

Maheer v White
2016 NY Slip Op 32530(U)
November 9, 2016
Supreme Court, Suffolk County
Docket Number: 12-3502
Judge: Denise F. Molia
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SHORT FORM ORDER

COPY

INDEX No. 12-3502
 CAL. No. 15-01761OT

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
 Acting Justice of the Supreme Court

MOTION DATE 10-2-15 (004)
 MOTION DATE 11-20-15 (005x)
 MOTION DATE 1-8-16 (006)
 MOTION DATE 1-8-16 (007x)
 ADJ. DATE 4-8-16
 Mot. Seq. # 004 - MG
 # 005x - MD
 # 006 - MG
 # 007x- MD; CASEDISP

-----X
 JOSEPH B. MAHER,

Plaintiff,

-against-

CHARLES WHITE, WELLS FARGO
 FINANCIAL NEW YORK, INC. AND
 CARRINGTON MORTGAGE SERVICES, LLC,
 LPS MORTGAGE PROCESSING SOLUTIONS,
 INC., LPS NATIONAL TAXNET, INC., LPS
 REAL ESTATE DATA SOLUTIONS, INC., LPS
 FIELD SERVICES INC., LENDER
 PROCESSING SERVICES, INC., FIDELITY
 NATIONAL MANAGEMENT SERVICES, LLC,
 LPS SERVICES LLC, BKIS LLC, BLACK
 KNIGHT REAL ESTATE DATA SOLUTIONS,
 LLC and SERVICELINK, LLC,

Defendants.
 -----X

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Upon the following papers numbered 1 to 112 read on this motion for summary judgment; Notice of Motion/
 Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers 23 - 31; 81 - 105;
 Answering Affidavits and supporting papers 106 - 110; Replying Affidavits and supporting papers 32 - 33; 111 - 112; Other
 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions by defendants LPS Mortgage Processing Solutions, Inc., LPS
 National Taxnet, Inc., LPS Real Estate Data Solutions, Inc., LPS Field Services Inc., Lender Processing

RST

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Services, Inc., Fidelity National Management Services, LLC, LPS Services LLC, BKIS LLC, Black Knight Real Estate Data Solutions, LLC, Servicelink, LLC, Wells Fargo Financial New York, Inc., and Carrington Mortgage Services, LLC, and the cross motions by plaintiff are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (#004) by defendants LPS Mortgage Processing Solutions, Inc., LPS National Taxnet, Inc., LPS Real Estate Data Solutions, Inc., LPS Field Services Inc., Lender Processing Services, Inc., Fidelity National Management Services, LLC, LPS Services LLC, BKIS LLC, Black Knight Real Estate Data Solutions, LLC, and Servicelink, LLC for an order granting summary judgment dismissing the complaint as asserted against them is granted; and it is further

ORDERED that the cross motion (#005) by plaintiff for an order granting summary judgment against defendants LPS Mortgage Processing Solutions, Inc., LPS National Taxnet, Inc., LPS Real Estate Data Solutions, Inc., LPS Field Services Inc., Lender Processing Services, Inc., Fidelity National Management Services, LLC, LPS Services LLC, BKIS LLC, Black Knight Real Estate Data Solutions, LLC, and Servicelink, LLC is denied; and it is further

ORDERED that the motion (#006) by defendants Wells Fargo Financial New York, Inc. and Carrington Mortgage Services, LLC for an order granting summary judgment dismissing the complaint as asserted against them is granted; and it is further

ORDERED that the cross motion (#007) by plaintiff for an order granting summary judgment against defendants Wells Fargo Financial New York, Inc. and Carrington Mortgage Services, LLC is denied.

This is an action to recover for damages allegedly sustained by plaintiff Joseph B. Maher as a result of a slip and fall accident that occurred on the morning of May 26, 2011. The accident allegedly happened when plaintiff was working as a Nassau County police officer with a team of other officers and U.S. Marshals in an attempt to execute a parole arrest warrant at a residence located at 32 Moore Avenue, Hempstead, New York. However, the team found the residence empty and it received information that the subject was present at an adjacent property located at 28 Moore Avenue, the subject premises. The team then entered the subject premises and, after searching the first two floors of the residence to no avail, plaintiff entered the attic with two team members. When the subject was not found, all of the team members left the residence, except plaintiff. While he was descending the flight of stairs used to access the attic, one stair tread allegedly broke, causing plaintiff to fall down the remaining steps and land in the hallway below.

By his verified complaint, plaintiff alleges, among other things, that General Obligations Law § 11-106 and General Municipal Law § 205-e permit him to seek recovery against defendants, as he was injured while in the lawful discharge of his official duties and that such injuries were proximately caused by defendants' common-law negligence, as well as in failing to comply with the requirements of municipal statutes, ordinances, or rules. Plaintiff further alleges that the subject accident was due to defendants' negligence in the "management, operation, control, and special use of" the premises,

namely, failing to keep the property secure and failing to perform proper maintenance thereon. In addition, plaintiff alleges that the premises was in violation of various town, village, fire prevention, and building codes. In their verified answers, defendants deny plaintiff's allegations and assert several affirmative defenses.

During discovery, it was determined that defendant Charles White was the owner of the subject premises on the date of the accident, and that he had defaulted on his mortgage loan payments in April 2011, shortly before the accident. At the time of the accident, a mortgage was held on the property by nonparty Wells Fargo Bank, N.A., as Trustee for Carrington Mortgage Loan Trust, and the mortgage loan was serviced by defendant Carrington Mortgage Services, LLC. As servicer of the mortgage loan, defendant Carrington Mortgage Services executed contracts with various parties, including defendants LPS Mortgage Processing Solutions, Inc., LPS National Taxnet, Inc., LPS Real Estate Data Solutions, Inc., LPS Field Services Inc., Lender Processing Services, Inc., Fidelity National Management Services, LLC, LPS Services LLC, BKIS LLC, Black Knight Real Estate Data Solutions, LLC, and Servicelink, LLC (hereinafter referred to as the "LPS defendants"), to perform cursory property inspections and maintenance upon premises whose mortgagors had defaulted on loan payments. These limited inspections and maintenance tasks, such as landscaping and exterior door security, were performed in attempts to preserve the value of the collateral used to secure the mortgage loans. A lis pendens was filed against the property in conjunction with a foreclosure proceeding on or about April 16, 2014.

The LPS defendants now move for summary judgment, arguing that they owed no duty to plaintiff to maintain the subject premises in reasonably safe condition. In support, the LPS defendants submit, among other things, a copy of a deed to the subject premises dated February 18, 2004; a copy of a mortgage on the subject property dated September 15, 2006; a copy of an assignment of the September 15, 2006 mortgage dated June 10, 2010; a copy of a lis pendens filed against the subject property dated April 16, 2014; transcripts of the deposition testimony of Chris Lechtanski, on behalf of defendant Carrington Mortgage Services, Joseph Iafelice, on behalf of defendant Servicelink, LLC, and plaintiff; a property preservation services contract dated April 12, 2011 and executed by defendants LPS Field Services and Carrington Mortgage Services; and copies of property inspection records for the subject premises.

Defendants Wells Fargo Financial New York, Inc. and Carrington Mortgage Services, LLC (hereinafter referred to as "the Mortgage defendants") separately move for summary judgment, also arguing that they did not owe any duty to plaintiff to maintain the subject premises in reasonably safe condition. The Mortgage defendants argue that they had no ownership or control over the subject property, as defendant Wells Fargo Financial New York never held any mortgage on it, and defendant Carrington Mortgage Services merely serviced the mortgage loan. In support of their motion, the Mortgage defendants submit, among other things, an affidavit of Elizabeth Ostermann, Vice President of defendant Carrington Mortgage Services; an affidavit of David Diaz, Vice President of nonparty Wells Fargo Bank; a partial copy of a pooling and servicing agreement between nonparties Wells Fargo Bank and New Century Mortgage Corporation, LLC; and a copy of a limited power of attorney executed in favor of defendant Carrington Mortgage Services.

Plaintiff cross-moves for summary judgment against the LPS defendants, and separately cross-moves for the same relief against the Mortgage defendants, asserting that he is entitled to recovery against them under General Municipal Law § 205-e, because the subject premises was in violation of the Village of Hempstead Code §§ 65-2 and 78-7 at the time of the accident. In the alternative, plaintiff argues that the LPS defendants are liable for his injuries because they had entirely displaced the property owner's duty to maintain the premises in a reasonably safe condition. In support of his cross motion against the LPS defendants, plaintiff submits, among other things, an affidavit of professional engineer Paul J. Angelides, P.E. with attached photographs, and an affidavit of Steve Neary. In support of his cross motion against the Mortgage defendants, plaintiff submits, among other things, copies of various citations issued by the Village of Hempstead in regards to the subject premises. The Mortgage defendants oppose plaintiff's cross motion, arguing that plaintiff has failed to rebut defendant Wells Fargo Financial New York's prima facie showing that it is an improper party to the action, and that plaintiff cannot establish a claim against either defendant under General Municipal Law § 205-e, as neither owned nor had control of the subject premises at the time of the accident. Further, the Mortgage defendants argue that Mr. Neary's affidavit is not properly before the Court, as he was not identified as an expert witness until March 2, 2016, over five months after the note of issue was filed. In opposition, the Mortgage defendants submit an affirmation of their attorney and an expert exchange notice. In reply, plaintiff submits an affirmation of his attorney.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

Plaintiff's cross motion for summary judgment in favor of his claims against the Mortgage defendants is denied. CPLR 3212 (a) provides that if no date for making a summary judgment motion has been set by the Court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]). The "good cause" requirement set forth in CPLR 3212 (a) "requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness – rather than simply permitting meritorious, non-prejudicial filings, however tardy" (*Brill v City of New York*, *supra*, at 652). Here, plaintiff served his cross motion against the Mortgage defendants on February 25, 2016, nearly five months after the note of issue was filed. As plaintiff has not offered any reason for his delay in filing his cross motion, he has failed to show "good cause" for its untimeliness. As such, his cross motion against the Mortgage defendants is denied (*see CPLR 3212[a]*; *Brill v City of New York*, *supra*; *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 86, 978 NYS2d 13, 22 [2d Dept 2013]).

As to the remaining motions, traditionally, common-law negligence claims by police officers and firefighters to recover for injuries sustained in the line of duty were barred by the “firefighter’s rule” (*see Wadler v City of New York*, 14 NY3d 192, 899 NYS2d 73 [2010]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 760 NYS2d 397 [2003]; *Kelly v City of New York*, 134 AD3d 676, 20 NYS3d 572 [2d Dept 2015]). However, General Obligations Law § 11-106 creates an exception to this rule, stating that “whenever any police officer or firefighter suffers any injury, disease or death while in the lawful discharge of his [or her] official duties and that injury, disease or death is proximately caused by the neglect . . . of any person or entity, other than that police officer’s or firefighter’s employer or co-employee,” the injured police officer or firefighter or, in the case of death, a representative of such police officer or firefighter, may seek to recover from the person whose negligence caused the injury, disease or death. Nevertheless, the firefighter’s rule still precludes police officers and firefighters from recovering in common-law negligence for line-of-duty injuries that occurred while performing an act “in furtherance of a specific police or firefighting function” which exposes the police officer or firefighter to a heightened risk of sustaining the particular injury (*Zanghi v Niagara Frontier Transp. Commn.*, 85 NY2d 423, 439, 626 NYS2d 23 [1995]; *see Kelly v City of New York*, *supra*; *Carro v City of New York*, 89 AD3d 1049, 933 NYS2d 605 [2d Dept 2011]).

General Municipal Law § 205-e creates a statutory cause of action for police officers injured by another person’s failure “to comply with the requirements of any statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all of their departments, divisions and bureaus.” To establish a cause of action under the statute, a police officer 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 the harm (*see Gammons v City of New York*, 24 NY3d 562, 570, 2 NYS3d 45, 50 [2014]; *Williams v City of New York*, 2 NY3d 352, 363, 779 NYS2d 449, 454 [2004]; *D’Andrea v Bond*, 141 AD3d 682, 35 NYS3d 474 [2d Dept 2016]). Despite the broad language of the statute, a police officer seeking recovery must demonstrate his or her injury resulted from the defendant’s “noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties,” such as provisions of the Vehicle and Traffic Law and the Penal Law (*Williams v City of New York*, *supra*, at 364; *see Galapo v City of New York*, 95 NY2d 568, 574, 721 NYS2d 857, 860 [2000]; *Desmond v City of New York*, 88 NY2d 455, 464, 646 NYS2d 492, 496 [1996]; *Lewis v Palazzolo*, ___ AD3d ___, 2016 NY Slip Op 06686 [2d Dept 2016]). Such a police officer must establish a causal connection between the alleged violation and the injuries sustained (*see Byrne v Nicosia*, 104 AD3d 717, 961 NYS2d 261 [2d Dept 2013]; *Jablonski v Jakaitis*, 85 AD3d 969, 926 NYS2d 137 [2d Dept 2011]; *Cerati v Berrios*, 61 AD3d 915, 878 NYS2d 160 [2d Dept 2009]).

A plaintiff seeking damages for personal injuries in a premises liability action must first establish, as a matter of law, that the defendant or defendants owed him or her a duty of reasonable care to maintain the property in a reasonably safe condition (*see Rivera v Nelson Realty, LLC*, 7 NY3d 530, 534, 825 NYS2d 422, 424 [2006]; *Tagle v Jakob*, 97 NY2d 165, 168, 737 NYS2d 331, 333 [2001]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 13, 929 NYS2d 620, 623 [2d Dept 2011]). Without this duty of reasonable care on the part of a defendant, there can be no breach of such duty and,

therefore, no proximate cause of plaintiff's injuries as a result of the breach (*see Conneally v Diocese of Rockville Ctr.*, 116 AD3d 905, 984 NYS2d 127 [2d Dept 2014]; *Ortega v Liberty Holdings, LLC*, 111 AD3d 904, 976 NYS2d 147 [2d Dept 2013]; *Nappi v Inc. Vill. of Lynbrook*, 19 AD3d 565, 796 NYS2d 537 [2d Dept 2005]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control, or special use of the property (*see Reynolds v Avon Grove Props.*, 129 AD3d 932, 12 NYS3d 199 [2d Dept 2015]; *Chernoguz v Mirrer Yeshiva Cent. Inst.*, 121 AD3d 737, 994 NYS2d 362 [2d Dept 2014]; *Gover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 869 NYS2d 593 [2d Dept 2008]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see Peralta v Henriquez*, 100 NY2d 139, 760 NYS2d 741 [2003]; *Frank v JS Hempstead Realty, LLC*, 136 AD3d 742, 24 NYS3d 714 [2d Dept 2015]; *Guzman v State of New York*, 129 AD3d 775, 10 NYS3d 598 [2d Dept 2015]).

The LPS defendants' and the Mortgage defendants' submissions motions are granted. Here, the moving defendants' submissions established a prima facie case that they owed no duty to plaintiff to keep the subject premises secure or to maintain them in reasonably safe condition, as they neither owned nor controlled the subject property at the time of the accident (*see Rivera v Nelson Realty, LLC, supra*; *Reynolds v Avon Grove Props., supra*; *Conneally v Diocese of Rockville Ctr., supra*). The deed dated February 18, 2004 demonstrates that the owner of the subject premises is defendant Charles White. The mortgage dated September 15, 2006 shows that nonparty Somerset Investors Corp. Was the mortgagee, and the assignment of mortgage dated June 8, 2010 shows that the mortgage was assigned to nonparty Wells Fargo Bank, as Trustee for Carrington Mortgage Loan Trust. These documents demonstrate, prima facie, that defendant Charles White was the owner of the subject property on the date of the accident, and that the LPS defendants and the Mortgage defendants had no ownership interest or control over it at that time (*see Suero-Sosa v Cardona*, 112 AD3d 706, 977 NYS2d 61 [2d Dept 2013]; *Forbes v Aaron*, 81 AD3d 876, 918 NYS2d 118 [2d Dept 2011]; *Pollard v Credit Suisse First Boston Mtge. Capital, LLC*, 66 AD3d 862, 887 NYS2d 626 [2d Dept 2009], *lv denied*, 14 NY3d 708, 900 NYS2d 731 [2010]). Moreover, defendant Charles White has not yet been divested of his title and interest in the subject property because there has not been an entry of a judgment of foreclosure, and a sale in conjunction therewith has not actually been conducted (*see Forbes v Aaron, supra*; *Pollard v Credit Suisse First Boston Mtge. Capital, LLC, supra*).

Plaintiff's submissions in support of his cross motion against the LPS defendants and in opposition to movants' summary judgment motions fail to demonstrate that the LPS defendants owed him any duty of care (*see Rivera v Nelson Realty, LLC, supra*; *Tagle v Jakob, supra*; *Alnashmi v Certified Analytical Group, Inc., supra*). The affidavits of professional engineer Mr. Angelides and Mr. Neary do not establish that the LPS defendants had any control over the subject property so as to impose a duty upon them to keep it secure or to maintain it in any way (*see Suero-Sosa v Cardona*, 112 AD3d 706, 977 NYS2d 61 [2d Dept 2013]; *Forbes v Aaron*, 81 AD3d 876, 918 NYS2d 118 [2d Dept 2011]; *Pollard v Credit Suisse First Boston Mtge. Capital, LLC, supra*). These affidavits attempt to show that the subject premises were in a dangerous and defective condition, not that the LPS defendants bore any liability for same. In addition, plaintiff's common-law negligence claim is barred by the "firefighter's rule" (*see Wadler v City of New York, supra*; *Giuffrida v Citibank Corp., supra*; *Kelly v City of New*

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York, supra). Plaintiff, who sought and received disability benefits for the injuries he sustained, was executing an parole arrest warrant at the time of the subject accident. The injuries plaintiff sustained from his fall from the attic stairs occurred during an act in furtherance of a police function which exposed him to a heightened risk of sustaining that injury, and they were directly related to the heightened dangers police officers assume as part of their job duties (*see Zanghi v Niagara Frontier Transp. Commn., supra; Kelly v City of New York, supra; Carro v City of New York, supra*).

Finally, as to the claim under General Municipal Law § 205-e, plaintiff alleges that the defendants failed to comply with Village of Hempstead Code §§ 65-2 and 78-7. Section 65-2 forbids any owner or person having charge or control of any vacant building or structure to permit same to remain in a condition constituting a fire hazard or accessible to children or to permit the dumping or accumulation of rubbish at or about such premises. Section 78-7 imposes a duty upon owners, operators, or occupiers of buildings and structures to maintain these premises and to keep them free of all nuisances and of any hazards to the safety of the occupants, pedestrians, and all persons utilizing them. Even if plaintiff's submissions demonstrated a causal connection between defendants' alleged violations of these codes and his injuries (*see Byrne v Nicosia, supra; Jablonski v Jakaitis, supra; Cerati v Berrios, supra*), a cause of action under this statute may not be predicated upon such general code provisions (*see Williams v City of New York, supra; Galapo v City of New York, supra; Desmond v City of New York, supra; Lewis v Palazzolo, supra*).

In light of the foregoing, the motions by the LPS defendants and the Mortgage defendants for summary judgment are granted, and the cross motions by plaintiff for summary judgment are denied.

Dated: 11-9-16

Hon. Denise R. Moka

A.J.S.C.

X FINAL DISPOSITION NON-FINAL DISPOSITION