[*1] INDEX NO. 103062/04

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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Ledesman, Lorenzo

INDEX NO. 103062/04

MOTION DATE

-v-

MOTION SEQ. NO. 006

Aragona Management group

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED

AUG 15 2007

COUNTY CLERK'S OFFICE NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion sequence oo5 and 006 are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion for summary judgment brought by Empire State Fueling Corp. is granted, and the third-party complaint, and all cross claims or counterclaims against Empire, are dismissed, with costs and disbursements to this party as taxed by the Clerk of the Court upon an appropriate bill of costs; and it is further

ORDERED that the motion for summary judgment brought by Abetta Boiler & Welding Service, Inc. is granted, and the third third-party action is dismissed, with costs and disbursements to this party as taxed by the Clerk of the Court upon a submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

It is further ORDERED that counsel for defendant Empire is directed to serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: 08/10/07

HON. CAROL EDMEAD, J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

----------x

LORENZA LEDESMA,

Plaintiff,

Index No. 103062/04

-against-

ARAGONA MANAGEMENT GROUP and WADSWORTH ASSOCIATES 9,

DECISION/ORDER

Defendants.

----------x

ARAGONA MANAGEMENT GROUP and WADSWORTH and ASSOCIATES 9,

Third-Party Plaintiffs,

Index No. 590507/04

-against-

EMPIRE STATE FUEL OIL CORP.,

Third-Party Defendant.

----------X

ARAGONA MANAGEMENT GROUP and WADSWORTH ASSOCIATES 9,

Second Third-Party Plaintiffs,

Index No. 591033/04

-against-

U.S. ENERGY CONTROLS INC.,

Second Third-Party Defendant.

----------X

ARAGONA MANAGEMENT GROUP and WADSWORTH ASSOCIATES 9,

Third Third-Party Plaintiffs,

Index No. 591033/04

-against-

ABETTA BOILER & WELDING SERVICE, INC.,

Third Third-Party Defendant.

----------X

Carol R. Edmead, J.:

MEMORANDUM DECISION

In this personal injury action, the following motions are before the court: (1) the motion brought by third-party defendant Empire State Fueling Corp. (Empire) for summary judgment dismissing the third-party complaint, and all applicable counterclaims and cross claims (mot. seq. no. 005); and (2) the motion for summary judgment dismissing the third third-party complaint, brought by third third-party defendant Abetta Boiler & Welding Service, Inc. (Abetta)(mot. seq. no. 006).

I. Background

Plaintiff Lorenza Ledesma was a tenant in 241 Sherman Avenue, New York, New York (the building). On May 28, 2003, she suffered personal injuries while taking a shower in her apartment. She contends that, while she stood under the water, a surge of very hot water came through the showerhead, causing her to step back out of its stream. In doing so, she lost her footing, fell, and was injured.

The building is a five-story walk-up, containing 72 apartments, and some commercial establishments. Although the building is separated into two portions, with two entrances, it has a single basement and one boiler. The present two motions center on the boiler, and especially, on the valve which mixes the hot water leaving the boiler, in the context of each party's obligation, if any, concerning maintenance and care of this

system.

At the time of the accident, defendant Aragona Management Group (Aragona) was the manager of the building. Aragona had no regular service contract with any company to service the building's boiler. If any problem arose with the boiler, Aragona would usually call in a request for inspection and repair to the company which was supplying oil to the building at that time, which, in this case, was Empire.

Plaintiff testified at her deposition that she had noticed a change in water temperature and pressure two months before her accident, in that the temperature became "[h]ot, very hot," and the water pressure became "strong." Abetta Not. of Motion for Summary Judgment, Ex. S, at 27. Plaintiff said that she complained to Samil, the building's superintendent, about the problem at that time. Aragona's principal, Joel Aragona, claimed in his deposition that, over the years, and from time to time, Aragona received complaints about the lack of hot water in the building. He did not, however, recall any other types of complaints concerning hot water prior to the date of plaintiff's accident.

On May 1, 2003, Empire made a service call to the building to inspect the boiler. The call was made by Alan Walowitz (Walowitz), an employee of Empire. Walowitz discovered that the boiler coil contained a pinhole, which was allowing hot water to

leak from the heated coil into the boiler, thus diluting the heat of the water reaching the apartments. Walowitz believes that he faxed the information to Aragona, and that Aragona "must have called back and he said that he'll get someone to do it." Walowitz Dep., at 134. Empire then generated a service ticket which read "coil leaking. Called Aragona. They will fix." Abetta Not. of Motion, Ex. V. Walowitz assumed that "[t]hey will fix" meant that Aragona would not be giving the job to Empire. In any event, Empire did not replace the boiler coil.

In seeing to the repair of the boiler coil, Aragona chose to contract with Abetta. According to a statement prepared by Abetta, Abetta "[f]urnished and installed a new hot water coil capacity of 72 apts. Cut out and replaced 1-section of 2" copper tubing and 2" sweat union. Job complete." The statement indicated that the work was complete on May 23, 2003, five days before plaintiff's accident.

II. Discussion

Summary judgment is a "drastic remedy" which should not be granted unless it "clearly appear[s] that no material and triable issue of fact is presented." *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 404 (1957); *see also Gonzalez v American Oil Company*, ___ AD3d ___, 836 NYS2d 611 (1st Dept 2007). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of

law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985); *see also Kesselman v Lever House Restaurant*, 29 AD3d 302 (1st Dept 2006). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to offer evidentiary facts sufficient to raise a triable issue of fact. *Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124 (2000); *see also Kesselman v Lever House Restaurant*, *supra*. However, "assertions, unsupported by competent evidence, are, at best, speculative and conclusory and, as such, insufficient to defeat ... summary judgment motions." *Caruso v John Street Fitness Club, LLC*, 34 AD3d 296, 296 (1st Dept 2006); *see also Kane v Estia Greek Restaurant, Inc.*, 4 AD3d 189 (1st Dept 2004).

A. Empire's Motion

In *Daniels v Kromo Lenox Associates, Inc.* (16 AD3d 111 [1st Dept 2005]), upon which Empire relies, the Appellate Division, First Department, held that "[i]n the absence of a contract for routine or systematic maintenance, an independent repairer/contractor has no duty to install safety devices or to inspect or warn of any purported defects." *Id.* at 112. In *Daniels*, the infant plaintiff was badly burned when he fell into a bathtub containing scalding water. Prior to the accident, defendant contractor had been called in to replace the boiler

coil, but not the mixing valve, which, apparently, had been identified as the cause of the extremely hot water which came from the bathtub tap. The Court found that "[t]here is no evidence that these contractors performed any regular inspections or service of the boiler or any work on the mixing valve," absolving them from any liability for the accident. *Id.*; *see also Kleinberg v City of New York*, 27 AD3d 317 (1st Dept 2006)(absent a contract for routine and systematic maintenance, independent contractor has no duty to inspect or warn of any purported defects); *Rosa v Mid Hudson Clarklift*, 269 AD2d 266 (1st Dept 2000)(same).

Apparently, no party here questions the fact that it was a fault in the mixing valve which caused the surge of hot water which, in turn, allegedly caused plaintiff's injury. Therefore, the question here is whether Empire "performed any regular inspections or service of the boiler or any work on the mixing valve," or had a duty to install a safe mixing valve, or to inspect the old one, or to warn of any allegedly dangerous condition of the mixing valve, after the replacement of the coil, based on the fact that Empire had made many service calls in the few years before plaintiff's accident concerning various complaints about heat in the building.

Aragona argues that Empire bears liability as a contractor responsible for the regular inspection and repair of the boiler

and mixing valve. In aid of this argument, Aragona produces several service tickets of visits Empire made to the building from 2001 to 2004. Notice of Empire's Motion, Ex. F. Based on these tickets, and the deposition of Walowitz concerning service calls Empire made to the building over the years preceding the accident, Aragona argues that, although Empire had no contract with Aragona, Empire made "regular and systematic inspection and maintenance of the boiler in issue, and numerous service calls that placed [Empire] on at least constructive notice that the mixing valve ... required adjustment." Affirm. of Cohan, in Opposition to Empire Motion, ¶ 33.

Aragona also produces, in response to Empire's motion, an affidavit from Leonard Weiss (Weiss), sworn to on March 20, 2007, as an expert professional engineer. Weiss opines that, after inspection of the boiler room, as well as the record herein, that "in the event that plaintiff's claims as to the manner of her accident can be credited," and that "such condition was the subject of prior complaints by both her and residents [of the building], that such complaints were the result of negligent, improper and insufficient maintenance of the subject boiler, its mixing valve, and component assembly parts by [Empire]." Aff. of Weiss, Ex. B to Aragona's Opposition, ¶ 3. He concludes that:

> Given these circumstances, and based upon my professional training and experience in plumbing and heating matters, it is my opinion within a reasonable degree of professional certainty that personnel

> employed by [Empire] could and should have corrected any defect with respect to the mixing valve at issue in their position as maintenance contractors and boiler inspectors with respect to the subject boiler so as to have the potential for accident and injury as claimed by [plaintiff] in the instant matter.

Plaintiff also relies on the argument that Empire may have had a duty to inspect and warn plaintiff and others of the alleged defects in the mixing valve, and that issues of fact as to that duty abound. She admits that Empire had "no formal contract of regular systematic inspection and maintenance" regarding the boiler (Aff. of Gross for Plaintiff, ¶ 3), but claims, however, that Empire, as a result of its numerous service calls, was on at least constructive notice "that the mixing valve attached to the boiler ... required adjustment." *Id.*

Although Abetta "takes no position with the relief sought by [Empire] in its motion for summary judgment" (Aff. Boyle for Abetta, ¶ 3), Abetta "objects to [Empire's] claim ... that any alleged work performed on the subject boiler by [Abetta] would have an effect on the temperature of the water in plaintiff's apartment." *Id.*, ¶ 4.

In the present case, there is no evidence that Empire had a "contract for routine or systematic maintenance" or performed "regular inspections" of the boiler or the mixing valve. Empire was called in to inspect the boiler on an ad hoc basis, in response to specific and sporadic complaints which, Empire points out, usually involved water which was not hot enough, or a lack

of water pressure, not water that was too hot, and likely to surge. As such, the motion's opponents have failed to raise any question of fact concerning Empire's liability for plaintiff's injuries.

Further, Aragona's expert, Weiss, cannot be credited. His speculation concerning how the accident happened is conclusory, and unacceptable on a motion for summary judgement. *See Rodriguez v Montefiore Medical Center*, 28 AD3d 357 (1st Dept 2006); *Bullard v St. Barnabas Hospital*, 27 AD3d 206 (1st Dept 2006). Further, his views as to who was responsible for the maintenance of the boiler are not an expert's opinion, in that this information is not an issue within Weiss's expertise as an expert in boilers and component part.

B. Abetta's Motion

Abetta also relies on *Daniels v Kromo Lenox Associates, Inc.* (16 AD3d 111, *supra*), claiming that the evidence shows that Abetta was an independent contractor, which was only called in to replace the boiler coil, and nothing else, and had no further obligation to inspect or warn of any condition of the mixing valve. In fact, Jesus Gonzalez (Gonzalez), an employee of Aragona, said at his deposition, that "[t]he job only called for replacement of the coil. There was nothing else that has to be done there ... . That is the only thing we do, replacement of coil." Gonzalez Dep., at 35. Gonzalez, when asked whether

Aragona would have done anything to the mixing valve as part of the job, Gonzalez answered "[n]o, we don't do that." *Id.* at 36. When asked if his personnel would have to make any adjustment to a mixing valve after the replacement of the coil, Gonzalez responded "no, we never adjust the mixing valve." *Id.* at 57.

While Abetta's opponents bring in the testimony of Walowitz, as to what he would have done after replacing the coil (checked a residential appartment to check the hot water), and Weiss, to testify as to what happens to the hot water in an apartment house after a corroded[1] boiler coil is replaced (hot water surges may occur), no one has alleged any facts which would show that Abetta was anything more than an independent contractor called in by Aragona to replace the boiler coil, and nothing else. There is, in fact, no evidence that Abetta ever did any work for Aragona in the building before. Abetta's contract with Aragona specifies only the items contained in its statement: the removal and replacement of the coil, and the replacement of two inches of copper tubing. As such, it was not requested to, and had no duty to, take any further action to warn any party about the possible consequences of installing a new coil, or to otherwise ensure plaintiff's safety. Consequently, pursuant *Daniels v Kromo Lenox Associates, Inc.* (16 AD3d 111, *supra*), there are no triable issues of fact as to Abetta's negligence.

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[1]There is no evidence that the coil was corroded.

Accordingly, it is

ORDERED that the motion for summary judgment brought by Empire State Fueling Corp. is granted, and the third-party complaint, and all cross claims or counterclaims against Empire, are dismissed, with costs and disbursements to this party as taxed by the Clerk of the Court upon an appropriate bill of costs; and it is further

ORDERED that the motion for summary judgment brought by Abetta Boiler & Welding Service, Inc. is granted, and the third third-party action is dismissed, with costs and disbursements to this party as taxed by the Clerk of the Court upon a submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 10, 2007

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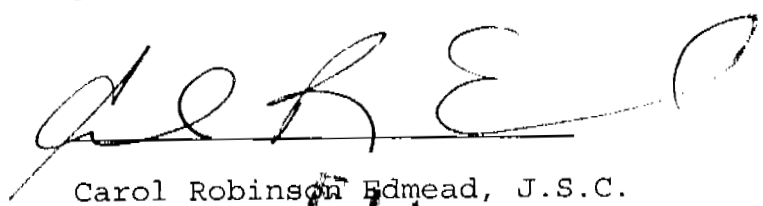

Carol Robinson Edmead, J.S.C.