CASE DISMISSED

C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X
PAUL VISELLI and DORI-ANN VISELLI

Index No: **300585/2013**

Plaintiffs,

-against-

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

THE RIVERBAY CORPORATION,

Defendant. X

The following papers numbered 1 to **5** read on this motion **for summary judgment**

No On Calendar of **August 17, 2015**	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	**1**
Answering Affidavit and Exhibits	**2**
Replying Affidavit and Exhibits	**5**
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	**1a, 3, 4**
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. This action arose as a result of personal injuries sustained by plaintiff, Paul Viselli, (Viselli), while employed as a firefighter. Viselli was descending a staircase on defendant's property, while in the process of responding to a fire alarm. Viselli slipped on a wet substance on the staircase, which resulted in injuries.

There are three causes of action: common law negligence, a claim under the statutory right granted to firefighters in General Municipal Law 205-a, and a derivative claim of co-plaintiff, Dori-Ann Viselli.

Preliminarily, the defendant's expert's affidavit is timely under a revision to CPLR 3212(b) which reads as follows: "Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (I) of paragraph (1) of

subdivision (D) of section 3101 was not furnished prior to the submission of the affidavit."

> General Municipal Law § 205-a creates a cause of action for firefighters where injury results from the negligent failure to comply with local ordinances, *inter alia.* Alleged here are violations of various provisions of title 27 of the Administrative Code of the City of New York, to wit: section 27-127 (general requirement to maintain buildings and their parts in a safe condition), section 27-128 (owner responsibility for safe maintenance of a building and its facilities), and section 27-2011 (requirement of an owner to maintain the public parts of a building in a clean and sanitary condition). Notice of the condition (*Lusenskas v Axelrod,* 183 AD2d 244, *appeal dismissed* 81 NY2d 300) can be inferred from evidence in the record of defendant's continuing battle with tenants who leave garbage in the common areas of the building (*see, O'Connell v Kavanagh,* 231 AD2d 29).
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> While a common-law claim requires a greater threshold of notice of the hazardous condition, there was ample evidence in the record that tenants would leave garbage in bags in the common areas,
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> *O'Grady v. New York City Hous. Auth.,* 259 A.D.2d 442 [1st Dept 1999).

Under *O'Grady*, it is clear that notice is an element in a GML 205-a claim. In O'Grady, a fire fighter slipped on a liquid substance from a bag of garbage that was on the staircase. In the case at bar, the substance was unknown. Multiple firefighters, including Viselli, testified that they did not notice any liquid substance on the staircase where Viselli fell when they ascended the staircase. No complaints had been received regarding the area where Viselli fell. There is no evidence of either constructive or actual notice to defendant of any liquid on the stairs. Therefore, the liquid substance on the staircase is neither a basis for defendant's liability under GML 205-a nor common law negligence.

With respect to the Building Code violations alleged by plaintiff, it is undisputed that the building was in existence prior to the enactment of the 1968 Building Code. "The [1968] Building Code does not apply since the building pre-dated its effective date (*see* § 27–111), and the exceptions to the grandfathering provision are inapplicable. In no 12–month period did the

building ever undergo alterations that cost 30% or more of the building's value. Plaintiff's current argument that the landlord failed to reveal the source of its knowledge as to the lack of pre–1995 qualifying alterations is both unpreserved and without merit.

Isaacs v. W. 34th Apts. Corp., 36 A.D.3d 414, 416, 828 N.Y.S.2d 308, 310 (2007)

Plaintiffs argue that defendant failed to address plaintiff's GML 205-a claims. However, by addressing the alleged statutory violations in seriatim, in both defendant's attorney's affirmation and in the defendant's expert, Vincent A. Ettari's, (Ettari), affidavit, the alleged statutory violations were shown to be inapplicable.

With respect to the alleged slipperiness of the steps from which Viselli fell, Ettari tested the coefficients of friction for the pertinent treads and landings and found a coefficient of friction of 0.550 to 0.625. Ettari provided a quote from a text entitled "Pedestrian Slip Resistance" which states: "[m]ost people can walk on most surfaces with a slip index of less than .3, and the .5 gives a margin of safety." Thus, testing on the pertinent treads indicate that they have an adequate co-efficient of friction. Similarly, Ettari's actual testing of the pertinent stairwell lighting indicates that the stairwell is well lit.

> Plaintiff failed to rebut this showing. The affidavit of plaintiff's expert was speculative and conclusory, and thus insufficient to raise an issue of fact (*see Buchholz v. Trump 767 Fifth Ave.,* 5 N.Y.3d 1, 798 N.Y.S.2d 715, 831 N.E.2d 960 [2005]; *Santoni v. Bertelsmann Prop.,* 21 A.D.3d 712, 800 N.Y.S.2d 676 [2005]; *Bean v. Ruppert Towers Hous. Co.,* 274 A.D.2d 305, 710 N.Y.S.2d 575 [2000]). The expert never visited the premises or inspected the circuit breakers that he alleged were deficient or defective.
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> *Zvinys v. Richfield Inv. Co.,* 25 A.D.3d 358, 359-60 [1st Dept 2006]).

Accordingly, defendant's motion is granted and the complaint is hereby dismissed.

The foregoing shall constitute the decision and order of the Court.

Dated: DEC 24 2015

KENNETH L. THOMPSON JR. J.S.C.