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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

KARL ANDERSON,

Plaintiff,

INDEX NO. 114152/08

-against-

MOTION SEQ. NO. 006



THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,

Defendant.

The following papers, numbered 1 to 3 were read on this motion by defendant for summary judgment.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 |
| Answering Affidavits — Exhibits (Memo) | 2 |
| Replying Affidavits (Reply Memo) | 3 |

Cross-Motion: ☐ Yes ☒ No

Motion sequences 006 and 007 are hereby consolidated for purposes of disposition. Karl Anderson (plaintiff) alleges in his complaint that he suffered severe burns when he fell against an uninsulated steam pipe after passing out in the bathroom of the apartment he rents from The Trustees of Columbia University (defendant). In motion sequence 006, defendant moves for an order granting it summary judgment dismissing the complaint, pursuant to CPLR 3212. In motion sequence 007, defendant moves pursuant to CPLR 3025(b) and/or 3025(c), for leave to amend its answer. Discovery is complete and Note of Issue has been filed.

BACKGROUND

Plaintiff is a Columbia Law School student, who resided in an apartment located at 411 W. 115th Street in Manhattan. The building was owned and operated by the defendant. The bathroom of the apartment was heated by an uninsulated and uncovered steam riser pipe that was approximately 19 inches in front of the toilet (*see* Affirmation of Jeremy A. Hellman, Esq. [Hellman Aff.], Exhibits. A, F). On February 17, 2007, while plaintiff was using the toilet he

suffered an episode of syncope, commonly known as fainting or loss of consciousness, which caused him to lean forward and make contact with the steam riser pipe. He sustained burns to his face and shoulder. The plaintiff alleges that the defendant breached a duty to insulate the steam riser pipe pursuant to common law and section 27-809 of the Administrative Code of the City of New York (Admin. Code).

In his deposition, the plaintiff described how he and others who used the bathroom would frequently make inadvertent contact with the steam pipe due to its close proximity to the toilet (Hellman Aff., Exhibit C, p. 50-53). The plaintiff also testified that because the pipe often made the bathroom unbearably hot, he would often have to open a window that was located right next to the riser pipe, risking further contact with the pipe. Two non-party witnesses have submitted affidavits stating that they often made contact with the pipe while using the bathroom and on some occasions actually singed their skin (*id.*, Exhibit D). The steam riser pipe was so close to the toilet that at the time of the occurrence, the plaintiff was burned while still sitting on the toilet (*id.*, Exhibits B, C).

The plaintiff claims that he complained to the building's superintendent on two separate occasions prior to the occurrence regarding the hazardous steam pipe (*id.*, Exhibit C, p. 50-53; Exhibit B). Several years prior to the occurrence, the subject bathroom was renovated (*id.*, Exhibit G). All of the fixtures in the bathroom were replaced but the steam riser pipe remained uncovered and uninsulated (*id.*).

Motion sequence 006

In motion sequence 006, the defendant moves for summary judgment, arguing that it had no duty to insulate, cover or regulate the steam riser heating pipe pursuant to common law and/or section 27-809 of the Admin. Code. Defendant asserts that New York courts have long rejected claims that landlords have a common-law duty to provide covering or insulation for steam riser pipes. Defendant also argues that it had no duty to insulate or regulate the heat

pipe pursuant to section 27-809 of the Admin. Code because the subject building was constructed prior to the enactment of this statute in 1968 and the exceptions which retroactively impose liability for code violations do not apply to this building. In support of its motion, defendant submits an affidavit from an expert witness, Steven Pietropaolo, an engineer. Defendant further argues that the plaintiff's fainting or passing out and making contact with the steam riser pipe was an intervening act, that was not a foreseeable risk that was proximately caused by the defendant's alleged failure to insulate the pipe in the apartment bathroom.

In opposition, plaintiff argues that the defendant did not establish a prima facie case for summary judgment because: (1) defendant did not establish that it was not statutorily required to cover the steam riser pipe because the affidavit of Steven Pietropalo does not establish the value and extent of the renovations made to the building at the time of the occurrence and therefore does not establish that the building is not subject to the Admin. Code provisions cited by the plaintiff; (2) defendant fails to show that it properly maintained the heating pipe pursuant to common-law principles; (3) the defendant's expert failed to establish that the pipe was safe and (4) there is an issue of fact as to whether it was foreseeable that the plaintiff could make contact with the exposed pipe. Plaintiff has submitted his own expert affidavit from Alvin Ubell. Mr. Ubell opines that the defendant breached its duty to safely maintain the premises and specifically breached a statutory duty to insulate or cover the pipe.

Motion sequence 007

In motion sequence 007, the defendant moves, pursuant to CPLR 3025(b) and/or 3025(c), for an order granting it leave to amend its answer to add a denial of plaintiff's negligence allegations. During the course of the briefing on this summary judgment motion, plaintiff raises the issue that the defendant's answer failed to address or respond to several paragraphs of the plaintiff's complaint, which concerned the alleged acts of negligence on the part of the defendant and the plaintiff's alleged injuries. The defendant claims that its failure to

address and deny these allegations was nothing more than inadvertent and excusable mistake and law office failure. Defendant now moves to amend its answer to include denial of these allegations. Plaintiff is in opposition to defendant's motion to amend.

According to CPLR 3025(b), a party may amend his pleading at any time by leave of court and "[l]eave shall be freely given upon such terms as may be just." The defendant argues that the amended answer only confirms what has long been understood, that it intends to deny plaintiff's allegations of negligence on its part, as well as contest the nature and cause of plaintiff's injuries.

STANDARDS

Summary Judgment

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 issue of fact from the case (*Smalls v AJI Indus., Inc.* 10 NY3d 733, 735, *rearg denied* 10 NY3d 885 [2008]; *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Duties of landowner to remedy dangerous or defective condition

A landowner has a duty to exercise reasonable care to maintain its premises in a reasonably safe condition "in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding risk" (*Solomon v Prainito*, 52

AD3d 803, 804-805 [2nd Dept 2010], quoting *Basso v Miller*, 40 NY2d 233, 241 [1976]). The general rule is that a landlord is not liable to a tenant for dangerous conditions on the leased premises, unless a duty to repair the premises is imposed by statute, by regulation or by contract (*see Rivera v Nelson Realty, LLC*, 7 NY3d 530, 534 [2006]). One exception is Multiple Dwelling Law § 78[1], which holds that every Multiple Dwelling shall "be kept in good repair" and that the "owner shall be responsible for compliance" with that obligation (Multiple Dwelling Law § 78[1]; *Rivera*, 7 NY3d at 535). Thus, the Multiple Dwelling Law extended the landlord's duty to repair, limited at common law to those areas of the leased property over which it retained control, to all parts of the demised premises (*id.*; *Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 643 [1996]).

Section 27-809 of the Admin. Code, requires as follows in pertinent part:

> All accessible piping in habitable and occupable rooms carrying steam, water, or other fluids at temperatures exceeding one hundred sixty-five degrees Fahrenheit shall be insulated . . .
>
> Where accessible piping carries a fluid not exceeding two hundred fifty degrees Fahrenheit and insulation would interfere with the functioning of the system, such piping may be uninsulated.

These and other code sections cited herein are part of the New York City Building and Plumbing Codes and are cited by the plaintiff in support of his argument that the defendant is statutorily liable for its failure to insulate or cover the heating pipe. It is well settled that a building owner in New York City has a duty to maintain his building in compliance with the building code and other statutory mandates unless the building is grandfathered pursuant to section 27-111 of the Admin. Code (*Guzman v Haven Plaza Housing Development Fund Co., Inc.*, 69 NY2d 559, 564-565 [1987]; *Sarmiento v C&E Assoc.*, 40 AD3d 524, 528 [1st Dept 2007]). The parties appear to agree that the subject building was built prior to 1968 and would therefore not normally be subject to the provisions of the Code (*see* Admin. Code § 27-111; *Isaacs v West 34th Apts. Corp.*, 36 AD3d 414, 416 [1st Dept 2007] [finding that Building Code

did not apply where subject building was constructed prior to effective date]; *Jones v Presbyterian Hosp.*, 3 AD3d 225, 228 [1st Dept 2004] [finding that auditorium built in 1961 was not subject to building code]). The Building Code was effective on December 6, 1968 (Admin. Code, § 27–105). Section 27–111 provides that lawful occupancy and use of any building on the Code's effective date may be continued. However, where a change in occupancy or use is made, the re-establishment of a prior occupancy or use that existed before 1968 is prohibited unless there is compliance with the Code (*id.* at § 27–112). Similarly, where alterations to an existing building are made, the entire building must be brought in compliance with the 1968 Code if the cost of alterations within a twelve month period exceeds 60% of the building value (*id.* at § 27–115). When the cost of alterations within a twelve month period is 30% to 60% of the value of the building, only the portions of the building altered must be brought into compliance with the 1968 code (*id.* at § 27-116). Yet, where the cost of alterations in any twelve month period is less than 30% of the value of the building, compliance with the Code is optional "provided the general safety and public welfare are not thereby endangered" (*id.* at § 27–117). Furthermore, if the alteration of a space in a building involves a change in the occupancy or use thereof, the alteration work involved in the change shall be made to comply with the requirements of the code and the remaining portion of the building shall be altered to such an extent necessary to protect the safety and welfare of the occupants (*id.* at §27-118). However, at the option of the owner, regardless of the cost of the alteration or conversion, an alteration may be made to a Multiple Dwelling in accordance with laws in existence prior to the 1968 code, provided the general safety and public welfare are not endangered (*id.* at § 27-120).

Plaintiff argues that these sections are applicable as the defendant made significant alterations to the subject bathroom back in 2000 that bring the bathroom into the ambit of the 1968 Code. The building is clearly a Multiple Dwelling as it served as housing exclusively for Columbia law school students and contained 32 units on 6 floors. Plaintiff points to the

deposition testimony of Louis Nieves (Nieves), who served as the superintendent of the building from 1968 until his retirement on March 31, 2006 (Hellman Aff., Ex. G, p. 7). Nieves estimated that sometime in 2000, the entire subject apartment, including its bathroom, was completely renovated in order to allow it to serve as private student housing. (Hellman Aff., Ex. G, p. 13-17). Plaintiff also maintains that since the uninsulated steam pipe in the bathroom endangered safety and public welfare, the defendant was under a statutory as well as a common-law duty to remedy the allegedly defective condition when it performed the alterations to the apartment.

In reply, defendant argues that it was not obligated to comply with the Admin. Code because the cost of the alterations to the building and/or the subject apartment did not exceed thirty percent of the value of the building at the time the alterations were performed. The defendant also points to the above cited language of the Admin. Code which specifically states that all steam pipes that carry liquid exceeding 165 degrees must be insulated unless insulation would interfere with the functioning of the heating system. Mr. Pietropaolo opines in his affidavit that the heating system inside the apartment would not function properly if the steam pipe were insulated. The plaintiff's expert, Mr. Ubell, disagrees and claims that a partial covering or a metal grill could have been placed over or in front of the steam pipe without causing a significant loss of heat or functionality.

DISCUSSION

After reviewing the record, the Court concludes that defendant is not entitled to summary judgment. First, based upon the record, triable issues of fact exist regarding whether the defendant was obligated to maintain the building in accordance with the provisions set forth in Admin. Code § 27-809, specifically the requirement that pipes carrying steam or hot water at temperatures exceeding one hundred sixty-five degrees be insulated. It is well-settled that, when determining whether to grant summary judgment to a defendant owner, the burden is on the defendant to lay bare its proof that it is excepted from any obligations under the Admin.

Code (*see Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 140 [1st Dept 2000]).

Relying on the Pietropaolo affidavit and what it claims to be a search of the relevant records, the defendant argues that the subject building was built before 1968, that the most extensive renovations performed at the building since the enactment of the 1968 code occurred between May 1, 2005 and May 1, 2006 and totaled approximately $213,000 and that the value of the building at the time of the renovations was approximately $984,375, pursuant to the formula set forth in § 27-199 of the Admin. Code (one and one quarter times the assessed value of the building) (Affirmation of Randi Schwartz, Esq., p. 7-8). However the information regarding the extent of the renovations performed at the building comes from an attorney without personal knowledge of the building's history, nor is there any indication that the defendant performed a thorough search of its records to determine whether any prior alterations to the building, or to plaintiff's apartment, would have brought the building within the parameters of the Code. Defendant failed to submit any documentation evidencing the extent of any alterations that were performed at the subject property, such as construction records, work orders or permits. Such documentation would be critical to analyzing the work performed under any and all provisions of the Admin. Code, as well as the actual cost of making the alterations compared to the value of the building at any given time. In the absence of such documentation, the defendant cannot meet its burden. However, despite the fact that defendant spends a great deal of time analyzing the perceived cost of the renovations and/or alterations performed to the apartment, that cost is not the applicable issue given the fact that the Admin. Code allows the owner of a Multiple Dwelling to make alterations without complying with the Admin. Code regardless of cost, as long as the general safety and public welfare are not thereby endangered (*see* Admin. Code, § 27–120).

The parties have not cited to and the Court has not found any case law which defines

"general safety or public welfare" within the context of the Admin. Code. Since plaintiff's expert maintains that the uninsulated steam pipe was hazardous and endangered others, there is an issue of fact that cannot be resolved on a motion for summary judgment. Similarly, whether or not a partial cover or insulation or a protective grill could have been utilized to protect the users of the bathroom from coming into contact with the pipe, without impairing the functionality of the heating system, is also a question of fact that also cannot be resolved on summary judgment.

The Court also finds that there is an issue of fact as to whether the defendant was negligent in allowing an unsafe heat riser pipe to exist on the premises. Citing to the *Rivera* case, where the Court held that neither MDL § 78(1) nor the common law imposes a duty upon a landlord to install radiator covers, defendant argues that it also has no duty to insulate heat riser steam pipes (*see Rivera*, 7 NY3d at 535). Yet the Court in *Rivera* specifically found that radiators were distinguishable from pipes because pipes were regulated by the Administrative Code and arguably more dangerous than uncovered radiators since "no one knows from looking at a pipe whether it carries hot or cold water", whereas a radiator is easily perceived as dangerous by most people other than young children (*id.* at 536). Thus *Rivera*, does not stand for the proposition that landlords need never provide covers or insulation for pipes pursuant to the Multiple Dwelling Law (*see Hughes v Concourse Residence Corp.*, 62 AD3d 463, 463 [1st Dept 2000]). Defendant also cites to the First Department case of *Isaacs v West 34th Apts. Corp.*, which cited *Rivera* while rejecting a common law requirement to insulate a steam riser piper that carried water heated to 165 degrees (36 AD3d 414, 415 [1st Dept 2007]). As plaintiff points out, *Isaacs* is readily distinguishable from this case as the subject pipe is significantly hotter than the 165 degree temperature in *Isaacs*, and the pipe in *Isaacs* was located behind the toilet whereas here the plaintiff's expert measured the pipe as located only 19 inches in front of the toilet (*id.* at 414; *see* Hellman Aff., photographs annexed to exhibit B). Furthermore in *Isaacs*, there were no prior complaints or incidents regarding the location of the steam riser

pipe whereas here, the plaintiff claims that it was common for persons to make inadvertent contact with the hot pipe and that prior complaints had been made (*id.*).

In fact, many cases have held that a landlord who fails to cover or insulate exposed steam pipes can be held liable for breaching its duty to maintain the leased premises in a reasonably safe condition (*see e.g., Lewis v Drake*, 295 AD2d 482 [2nd Dept 2002]; *Delaney v First Concourse Mgt. Co.*, 275 AD2d 233 [1st Dept 2000]; *Fleming v New York City Housing Authority*, 262 AD2d 525 [2nd Dept 1999]; *Brown v New York City Housing Authority*, 250 AD2d 719, 720 [2nd Dept 1998]; *Morinia v New York City Housing Authority*, 250 AD2d 657 [2nd Dept 1998]). The defendant's attempts to distinguish these cases are unavailing. The defendant argues that the plaintiff's injury was not a foreseeable risk that was proximately caused by its alleged failure to insulate the heat riser pipe in the apartment bathroom. Defendant further claims that it could not have foreseen that the plaintiff would suffer an episode of syncope and sustain burn injuries due to prolonged contact with the heated pipe. It is true that some courts have granted summary judgment to landlords in cases where they deemed it was not foreseeable that the plaintiff would sustain burn injuries after passing out or losing consciousness and leaning against an exposed heat pipe for a lengthy period of time (*see e.g. Ferguson v New York Hous. Auth.*, 77 AD3d 706, 707 [2nd Dept 2010]; *Sanchez v Biordi*, 259 AD2d 434, 434 [1st Dept 1999]). However, there is no evidence here that the plaintiff was in prolonged contact with the steam pipe and Anderson indicated at his deposition that he never lost complete consciousness. Additionally, the toilet was so close to the pipe that Anderson claims he was still sitting on the toilet when he came into contact with the pipe (*see* Hellman Aff., photographs annexed to exhibit B).

In *Derdiarian v Felix Contr. Corp.* (51 NY2d 308 [1980]), the Court of Appeals articulated the circumstances where a superseding cause or other factors intervene to break the nexus between a defendant's negligence and plaintiff's injury. *Derdiarian* involved a plaintiff who was

injured when a vehicle driven by the defendant's employee crashed into a construction site and spilled hot oil on the plaintiff. The defendant driver had suffered an epileptic seizure causing him to lose control of the car. The Court held that the jury could find that the defendant contractor was liable for failing to secure the construction site (*id* at 316). The Court further found that "the precise manner of the [accident] need not be anticipated" and that the defendant contractor was not insulated from liability as a matter of law "where the general risk and character of injuries are foreseeable" because a "prime hazard of such dereliction is the possibility that a driver will negligently enter the work site" (*id.* at 316-317). Similarly, "[a]n intervening act may not serve as a superseding cause, and relieve an actor of responsibility , where the risk of the intervening act occurring is the very same risk which renders the actor negligent" (*id.* at 316).

Here, a jury could find that the foreseeable risk created by the defendant was the injury of a user of the bathroom from inadvertent contact with the steam pipe (*see Delaney*, 275 AD2d at 233). The precise manner in which the plaintiff made contact with the pipe need not be foreseeable, particularly when the plaintiff had already allegedly complained to the defendant about prior incidents where he and others had made inadvertent contact with the pipe while using the toilet. In view of the foreseeability of accidental contact with the steam pipe, it cannot be said, as a matter of law, that the plaintiff's synopic episode was an extraordinary intervening act which breaks the chain of causation and makes the risk of injury unforeseeable (*see id.* at 233-234). Thus, the court finds that factual issues regarding whether the defendant breached its common-law duty to maintain the premises in a reasonably safe condition and whether such breach proximately caused the plaintiff' accident must be determined by the trier of fact. Accordingly, defendant's motion for summary judgment is denied.

As to defendant's motion seeking leave to amend its answer, the motion is granted. As stated above, leave to amend shall be freely granted and insofar as the defendant has

contested liability, and plaintiff's damages throughout the litigation, plaintiff is not prejudiced by the amendment. Taking into account the liberal standards for amending pleadings, the circumstances here do not warrant the drastic measure of denying the motion to amend which would effectively render the defendant without a defense to liability and damages, and would violate New York's policy of disposing of actions on the merits (*see Weinstein v National Committee for Furtherance of Jewish Education*, 105 AD2d 674 [1st Dept 1984]). Accordingly, the motion to amend is granted.

Accordingly, it is

ORDERED that defendant's motion for summary judgment, motion sequence 006, pursuant to CPLR 3212 is denied; and it is further,

ORDERED that defendant's motion to amend the answer, motion sequence 007, is granted and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof upon the plaintiff.

This constitutes the Decision and Order of the Court.

**Dated:** 1/22/13

**PAUL WOOTEN J.S.C.**

**Check one:** ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

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