

**Sawchuk v 335 Realty 58 Associates**

2006 NY Slip Op 30460(U)

October 24, 2006

Supreme Court, New York County

Docket Number: 108058/02

Judge: Shirley Werner Kornreich

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

PRESENT: **SHIRLEY WERNER KORNREICH**  
J.S.C.

PART 54

Index Number : 108058/2002

SAWCHUK, CAROL

vs  
335 REALTY 58 ASSOCIATES

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 9/2/06  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 13 were read on this motion to/for Summary

*judgment & cross-motion for summary judgment*

PAPERS NUMBERED

1-3  
4-9  
10-13 (including 12A)

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits  
*+ motion papers on motion sequenced 007*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
NOV 03 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

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WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

**SHIRLEY WERNER KORNREICH**  
*[Signature]*  
J.S.C.

Dated: 10/24/06

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
CAROL SAWCHUK,

Plaintiff,

Index No.: 108058/02

-against-

**DECISION & ORDER**

335 REALTY 58 ASSOCIATES, a General Partnership,  
and MARTIN HOLLANDER, BAYRAM RODOPLU,  
HICRAN RODOPLU, and ROCKAWAY FUEL OIL  
CORP., MARIN MANAGEMENT CORP., and  
SANITARY PLUMBING & HEATING,

Defendants.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

**FILED**  
NOV 03 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Motion Sequence numbers 006 and 007 are hereby consolidated for disposition

In this action for personal injuries, defendants move by separate motions and cross-motion for summary judgment dismissing the second amended complaint. At oral argument, the parties consented to the granting of summary judgment dismissing the action as against defendant Rockaway Fuel Oil Corp. ("Rockaway").

This action arises out of an accident on December 27, 2001, in which plaintiff was scalded by hot water coming out of her bathtub and shower in apartment 4R, located at 335 East 58<sup>th</sup> Street, New York, New York ("Premises"). Defendant 335 Realty 58 Associates ("335"), is a partnership that owns the Premises. The partners of 335 are the individual defendants, Martin Hollander, Byram Rodolpu, and Hicran Rodoplu, and possibly Martin Hollander's wife, Helen Hollander, who is not named as a defendant.<sup>1</sup>

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<sup>1</sup>The testimony of Martin Hollander and Bayram Rodolpu was contradictory on this point.

The Premises are managed by defendant Marin Management Corp. ("Marin"), which is wholly owned by Martin Hollander. Sanitary Plumbing & Heating ("Sanitary") provided plumbing services at the Premises. The motions and cross-motion are granted solely to the extent that summary judgment is granted in favor of Rockaway, Sanitary and Marin for the reasons that follow.

Plaintiff alleges that at the time of the accident, she was seated on the edge of the bathtub on a cloth mat. She had turned on the hot water to rinse a mop that she had used to clean the landings and stairs leading to her fourth floor walk-up apartment, in preparation for a party. She claims that she slipped and fell into the tub, which was partially filled with hot water and, in attempting to turn the hot water off, she accidentally turned on the shower. She admits that she did not turn on the cold water tap to rinse the mop and that she had been drinking wine, although she is not sure how much wine she had imbibed. It is undisputed that when plaintiff arrived at the hospital she had a blood alcohol level of 0.23. Plaintiff suffered second and third degree burns as a result of the incident, even though she alleges that she was out of the water in fifteen to twenty seconds. Plaintiff admits that she has been an alcoholic during a good portion of her adult life, a problem which worsened in the mid-nineteen-nineties.

Plaintiff's theory of liability is that the mixing valve attached to the basement boiler allowed the water to become too hot. She submits an expert report and affidavit, from an engineer, who claims expertise in scalding. The evidence to support plaintiff's theory includes the following: the mixing valve on the boiler bore a tag stating a range of 140 to 200 degrees; that temperature range is improper for domestic hot water use; there

was no gauge near the mixing valve to measure the temperature of water going to the apartments; the maximum hot water temperature for water coming out of the valve should be no more than 140 to 150 degrees Fahrenheit to generate the minimum hot water temperature of 120 degrees for apartments farthest from the boiler, as required by the New York City Building Code, §27-2031; plaintiff's expert measured the temperature of hot water coming out of plaintiff's tub at 200 degrees; second degree and third degree burns can be caused by exposure to 140 degree water for five seconds, or 158 degree water for one second. In addition, the court notes that Rockaway's expert affidavit states that each bathtub and shower should be equipped with its own mixing valve.

The individual defendants, 335 and Marin move for summary judgment on the theories that they did not have notice, actual or constructive, of excessively hot water in plaintiff's apartment and that the causal connection necessary to establish proximate cause was broken by plaintiff's inebriation, which caused her to fall and turn on the shower, by her decision not to turn on the cold water, and by her unforeseeable use of the tub to rinse a mop. Sanitary defends on the ground that it never did any work at the Premises that affected the temperature of the water going to plaintiff's apartment.

There is sufficient evidence in the record from which the jury could find that Bayram Rodolplu ("Rodolplu") had constructive notice that the mixing valve could supply excessively hot water to the apartments in the Premises. Rodolplu is a general partner of 335, which purchased the Premises in 1992. He is also employed by 335 as a superintendent of the Premises. There is evidence in the record that 335's attorneys submitted an expert disclosure in 2004, in a different action against plaintiff, stating that

“Mr. Rodolpu’s expertise emanates from his background as a steam fitter, as a plumber for 20 years ... and as a boiler repairman.” Furthermore, Rodolpu testified that he never checked the hot water temperature in the Premises, that he had the only key to the boiler room, that his duties included going to the boiler to clean and flush the automatic feeder, that the boiler was unchanged from time that 335 purchased the Premises in 1992 until the date of the accident, and that Rodolpu was the superintendent of the Premises during that period.

Accordingly, there is evidence from which a jury could infer that Rudolpu was negligent because during a nine year period he saw the tag on the boiler, observed the lack of a temperature gauge, never tested the water temperature and was experienced enough to be aware of a potential problem of excessive hot water. *Daughtery v. New York*, 137 A.D.2d 441, 444 (1<sup>st</sup> Dept. 1988)(landlord found to have constructive notice where excessive hot water existed for such long time that knowledge should have been acquired with exercise of reasonable care).

Plaintiff’s alleged inebriation is itself a question of fact, as she has submitted a medical affidavit, from a doctor experienced in metabolism and treating alcoholics, which opines that an alcoholic’s “level of intoxication and impairment cannot be adequately assessed by reliance upon a blood alcohol level.” In addition, the doctor based his opinion on “the fact that just prior to the accident the plaintiff was apparently able to pursue vigorous activity requiring a significant degree of equilibrium and balance, without any mishap.”

Plaintiff’s failure to turn on the cold water does not break the causal connection as

a matter of law. *Gottlieb v. 31 Grammercy Park South Owners Corp.*, 276 A.D.2d 417 (1<sup>st</sup> Dept. 2000)(rejecting claim that plaintiff's act of turning off the cold water was an intervening act that relieved defendant of liability as a matter of law). *Lam v. Neptune Associates*, 203 A.D.2d 335 (2d Dept. 2004) and *Chorostecka v. Kaczor*, 6 A.D.3d 643 (2d Dept. 2004), are distinguishable. In *Lam*, the plaintiff failed to present proof of actual or constructive notice. In *Chorostecka* there was no evidence that the temperature of the hot water heater was set too high, or that the boiler and hot water system was defective or violated any code. Here, by contrast, there is evidence of constructive notice, of an improper mixing valve, of lack of a temperature gauge, of lack of a mixing valve for plaintiff's bathroom, and of violation of the Building Code.

There are questions of fact that preclude summary judgment relating to plaintiff's accidental engagement of the shower, including whether she was inebriated or whether it was a consequence of the same alleged negligence of the defendants, i.e., the excessively hot water. Finally, the court finds that plaintiff's decision to rinse the mop in the tub was not unforeseeable as a matter of law, especially given the evidence that her apartment did not have a slop sink for that purpose. *Cf.*, *Rivera v. New York*, 11 N.Y.2d 856, 857 (1962)(plumbing not cause of scalding accident where child wearing wet boots balanced on curved edge of bathtub filled with hot water).

If Rodolpu is found to be negligent by the trier of fact, his negligence can be imputed to 335 on the theory of *respondeat superior*. *Riviello v. Waldron*, 47 N.Y.2d 297, 302 (1979) (doctrine of *respondeat superior* renders master vicariously liable for tort committed by servant acting within scope of employment). The individual defendants

can also be held to be vicariously liable on the basis of their status as general partners of 335, if the jury finds Rodoplu liable for the accident. *Partnership Law*, §26(a); *Judd Linseed & Sperm Oil Co. v. Hubbell*, 76 N.Y. 543 (1879); *Amsterdam Electric Light, Heat & Power Co. v. Rayher*, 43 A.D. 602 (2d Dept. 1899).

However, there is no evidence in the record upon which Marin or Sanitary could be found to be negligent. There is no evidence that Marin had actual or constructive notice of the allegedly excessive heat of the water and it is uncontradicted that such complaints were Rodoplu's responsibility. There is also no evidence that Sanitary performed any work at the Premises that had any bearing on the water temperature in plaintiff's bathroom.

The remaining contentions of the parties have been considered and have been found to be without merit. Accordingly, it is

ORDERED that summary judgment is granted in favor of Marin Management Corp. and Sanitary Plumbing & Heating Corp., and the second amended complaint and all cross-claims against said defendants are dismissed with prejudice; and it is further

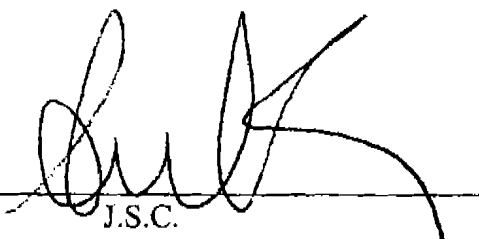
ORDERED that summary judgment is granted on consent in favor of Rockaway Fuel Oil Corp., and the second amended complaint and all cross-claims against it are dismissed with prejudice; and it is further

ORDERED that the motion for summary judgment by defendants 335 Realty 58 Associates, Martin Hollander, Bayram Rodoplu and Hicran Rodoplu, is denied, and, upon service upon him of a copy of this order with notice of entry, the Clerk is directed to sever the action as against defendants 335 Realty 58 Associates, Martin Hollander, Bayram

Rodoplu and Hicran Rodoplu, which shall continue as a separate action, and to amend the caption of the action accordingly.

Dated: October 24, 2006

ENTER:

  
J.S.C.

**FILED**  
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