FDNY) training exercise on June 25, 2009. Plaintiff SueAnn Rocco asserts a claim for loss of consortium.

The City moves for an order granting dismissal of the complaint pursuant to CPLR§3211 or, alternatively, for summary judgment pursuant to CPLR §3212, dismissing the complaint. The City moves on two grounds: (1) that the plaintiff's common-law negligence cause of action is barred by the firefighter's rule; and (2) that to the extent that plaintiff has sufficiently pled a GML §205-a claim, said claim fails because the violations set forth in plaintiff's pleadings do not suffice as proper GML§205-a statutory predicates, and/or plaintiff cannot prove violations of a predicate provision.

Factual and procedural background:

In the bill of particulars, plaintiff alleges that he was caused to fall and sustain an ankle injury during a training exercise due to an inappropriately high amount of pressure in an experimental hose that he was using, the lack of a back-up person/firefighter to provide stability when the hose was activated, and an accumulation of water on the floor from the prior training exercise due to an improper drainage condition at the FDNY facility. Plaintiff asserts that defendant was negligent in failing to provide him with a safe place to work, equipment, assistance, or training with the hose.

Plaintiff testified that after first putting out a fire at the training facility as part of a drill, he engaged in another firefighting exercise, and fell and slipped, after opening the nozzle of an experimental pressurized hose, due to the force of the water pressure, the loss of his footing and an "excess" of water under him that had accumulated from the previous drill (defendant's moving affidavit, exhibit (exh.) F at 61, exh. E at 49, 51). Plaintiff stated that as he crawled away from the scene, he observed a couple of inches of water on the floor (*id.*, exh. F at 61-62), and that there was water drainage at the facility, but that, apparently, it was not draining quickly (*id.*, exh. E at 52). Plaintiff also testified that there was no other firefighter directly behind him when the hose was activated.

Conclusions of law:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1989]; *People v. ex rel Spitzer v. Grasso*, 50 A.D.3d 535 [1st Dept. 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" (*Morgan v. New York Telephone*, 220 A.D.2d 728 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.d.2d 224 [1st Dept. 2002]).

1. The Negligence Claim:

The City argues that plaintiff's negligence claim is barred by the firefighter's rule which "precludes firefighters and police officers from recovering damages for injuries caused by negligence in the very situations that create the

occasion for their services" (*Zanghi v. Niagara Frontier Transp. Commn.*, 85 N.Y.2d 423, 438 [1995]). Where an act taken in furtherance of a specific firefighting function exposes a firefighter to a heightened risk of sustaining the particular injury, recovery for negligence is barred (*id.*). The firefighter's rule does not apply if a firefighter is injured "merely because he or she happened to be present in a given location, but was not engaged in a specific duty that increased the risk of sustaining that injury" (*id.*; see also *Wadler v. City of New York*, 14 N.Y.3d 192, 195 [2010]).

Defendant argues that plaintiff was injured in the course of performing his duties as an on-duty FDNY firefighter, which increased the risk of injury, due to the unavoidable presence of water on the floor. Plaintiff contends that the training exercise for the experimental hosing system superimposed new and unexpected risks of harm that were not inherent to firefighting duties, but which posed a unique hazard created by FDNY. He also submits an affidavit from Michael F. Cronin, a consultant in the area of fire safety, who states that trying out an experimental hose is not what a firefighter would normally do.

The complaint clearly alleges that when plaintiff was injured he was "engaged in the . . . training exercises in the course of and scope of his duties as a firefighter with the [FDNY]" (defendant's moving aff., exh. B, ¶ 9). Plaintiff's notice of claim states the claim arose when plaintiff was engaged "while a firefighter in the course and discharge of his duties" (*id.*, exh. A at 3). Plaintiff testified that he was on duty at the time of the accident, and was going to tactical training as part of his job description (*id.*, exh. E at 26). It is undisputed that when plaintiff fell he was engaged in an exercise, with other firefighters and officers, extinguishing a fire, at an FDNY training facility.

These record facts describe a firefighting function and conduct "[t]aken in furtherance of a specific . . . firefighting function which exposed [him] to the risk of the injury [he] ultimately sustained" (*Gammons v. City of New York*, 109 A.D.3d 189, 195 [2d Dept. 2013]; *see Wadler*, 14 N.Y.3d at 196 ["[a]n act taken in furtherance of a specific police function—entry into a protected parking lot, which only plaintiff's police credentials allowed him to enter—exposed plaintiff to the risk of this injury"]; *Norman v. City of New York*, 60 A.D.3d 830, 831 [2d Dept. 2009] [physical fitness examination, partly designed to mimic the type of activity officers would encounter in the field was heightened risk]; *Brady v. City of New Rochelle*, 296 A.D.2d 365, 366 [2d Dept. 2002] (firefighter's rule precluded negligence claim for injury in a motorcycle accident during a police training course)).

Plaintiff's performance of his duties in this instance also "did not merely furnish the occasion for the accident" (*Sexton v. City of New York*, 32 A.D.3d 535, 536 [2d Dept. 2006] [official act of instructing firefighting trainees how

to operate machinery did not merely furnish the occasion for the accident]; *Wadler,* 14 N.Y.3d at 196). While operating a different or experimental hose may have been a new experience for plaintiff, and not necessarily an everyday task for firefighters, this does not take the experience outside of firefighting, any more than would the use of a new type of fire engine/truck, or the performance of a new maneuver, strategy or drill. Assuming *arguendo*, that, as plaintiff contends, the drill was improperly conducted, this also would not take the activity outside of the firefighting function, but describes a firefighting function that was carelessly performed. Therefore, the claim must be dismissed.

2. The GML § 205-a Claim:

In New York, a firefighter may assert a tort claim for personal injury based on the statutory right of action under GML § 205–a. To make out such a claim, a plaintiff is required to:

> "[1] identify [a] statute or ordinance with which the defendant failed to comply, [2] describe the manner in which the [plaintiff] 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....
>
> [Regarding the allegedly violated statute or ordinance,] as a prerequisite to recovery, [the plaintiff] must demonstrate injury resulting from [the defendant's] negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties. At the same time, a series of amendments to section 205–e teaches us that we should apply this provision expansively so as to favor recovery . . . whenever possible"

(*Williams v City of New York*, 2 N.Y.3d 352, 363–364 [2004]).[1] The City argues that the GML § 205-a claim should be dismissed because the violations set forth in plaintiff's pleadings do not suffice as a predicate and plaintiff cannot prove that a predicate provision was violated.[2]

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[1] *Williams* involved GML § 205-e, which was intended to be identical to GML § 205-a, except that it concerns the police, and both sections "should be construed and applied in the same way" (*Desmond v. City of New York*, 88 N.Y.2d 455, 463 [1996]).

[2] Plaintiff argues that the City is estopped from challenging the causal relationship of plaintiff's injuries to the claimed violations because plaintiff was retired as disabled after the incident. As the City did not move on this ground, it is unnecessary to reach this issue here.

In the bill and supplemental bills of particulars,[3] plaintiff alleges that defendant violated 29 CFR 1910.22; Administrative Code of the City of New York (Administrative Code) §§ 28-301.1 and 29-107.5 and Labor Law § 27-a.

Administrative Code § 28-301.1 provides that

> "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 the 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. . . . The owner shall be responsible at all times to maintain the building and its facilities . . . regulated by this code in a safe and code-compliant manner and shall comply with the inspection and maintenance requirements of this chapter."

In moving,[4] the City argues that Administrative Code § 28-301.1 does not apply because plaintiff has not identified a maintenance condition that rendered the training facility unsafe for the activity that took place there. This assertion ignores that, in the initial bill of particulars, plaintiff alleged that the water drainage system was deficient or nonexistent. In its moving brief (*see* ¶¶ 14, 17 and 25), the City presented testimony concerning water accumulation and drainage at the facility, evincing its awareness of plaintiff's claim.[5] Despite this, and the assertions contained in the bill

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[3]In opposition, plaintiff states that he is not relying on his bill of particular assertions concerning Labor Law §§ 200, 240 and 241 (6) violations or his notice of claim assertions concerning the violation of FDNY training bulletins or manuals.

[4]"The prevailing weight of authority establishes that [Administrative Code §§ 27-127 and 27-128] are proper statutory predicates for liability under [GML] § 205-a" (*Pirraglia v. CCC Realty NY Corp.*, 35 A.D.3d 234, 235 [1st Dept. 2006]). Administrative Code §§ 27–127 and 27–128 were repealed and recodified at Administrative Code § 28–301.1 (*McLaughlin v. Ann-Gur Realty Corp.*, 107 A.D.3d 469, 469 [1st Dept. 2013]). Therefore Administrative Code § 28–301.1 would also serve as a valid GML § 205-a predicate.

[5]Plaintiff's opposition argument, that the conditions created by the lack of drainage were not intended by the City to be part of the training exercise, but existed because the City failed to construct the facility to have *any* drainage on the floor, is based on the City's lack of response to this court's June 19, 2012 discovery order directing the City to provide inspection, maintenance and complaint records for the training facility, for six months prior to the occurrence records, *to the extent that they existed.* The record contains testimony that there was drainage at the facility,

of particulars, the City did not address or provide admissible evidence demonstrating that the drainage system function was adequate and working as intended on the date of the incident, or make another argument about plaintiff's water and drainage allegations in relation to the GML § 205-a claim. Consequently, the City did not meet its burden on the motion, making it unnecessary to consider the sufficiency of the opposition papers (*Alvarez,* 68 N.Y.2d at 324).

In reply, the City argues that plaintiff may not assert a drainage condition as a basis for recovery because of the failure to raise this condition in the notice of claim.[6] While the City is not precluded from again raising this issue (*Frank v. City of New York,* 240 A.D.2d 198, 198 [1st Dept. 1997] [City free to raise the issue up until the trial], citing *Velez v. City of New York*, 157 A.D.2d 370, 374 [1st Dept. 1990] ["[p]recedent forecloses plaintiff's argument that a defense based on this failure was waived because not affirmatively raised until trial"]), the bill of particulars concerned drainage/water accumulation assertions, yet the City did not raise the notice of claim argument in moving, and thus, may not now raise it for the first time in reply as plaintiff has not been afforded an opportunity to be heard on the issue (*see Azzopardi v. American Blower Corp.*, 192 A.D.2d 453, 454 [1st Dept. 1993]; *Dannasch v Bifulco*, 184 A.D.2d 415, 417 [1st Dept. 1992]; *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 562 [1st Dept. 1992]; *see also Ford v Weishaus*, 86 A.D.3d 421, 422 [1st Dept. 2011] [moving papers defect may not be cured with reply submission]).

The City argues that Labor Law § 27-a is not a proper predicate for a GML § 205-a claim and that the asserted conditions by plaintiff are not "recognized hazards" under this statute.[7] "Labor Law 27 §-a, known as the Public

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and despite plaintiff's contention otherwise, in light of the wording of the June 19, 2012 order, the fact that the City did not provide records does not demonstrate that there was no drainage.

[6]In the notice of claim, plaintiff states that the nature of the claim involved the City's failure to provide him with a safe place to work and its carelessness, recklessness and negligence, including in causing plaintiff to operate a highly pressurized, untested and unrated hose line without adequate supervision, assistance, training or back up, and to participate in an unreasonably hazardous training exercise. Plaintiff also states that he was unnecessarily exposed to extreme danger in a nonemergency situation, and directed to participate in the exercise in violation of OSHA rules and regulations and FDNY protocols for the exercise. Plaintiff asserts that the claim arose because he was directed to control the nozzle of the hose, without proper assistance, training or back up, resulting in his being thrown and falling.

[7]In a footnote, the City argues that it rejected plaintiff's fourth supplemental bill of particulars, which included plaintiff's Labor Law § 27-a allegation. Plaintiff was permitted to serve a supplemental bill of particulars without leave of court to assert these violations (*Fisher v.*

Employee Safety and Health Act (... PESHA), was enacted to provide individuals working in the public sector with the same or greater workplace protections provided to employees in the private sector under [the Occupational Safety and Health Act (OSHA)]" (*Gammons*, 109 A.D.3d 189, 2013 NY Slip Op. 05298, *6 [citation and quotation marks omitted]).

Labor Law § 27-a (3) (a) (1) provides that:

> "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.
>
> Notably, in implementing standards for Labor Law § 27–a or PESHA, New York has adopted the workplace safety standards promulgated under [OSHA] (29 USC § 651 et seq...)" (*id.* at 197-198)

The City first argues that Labor Law § 27-a is not a proper predicate because the statute itself, and its place in the statutory scheme, demonstrate that the Legislature's intent was to establish an administrative regulatory scheme enforceable by the Commissioner of Labor, and not to bestow a broad right enabling individual tort actions relating to workplace hazards. Regarding this argument, the City states that OSHA specifically provides that nothing in it shall be construed to supersede or affect workers' compensation law, or to affect common law or statutory rights, duties or liabilities of an employer or employees arising out of employment. The City argues that there is no reason to interpret PESHA differently, or to determine that Labor Law § 27-a is a codification of the common law,[8] rather than the adoption of a focused federal administrative scheme. The City also contends that the determination in *Balsamo* (287 AD2d 28), that Labor Law § 27-a is a proper GML § 205-e statutory predicate, was in error.

Recently, in *Gammons* (109 A.D.3d at 197), the Second Department again concluded that Labor Law § 27-a may serve as a proper GML§ 205-e statutory predicate. The *Gammons* Court addressed the City's contention that Labor

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City of New York, 48 A.D.3d 303, 304 [1st Dept. 2008]; *Balsamo v. City of New York*, 287 A.D.2d 22, 27 [2d Dept. 2001]). There was no surprise here as the City raised Labor Law § 27-a in moving, and rejected plaintiff's attempt to supplement its bills of particulars with that claim, indicating that it was apprised of the assertion. The City does not demonstrate prejudice here.

[8]The City notes that the common law is not concomitant with a duty to ensure the absence of recognized hazards in the work place.

Law § 27-a does not confer a private right of action upon individuals, indicating awareness of the fact that the statute was not intended as the foundation for an individual's tort cause of action. The *Gammons* Court noted, as here, that the plaintiff did not assert Labor Law § 27–a (3) (a) (1) as a cause of action to recover damages, but asserted that its violation served as a predicate for a GML § 205–e claim.[9]

The City argues that a determination that Labor Law § 27-a is a GML § 205-a predicate improperly subjects public employers to unpredictable potential liability, due to the lack of specificity and the extent of the varied conditions potentially covered, as the statute's scope exceeds any statutory provision that the Court of Appeals has recognized as an appropriate GML § 205-a or 205-e predicate. The breath of Labor Law § 27-a is apparent from its language, and the implications thereof were undoubtedly recognized by the Second Department, which stated that "courts have permitted plaintiffs to utilize various statutes, which provide for general duties of care, to serve as valid predicates for [GML] § 205–e claim[s]" (*Gammons*, 109 A.D.3d at 197, citing *Gonzalez v. Iocovello*, 93 N.Y.2d 539, 551–552 [1999] [section 205–e claim predicated upon violation of Vehicle and Traffic Law § 1104 (e) or New York City Charter § 2903 (b) (2)]; *Hayes v. City of New York*, 264 A.D.2d 610, 611 [1st Dept. 1999] [Multiple Dwelling Law § 78 valid predicate])."

In addition, in *Gammons,* the Court found unpersuasive the City's contention, also made here, that a determination that Labor Law § 27-a is a proper GML § 205-e predicate would conflict with the Court of Appeal's statement in *Galapo v. City of New York* (95 N.Y.2d 568, 574 [2000]), that this statute was not intended to afford greater rights to police officer than those afforded to the general public (*Gammons*, 109 A.D.3d 189 at 200-201). The City does not provide authority for its additional contention that such distinctions may not be made between uniformed and nonuniformed employees, reasoning to support this contention, or address whether or not nonuniformed public employees, generally, may sue their employers for work-related injuries.

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[9]Without citation to authority, the City asserts that this court may adjudicate the issue of the validity of Labor Law § 27-a (3) (a) (1) as a GML § 205-a predicate because the City makes new arguments here that were not addressed in *Balsamo*. Whether or not this is true, the Court's opinion in *Gammons*, issued while this motion was pending, reveals that the Second Department essentially and sufficiently addressed the points that the City makes here.

In any event, "[t]rial courts within [the First] Department must follow the determination of the Appellate Division in another Department until such time as [the First Department] or the Court of Appeals passes on the question" (*People v. Shakur*, 215 A.D.2d 184, 185 [1st Dept. 1995]; *Tzolis v. Wolff*, 39 A.D.3d 138, 142 [1st Dept. 2007], *affd* 10 N.Y.3d 1000 [2008]; *Mountain View Coach Lines v. Storms*, 102 A.D.2d 663, 664 [2d Dept. 1984]).

The City argues that the condition plaintiff alleges cannot be shown to be a "recognized hazard" within the meaning of the Labor Law § 27–a (3) (a) (1), which addresses hazards "that are causing or are likely to cause death or serious physical harm to its employees." As is common knowledge, police work and firefighting are dangerous, and concerning certain risks faced by police officers, the Court of Appeals has held:

> "that [Labor Law § 27-a] does not cover the special risks faced by police officers because of the nature of police work. The judgments that must be made by police supervisors in minimizing the danger that police officers inevitably face, while at the same time protecting the public, are uniquely sensitive, difficult and important. Police supervisors must decide, among other things, how police officers should use and store their weapons and ammunition; how much security should be provided when prisoners are transported; and where and under what conditions prisoners should be detained. We think it highly unlikely that the Legislature intended the general language of section 27-a to authorize Department of Labor inspectors enforcing PESHA to second-guess the decisions of police supervisors on matters like these" (*Williams*, 2 N.Y.3d at 368).

Williams instructs that Labor Law § 27-a does not apply where a plaintiff's injury is allegedly caused by the particular special risks endemic to the dangerous work of either firefighting or police work, as opposed to general occupational risks, because minimizing such particular special risks involves the expertise and sensitive supervisory judgments of those in these uniformed services.

The City states that the complaint does not specify the recognized hazard to which plaintiff claims he was subjected, so that it was required to assume that it was the training exercise, or the use of hoses under controlled conditions during the exercise, as stated in the notice of claim and complaint, where plaintiff alleged that he was not properly trained and did not know how to properly operate the new fire hose. The City argues that because the training exercise involved the use of supervisory discretion and judgment in providing a proper training environment for

firefighters, there was no recognized hazard. Regarding such discretion and judgment, the City argues that FDNY's tactical choice to use training operations to test the new hose, and chosen methods for training, cannot be deemed recognized hazards. The City also argues that Labor Law § 27-a is inapplicable because the accident did not occur due to a physical or environmental hazard, and that cases in which courts have determined that Labor Law § 27-a is a proper predicate uniformly involved a physical condition or defective equipment.

The FDNY's tactical choice to use training operations to test a new type of hose falls into the *Williams* category of special risks and would require the type of second-guessing by PESHA inspectors that the *Williams* Court opined that the Legislature, in enacting Labor Law 27-a, likely did not intend. This, however, was not plaintiff's only allegation, and, again, in moving the City did not adequately address plaintiff's bill of particulars contentions concerning drainage issues and excessive water accumulation, a premises condition. In *Singleton v. City of New York* (13 Misc. 3d 1173, 1177-1178 [Sup Ct, Kings County 2006]), the court dealt with the application of Labor Law § 27-a where the plaintiff/police officer alleged inadequate protections/padding in a training room, during an exercise that allegedly included the enactment of street confrontation. Defendants moved pursuant to CPLR§ 3211 to dismiss the claim. The court stated

> " it cannot yet be determined whether such a training exercise was sufficiently routine, standard and regulated or whether it could be construed as constituting a more unpredictable risk either inherent in, or unique to, police work. . . . Given that plaintiff's section 205-e claim, as pleaded, essentially alleges that she was provided with a room inadequate for its purpose and no safety equipment with which to perform her assigned task of participating in the subject training exercise, the court finds that the violation of section 27-a alleged herein is properly construed as analogous to the provision of a dangerous horse to the plaintiff in *Campbell* or the unpadded computer console in *Balsamo*, and does not merely implicate policies utilized to manage the inherent dangers of police work as was the case in *Williams*. Accordingly, having adequately pleaded a cognizable violation of section 27-a by the City, plaintiff's section 205-e claim is not subject to dismissal under CPLR 3211 (a) (7)" (*id.* at 1177-1178).

Here, the City asserts that the training room was intended to simulate field conditions in an attorney affidavit, which is not admissible evidence. The City also did not submit evidence to demonstrate that FDNY intended there to

be a large accumulation of water on the floor at the start of an exercise, or that, whatever the drainage/water accumulation conditions existing on the date of the incident, that those conditions implicated policy or supervisory decision concerning the special risks of firefighting, or were not a recognized hazard (*see Gammons*, 109 A.D.3d at 201-202 [City did not meet evidentiary burden to demonstrate fall off of truck is not a recognized hazard]).[10] As the City correctly notes, extinguishing fire with a hose and water would lead to water on the floor, undoubtedly an inherent condition in actual firefighting.

However, this case involves a training facility, where the record suggests that the FDNY regulated the environment, including the drainage, and otherwise (*see* defendant's moving affidavit, exh. F at 65-66 [indicating that the fire was controlled]; exh. E at 50 [same]). While the presence of some water on the floor from a prior exercise may have been inevitable, the City does not demonstrate that the conditions that existed on the date that plaintiff fell reflected supervisory judgment to faithfully replicate difficult field conditions involving water, as the City conclusorily asserts.[11] Therefore, on this record, summary judgment must be denied.

As the City has not met its burden to demonstrate that the predicates asserted by plaintiff do not apply,[12] it has not met its burden to demonstrate that plaintiff has not alleged and cannot prove violation of a GML § 205-a predicate provision, and its motion must be denied. Consequently, it is unnecessary to address the other predicates that plaintiff asserts. As discussed above, the City's reply argument about the notice of claim deficiency concerning drainage is improperly raised for the first time in reply (*see Azzopardi*, 192 A.D.2d at 454; *Ritt*, 182 A.D.2d at 562; *Dannasch*, 184

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[10]While the City has provided testimony that after training drills the amount of water on the ground would be less than what firefighters typically encounter (Exh. G at 88), it does not demonstrate that this was the case on the date of the drill, and plaintiff's testimony suggests that there was a large accumulation of water on the floor.

[11]Other than the parties' agreement that a new type of hose was involved, the City did not demonstrate that the drill in which plaintiff was engaged was not "standard, routine and regulated" (*Singleton*, 13 Misc 3d. at 1177). There was testimony, including plaintiff's, that the training facility contained drainage, but the City did not provide admissible evidence to demonstrate that it was adequate and in working order, or that there was no excessive, unintended, accumulation of water on the date of the incident.

[12]The City did not adequately address Administrative Code (Fire Code) § 29-107.5, and therefore did not meet its burden in moving concerning that code.

A.D.2d at 417), and it and the City's other newly-raised reply arguments also will not be addressed here.

As the negligence claim has been dismissed, the City's unopposed motion for summary judgment dismissing the derivative claim of SueAnn Rocco is granted, as no cause of action for loss of consortium is authorized under GML § 205-a (*see Korfman v. Parkway Vil. Assoc.*, 110 A.D.2d 886, 887 [2d Dept 1985]).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion of the City of New York is granted to the extent that the first and third causes of action of the complaint are dismissed and is otherwise denied; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: October 16 2013

OCT 16 2013

ENTER:

Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED

OCT 23 2013

COUNTY CLERK'S OFFICE
NEW YORK