SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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INDEX NO. 154124/2014

WILTON GASTON,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 002

- v -

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and NATIONAL GRID,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 95-111, 113, 116-125

were read on this motion for summary judgment.

By notice of motion, defendants move pursuant to CPLR 3211(a)(1) and (7) and CPLR 3212 for an order dismissing the complaint in its entirety. Plaintiff opposes.

I. BACKGROUND

By letter dated September 18, 2013, defendant National Grid submitted a proposal to the housing department manager of defendant Trustees for work to be performed on three boilers located in premises owned by Trustees at 100 Haven Avenue in Manhattan. On October 22, 2013, non-party Hercules Welding & Boiler Works, Inc. prepared an invoice for National Grid for servicing the boilers pursuant to National Grid's proposal. (NYSCEF 102).

On October 16, 2013, plaintiff, employed by Hercules, was assigned to help with the replacement of safety valves on one of the boilers located in the basement of the premises. At his deposition, plaintiff testified that upon arriving there that morning, he and a Hercules mechanic observed a National Grid technician perform unrelated work on the boiler. Once the technician had completed his work, and Trustees's superintendent had turned off the boiler and drained the

water from it, and after waiting for the boiler to cool, plaintiff descended to the top of the boiler from a catwalk above by climbing under a fence surrounding the catwalk. Plaintiff stood on top of the boiler and completed replacing the safety valves. Then, as he attempted to ascend from the boiler and onto the catwalk, his foot slipped due to "the round shape of the boiler." His left knee landed on the top of the boiler and his shoulder landed against the fence of the catwalk, thereby preventing him from falling off. Although the room was hot, plaintiff felt neither nauseous nor dizzy, and he did not faint before he fell. After plaintiff slipped, the mechanic helped him back on to the catwalk. Plaintiff also testified that the valves were changed as part of yearly seasonal maintenance. No one from Trustees or National Grid had instructed plaintiff on how to perform his work. (NYSCEF 97).

On March 22, 2016, some two months after his deposition, plaintiff prepared an errata sheet, adding "heat boiler" as a cause of his accident. (NYSCEF 97). By letter to plaintiff's counsel dated March 28, 2016, defense counsel objected. (NYSCEF 109).

On May 17, 2016, the mechanic testified at his deposition that Hercules had assigned plaintiff and him the sole task of replacing old and leaky safety valves on the top of the boiler. He related that when they arrived at the job site, the boiler, although turned off, remained hot because a valve had been left open. Once the valve was closed, there was no need to wait for the boiler to cool because it was insulated. As plaintiff was installing the new valves, he passed out and as he did, he put his foot between two pipes and twisted his ankle. The mechanic jumped up and held plaintiff so that he would not fall off the boiler. (NYSCEF 99).

On May 17, 2016, National Grid's technician testified that he was working on site on another project when plaintiff fell and that no one from National Grid or Trustees supervised plaintiff's work that day. Access to the boiler room was obtained through Trustees's

superintendent who was also responsible for turning off the boiler before workers were permitted to operate it. He explained that the top of the boiler is accessed from stairs to a catwalk located above the boiler. When plaintiff fainted, the technician helped the mechanic lower him from the boiler. In his opinion, plaintiff was overdressed that day and was thus prone to being overheated and fainting. (NYSCEF 100).

Trustees's assistant director of physical plant testified that the mechanic and plaintiff were engaged in general maintenance work, and he was unaware of any construction or renovation work conducted at the premises that day. (NYSCEF 101).

Trustees's housing department manager testified that there was a boiler service contract between Trustees and National Grid, and that National Grid submits proposals for nonemergency repairs. (NYSCEF 103).

A National Grid proposal dated September 18, 2013, and addressed to Trustees, provides a quotation for services to be rendered to three boilers. The services for boiler number one are: draining the boiler, cutting out a corroded handhold ring, supplying and welding a new ring and handhold assembly, supplying and installing a ring assembly, submitting an R1 form, and supplying and installing two safety relief valves, for the price of $2,687.50. For boiler number two, they are: supplying and installing a handhole assembly, installing new handhole gaskets, supplying and installing two safety valves, replacing leaking pipes and fittings from drain line, and supplying and installing pipe, unions, a tee, and nipples, for the price of $5,250. And for boiler number three, the services are: supplying and installing a cover and gasket, supplying and installing safety relief valves, and installing gaskets, for the price of $4,428. All three boilers would also be filled and tested. (NYSCEF 102). By invoice dated October 22, 2013, Hercules invoiced National Grid for the above work. (*Id.*).

II. MOTION FOR SUMMARY JUDGMENT

Although defendants move under both CPLR 3211(a)(1) and (7) and 3212, the parties uniformly address the motion as one for summary judgment, thereby charting the course of the motion.

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. Labor Law § 200 and common law negligence

1. Contentions

Defendants contend that plaintiff's common law negligence and Labor Law § 200 claims must be dismissed, as they neither directed nor controlled the means and methods of plaintiff's work, and in the absence of evidence of a dangerous or defective condition that caused plaintiff's accident. They observe that plaintiff attributed his fall solely to the shape of the boiler, and to the extent that he now claims that the boiler's heat contributed to his accident, he improperly added that claim to the errata sheet, as it does not constitute a correction but a material change to his

deposition testimony. Even if the errata sheet is considered, defendants note that plaintiff admitted having remained in the boiler room for hours without incident, and at his workers' compensation hearing, he claimed to have slipped solely due to the curve of the boiler. (NYSCEF 98). The mechanic also testified that the boiler was not hot. Moreover, they maintain, even if the heat is considered a defective condition, they had no notice of it.

Plaintiff argues that Trustees, as the property owner, violated Labor Law § 200 because the catwalk did not extend to the area where he performed his work. Moreover, he and the mechanic were forced to work on an unguarded, bare metal, round-topped boiler with no stable work surface, guard rails, safety harnesses, or other safety devices. He also asserts that whether the boiler was defective is irrelevant, as it was the boiler's rounded and unguarded surface that demonstrates that Trustees did not provide reasonable and adequate protection to workers required to access the tops of boilers several feet above the ground, and several feet from the nearest portion of the catwalk. He also observes that Trustees may be held liable even if it had no supervisory control over plaintiff's work.

Regardless of whether he fell due to the heat or the rounded edge of the boiler, plaintiff contends that the injury was due to a lack of adequate protection, and that he did not fall off the boiler is of no moment as the mechanic prevented him from falling. Moreover, Trustees's superintendent failed to shut down and cool off the boiler fully before he and the mechanic worked on it, thereby creating an additional hazard. As Trustees controlled the superintendent's work, it is liable for his failure.

On reply, defendants assert that plaintiff fails to raise an issue of fact as to their lack of supervision over the means and methods of plaintiff's work. Trustees's control of the superintendent's means and methods is irrelevant as there is no evidence that it controlled

plaintiff's means and methods of work. To the extent that plaintiff argues that Trustees created a hazardous condition by failing to shut down the boiler, he offers no supporting evidence nor does he show that the boiler's rounded surface constitutes a defect or that the location of the catwalk proximately caused his injury.

2. Analysis

Pursuant to Labor Law § 200, an owner may be held liable for a dangerous condition on premises if it either created it or had actual or constructive notice of the condition and failed to remedy it. (*Savlas v City of New York*, 167 AD3d 546, 548 [1st Dept 2018]). An owner may not be held liable for failing to provide a safe place to work for any alleged injuries arising out of the method and manner of the work being performed, unless it exercised supervisory control over the injury-producing work. (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). Likewise, a contractor may be held liable if it had actual or constructive notice of the dangerous condition, and had control over the worksite. (*Urban v No. 5 Times Square Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009], quoting *Keating v Nanuet Bd. of Educ.*, 40 AD3d 706, 708 [2d Dept 2007]).

a. Shape of boiler and length of catwalk

To the extent that the shape of the boiler was a substantial factor in causing plaintiff's accident, absent any evidence that Trustees or National Grid designed or shaped the boiler, they may not be held liable for it. (*See e.g., Bradley v HWA 1290 III LLC*, 157 AD3d 627, 631 [1st Dept 2018], *affd* 32 NY3d 1010 [2018] [defendants not liable for causing or creating dangerous condition related to design of cabinet, as they did not design or manufacture it]). Nor is there evidence that defendants had any prior notice of the alleged dangerous condition of the boiler. (*Id.* at 633 [no proof of actual or constructive notice of dangerous condition of cabinet as no past

complaints, proof that cabinet did not pass inspection, or proof of industry-wide problems or issues with cabinet]).

Defendants' denial that the length of the catwalk constitutes a dangerous condition is fatally conclusory, and their argument that plaintiff offers no evidence on that issue does not satisfy their burden on this motion. (*See Englington Med., P.C. v Motor Vehicle Acc. Indem. Corp.*, 81 AD3d 223, 230 [2d Dept 2011] ["burden on a motion for summary judgment cannot be satisfied merely by pointing out gaps in the plaintiff's case"]).

To the extent that defendants claim that neither "condition" proximately caused plaintiff's injury, plaintiff raises a factual issue by his testimony that the accident occurred as he was attempting to ascend from the boiler to the catwalk.

b. Heat in boiler room

During the course of his deposition, plaintiff was asked several times about how he had fallen, and he consistently responded that it was due to the shape of the boiler. (NYSCEF 97, at 71). He also stated that he was not nauseous, dizzy, or faint because of the heat. (*Id.* at 93). As his errata sheet contains an unexplained and material change in the theory of the case, and given his initial denial that he was ill from the heat, the errata sheet is disregarded. (*See Rodriguez v Jones*, 227 AD2d 220, 220 [1st Dept 1996] [affirming refusal to consider errata sheet where party offered no explanation and record did not support proposed changes]).

The technician's opinion that plaintiff was overdressed that day and thus prone to overheating and fainting is too vague, conclusory, dependent on facts *dehors* the record, most of which could not have personally known by the technician, and otherwise constitutes inadmissible lay opinion evidence, as does the mechanic's testimony that plaintiff fainted due to the heat of the room.

Accordingly, plaintiff's Labor Law § 200 and common law negligence claims premised on the shape of the boiler and alleged heat in the boiler room are dismissed.

B. Labor Law §§ 240(1) and 241(6)

Defendants argue that as the work performed by plaintiff constituted routine maintenance, Labor Law §§ 240(1) and 241(6) are inapplicable.

According to plaintiff, the replacement of the boiler's safety valves was part of a larger repair project, and thus, it did not constitute routine maintenance. He also alleges that National Grid's proposal to Trustees, and Hercules's quote to National Grid demonstrate that the replacement of the boiler's safety valves was part of a project to overhaul the boiler system, and thus, was outside the scope of the regular service contract.

Defendants argue in reply that plaintiff raises no triable issue of fact as to whether the work performed was routine maintenance, as Hercules's proposals and invoices reflect that the work involved routine boiler maintenance, and that the work performed was within the scope of National Grid's and Trustees's regular service contract. That it necessitated additional expenses and was performed pursuant to a proposal that required Trustees's approval does not take it outside the regular service contract.

Sections 240(1) and 241(6) of the Labor Law do not apply to the performance of "routine maintenance." (*Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]). The distinction between routine maintenance and a covered repair is "frequently a close, fact-driven issue," which depends on, *inter alia*, whether the item being worked on was inoperable or malfunctioning, and whether the work involved replacing component parts damaged by normal wear and tear. (*Pieri v B & B Welch Assocs.*, 74 AD3d 1727, 1728 [4th Dept 2010]). Also pertinent is whether the work was called for by an isolated event rather than a recurring

condition, whether the object to be replaced was a worn-down component in an otherwise operable unit or system, and whether it was intended to have a limited life span or to require periodic maintenance. (*Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 527 [1st Dept 2014]).

Given plaintiff's testimony that the valves were changed as part of annual maintenance, and the mechanic's testimony that the valves must be replaced due to normal wear and tear, defendants show, *prima facie,* that plaintiff was engaged in routine maintenance, even though valves being replaced were defective and/or leaking. (*See Parente v 277 Park Ave. LLC*, 63 AD3d 613, 614 [1st Dept 2009] [replacing routinely worn-out parts is maintenance]; *see e.g.*, *Wein v Amato Properties, LLC*, 30 AD3d 506, 507 [2d Dept 2006] [replacement of defective safety valve on boiler constituted routine maintenance]).

When work is "ongoing and contemporaneous" with other work forming part of a single, larger construction project, it may be covered by the Labor Law. (*See Prats v Port Auth. of New York & New Jersey*, 100 NY2d 878, 881 [2003] [inspection of air-conditioning unit was protected activity as ongoing and contemporaneous with work forming part of single contract to overhaul air conditioning system]; *Fitzpatrick v State*, 25 AD3d 755, 757 [2d Dept 2006] [replacement of photo cell, although routine maintenance activity, fell within scope of Labor Law as part of larger project, and plaintiff's work was contemporaneous with other replacement work being performed by same party]).

Plaintiff offers no evidence, expert or otherwise, explaining that the work outlined in the proposal and invoices constitutes a "major boiler system overhaul" which would fall outside a regular service contract. He also cites no authority for the proposition that work done outside or in addition to a service contract is not routine maintenance. Plaintiff thus raises no triable issue

as to his Labor Law §§ 240(1) and 241(6) claims. In light of this result, the parties' other arguments as to these claims need not be addressed.

C. Sole proximate cause

Defendants contend that plaintiff's Labor Law claims fail because plaintiff was the sole proximate cause of his accident, which plaintiff denies. Even if negligent, plaintiff alleges that there were no safety devices provided to him. On reply, defendants assert that because plaintiff slipped on the rounded surface of the boiler and did not fall to the ground from the top of the boiler, there was no need for a safety device.

Where there is no violation of the Labor Law, and the plaintiff's conduct was the sole proximate cause of his injury, the defendant may not be held liable. (*Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280, 290 [2003]). As defendants do not show, *prima facie*, that they cannot be held liable under Labor Law § 200 and common law negligence for the dangerous condition of the catwalk (*supra*, II.A.2.), whether plaintiff was the sole proximate cause of his injury need not be addressed. (*Hernandez v Argo Corp.*, 95 AD3d 782, 783 [1st Dept 2012] ["Given defendants' statutory violation, plaintiff's conduct cannot have been the sole proximate cause of the accident"]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion is granted to the extent of dismissing: (1) plaintiff's Labor Law §§ 240(1) and 241(6) claims in their entirety, and (2) plaintiff's Labor Law § 200 and common law negligence claims premised on the shape of the boiler and heat in the boiler room, and is otherwise denied.

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4/24/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
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