# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** Hon Joan A. Madden **PART** 11
*Justice*

Index Number : 150115/2011
GIBLIN, JAMES
vs.
SOLOFF MANAGEMENT
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

**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 the annexed Memorandum Decision/Order.

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

**Dated:** October 18, 2013

HON. JOAN A. MADDEN J.S.C.

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 11

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JAMES GIBLIN,

**Decision and Order**

Plaintiff,

Index # 150115/11

-against-

SOLOFF MANAGEMENT CORP.
and 79 S N LTD.,

Defendants.

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JOAN A. MADDEN, J.:

In this personal injury action, defendants Soloff Management Corp. (Soloff) and 79 S N Ltd. (79 S N) (collectively defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Plaintiff, James Giblin (Giblin), cross-moves, pursuant to CPLR 3025 to amend the complaint and, pursuant to CPLR 3212, for summary judgment on liability on the amended complaint.

## BACKGROUND

On October 5, 2010, plaintiff, a police officer, was injured, while on duty, when an alleged perpetrator (Lyles) fled from a building located at 83 St. Nicholas Place in Manhattan (the building). According to the complaint, Lyles collided with plaintiff who was guarding the entrance of that building while his fellow police officers were inside investigating a report of drug activity on the premises. Following the collision, plaintiff and Lyles fought and, following the collision and fight, plaintiff required at least 25 stitches to close a cut on his face (Mascolo aff, exhibit A [complaint] ¶¶ 9-18). The

building is owned by defendant 79 S N and it is managed by an entity that was formerly known as defendant Soloff.

Plaintiff alleges that Lyles was able to gain access to the building because the entry door was unlocked (complaint, ¶¶ 35, 37) and that the lack of security cameras in the building created a haven for criminals (complaint, ¶ 36)

The complaint alleges causes of action, against 79 S N and Soloff, sounding in: 1) negligence for failure to provide adequate and proper security for the premises; 2) failure to provide plaintiff with a safe place to work; and 3) violation of section 200 of the Labor Law.

**CONTENTIONS**

In support of the motion for summary judgment dismissing the complaint, the defendants argue that: 1) the "firefighter's rule" (General Obligations Law [GOL] § 11-106 [1]) bars plaintiff from maintaining his negligence causes of action; 2) there is no evidence that the alleged lack of security at the building was the proximate cause of plaintiff's injuries; 3) the incident was not foreseeable; 4) Lyles's actions were a superceding/intervening cause; 5) they were not on notice of any defective conditions at the premises; and 6) Labor Law § 200 and the common-law duty to provide an employee with a safe place to work are not applicable to the facts of this case.

In opposition to the motion, and in support of the cross motion to amend and for summary judgment on liability, plaintiff claims that there is a question of fact about whether the entrance doors were negligently maintained and/or whether there was adequate security. Moreover, plaintiff argues that defendants were on notice about the poor security and prior criminal activity and that, despite defendants' knowledge, they

failed to take precautions to protect tenants and lawful visitors from allegedly foreseeable criminal acts.

Plaintiff also seeks to amend the complaint to add a allegations that the negligence claims are not barred by the so-called "firefighters rule" based on GOL § 11-106 (1), under which a plaintiff who is a police officer (or firefighter) may recover for injuries sustained in the line-of-duty when his injuries are caused by defendants' negligent conduct, and not by a fellow police officer or other co-employee

DISCUSSION

Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman v City of New York*, 49 NY2d at 562; *see also Ellen v Lauer*, 210 AD2d 87, 90 [1st Dept 1994][it "is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists . . . [citations omitted]").

**Negligence**

Prior to 1996, police officers were barred from asserting common law negligence claims for injuries sustained in the line-of-duty. The so-called "firefighter's rule" barred police officers and firefighters from recovering for line-of-duty injuries that occurred as a result of specific risks inherent in their duties (*see Santangelo v State of New York*, 71 NY2d 393, 397 [1988]). In 1996, the legislature enacted GOL § 11-106,[1] which largely abolished the "firefighter's rule" by giving firefighters and police officers a cause of action in negligence for line-of-duty injuries (except for actions against co-workers and municipal employers) (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 78 [2003]).

As noted above, with respect to GOL § 11-106(1), defendants seek dismissal on the grounds that plaintiff's cause of action for common law negligence is barred under its provisions and plaintiffs seek to amend the complaint on the grounds that the complaint states a viable cause of action for negligence under the statute. For the reasons below, defendants' motion for summary judgment is granted, and plaintiff's cross motion to amend and for partial summary is denied.

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[1] GOL 11-106 (1) states in pertinent part:

> "[i]n addition to any other right of action or recovery otherwise available under law, whenever any police officer . . .suffers any injury, disease or death while in the lawful discharge of his official duties and that injury, disease or death is proximately caused by the neglect, willful omission, or intentional, willful or culpable conduct of any person or entity, other than that police officer's . . . employer or co-employee, the police officer . . . suffering that injury . . . may seek recovery and damages from the person or entity whose neglect, willful omission, or intentional, willful or culpable conduct resulted in that injury. . ."

In order to prove a cause of action for common-law negligence pursuant to GOL 11-106(1), Giblin must establish that there was a duty owed by defendants to the plaintiff, a breach of that duty and an injury proximately caused by that breach (*Irizarry v Heller*, 95 AD3d 951, 952-953 [2d Dept 2012]). In *Giuffrida* (100 NY2d at 80), the Court of Appeals defined proximate cause to mean "[a] cause that directly produces an event and without which the event would not have occurred" (internal quotation marks and citation omitted). In contrast, the Court explained that:

> "indirect causation involves a somewhat less than direct and unimpeded sequence of events resulting in injury. Whereas [proximate] causation requires that the defendant's conduct be a substantial causative factor, an indirect cause is simply a factor that – though not a primary cause – plays a part in producing the result"

(*id.* [internal quotation marks and citations omitted]).

Here, plaintiff has failed to establish his prima facie case that his injuries were proximately caused by breach of a duty that defendants allegedly owed to him. Rather, in this case, defendants have established their prima facie case for dismissal by demonstrating that the proximate cause of Giblin's injuries was an assault –collision and the fight that followed – by Lyles (complaint, ¶¶ 12 - 24; Mascolo affirmation, exhibit E [Giblin trans.], at 43-46; Mascolo affirmation, exhibit G [Keung trans.] at 28-29; Mascolo affirmation, exhibit H [Irvin trans], at 22-25). Although the alleged lack of security on the premises may have indirectly contributed to the event, the causal connections between the unsecured door and plaintiff's injuries are too remote for the imposition of liability under a theory of common-law negligence (*see Betterly v Estate of*

*Silver*, 266 AD2d 30, 30 [1st Dept 1999]; *see also Coronel v Chase Manhattan Bank*, 19 AD3d 310, 311 [1st Dept 2005] *affd* 8 NY3d 838 [2007]).

As defendants have established as matter of law that there is no casual connection between any alleged negligence of defendants and plaintiff injuries, the court need not reach whether Lyle's criminal conduct was reasonably foreseeable based on prior criminal activity, including drug use, in or near the building.

**Labor Law § 200 and Safe Place to Work Claims**

Labor Law § 200 is a codification of the common-law duty placed on owners and contractors to provide employees with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). Liability common-law negligence and for violations of Labor Law § 200 may be imposed on those who exercise control or supervision over the means and methods that a plaintiff employs in his work (*id.*). In this case, defendants neither employed the plaintiff nor supervised or controlled the way plaintiff, a police officer, performed his job. Under the facts of this case, neither the duties imposed by Labor Law § 200 nor the common-law "safe place to work" rules apply to the defendants (*see Xirakis v 1115 Fifth Ave. Corp.*, 226 AD2d 452, 454 [2d Dept 1996] [neither labor law nor common law negligence claims survived dismissal where defendants did not direct or control plaintiff's work]). Accordingly, the second and third causes of action sounding in negligent failure to provide a safe place to work and liability based on Labor Law § 200 are dismissed.

Therefore, it is

ORDERED that defendants Soloff Management Corp. and 79 S N Ltd.'s motion for summary judgment dismissing the complaint is granted and the complaint is

dismissed with costs and disbursements to the defendants as taxed by the Clerk upon submission of an appropriate bill of costs and; it is further

ORDERED that plaintiff James Giblin's cross motion to amend the complaint and for summary judgment on liability is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: October 8, 2013

J.S.C.

HON. JOAN A. MADDEN
J.S.C.