

**Gonzalez v 162 Broadway Assoc., L.L.C.**

2023 NY Slip Op 33603(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 161996/2018

Judge: Leslie A. Stroth

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

**PRESENT: HON. LESLIE A. STROTH PART 12**

*Justice*

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RAQUEL GONZALEZ

Plaintiff,

- v -

162 BROADWAY ASSOCIATES, L.L.C.,

Defendant.

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INDEX NO. 161996/2018

MOTION DATE 05/30/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 77

were read on this motion to/for

JUDGMENT - SUMMARY

This motion arises out of a negligence claim asserted by plaintiff Raquel Gonzales (plaintiff) against defendant 162 Broadway Associates, L.L.C. (defendant) for injuries plaintiff sustained as a result of being burned by hot water in the bathtub of her apartment at 600 West 162nd Street in Manhattan, Apartment 4D (the subject premises) on August 5, 2018.

Plaintiff commenced this personal injury action by filing a summons and complaint on December 20, 2018. Defendant moves for summary judgement pursuant to CPLR 3212 dismissing plaintiff's complaint.

**I. Alleged Facts**

Plaintiff suffers from a knee and skin condition which require her to use a chair in the bathtub. On August 5, 2018, plaintiff attempted to enter the bathtub. As she entered, her hand slipped off the chair causing her to fall and hit the shower knob, which turned the water on. Water spilled from the tub's spout and onto plaintiff. She then fell forward into the tub, with her face down, screaming for help.

According to plaintiff in her statement of counter facts, the water stopped on its own after approximately one minute. See NYSCEF doc. no. 62. During the time that the water was on, it made

contact with the back of plaintiff's hand and her lower back, causing her to suffer second and third-degree burns. After this incident, EMS arrived, and plaintiff was taken out of the apartment on a stretcher and to the emergency room at Harlem Hospital. She was then transferred to a Burn Unit at New York Presbyterian Weill Cornell for further treatment for her burns.

## II. Analysis

It is well-established that a motion for summary judgment must include sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *See Alvarez v Prospect Hospital*, 68 NY2d 320 (1st Dept 1986). The Court must view the evidence in the light most favorable to the non-moving party and give the non-moving party the benefit of all reasonable inferences that can be concluded from the evidence. *Id.* Summary judgment is a drastic remedy that should not be granted where there is any doubt to the existence of the issues of fact. *Andre v Pomeroy*, 35 NY2d 361 (1974). Moreover, courts are more reluctant to grant summary judgment on negligence claims as "there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances." *Id.* at 364.

"A landlord has a duty to maintain its property in a reasonably safe condition under the extant circumstances." *Beck v J.J.A. Holding Corp.*, 12 AD3d 238, 240 (1st Dept 2004). Building owners may be held liable for injuries resulting from dangerous conditions on their property where they created the condition or had actual or constructive notice of the condition. *See Eaderesto v. 22 LeRoy Owners Corp.*, 101 AD3d 450 (1st Dept 2012). New York City Administrative Code § 27-2031 directs that dwelling units must be supplied with hot water at a constant minimum temperature of 120 degrees Fahrenheit between 6:00 am and midnight. *See Williams v Jeffmar Mgt. Corp.*, 31 AD3d 344, 346 (1st Dept 2006).

With respect to a maximum hot water temperature, the administrative code is silent but there is case law that held that where evidence that a building's hot water temperature was set at 140 degrees and

where the actual temperature of the water sometimes ranged above that setting, such upward fluctuations in temperature do not necessarily establish a violation of the landlord's common law duty. *See Williams v Jeffmar Mft. Corp.*, 31 AD3d 344, 820NYS2d 212 (1st Dept., 2006) *lv. denied*, 7 NY3d 718, 860 NE2d 991, 827 NYS.2d 689 (2006).

Defendant now moves for summary judgment on the basis that it did not create the hot water condition, that it did not have any notice of same, and that it kept the temperature of the hot water at 140 degrees as per the relevant case law. In support of its motion, defendant submits, *inter alia*, the deposition testimony of Site Manager Noey Matos (NYSCEF doc. no. 54); the work orders for the subject apartment (NYSCEF doc. no. 53); and the records of Commercial Combustion Services, the maintenance provider for the boiler and domestic hot water system (NYSCEF doc. no. 56).<sup>1</sup> Through this evidence, defendant maintains that no complaints about the boiler were ever made, that the records do not indicate any issues with the boiler or the domestic hot water system prior to plaintiff's accident, and that the water was maintained at the required 120 to 140 degree range.

#### A. Notice

Defendant asserts it had no notice of any malfunction relating to the water temperature. In his deposition testimony, Mr. Matos, the site manager, stated that he was responsible for addressing tenant complaints and that he maintained the boiler room and arranged repairs to the boiler. *See* NYSCEF doc. no. 54. He testified that he did not recall receiving any complaints pertaining to the boiler system or the water temperature. *Id.* In addition, defendant asserts the Commercial Combustion Service records do not indicate any issue with the boiler or hot water system on the date before the accident, nor do the building's

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<sup>1</sup> Defendant also submits an affidavit of Robert M. Kostival, licensed professional engineer, regarding his review of the discovery materials and his site inspection at the accident location. Mr. Kostival inspected the location on February 5, 2020, well after the date of the alleged accident. As the premises may have changed in the intervening year and a half, Mr. Kostival's observations are irrelevant. Further, the Court is in possession of the remaining discovery in which Mr. Kostival attempts to provide his expert opinion, and the Court does not need and did not request expert assistance in reviewing such evidence.

work orders for plaintiff's apartment demonstrate that repairs to or complaints about the hot water were made by defendant. As such, defendant maintains that it had no actual or constructive notice of any issue with the boiler or hot water temperature, which would preclude a finding of liability for injuries caused by a problem with the boiler or hot water.

In opposition, plaintiff argues that, based on Mr. Matos' testimony, it is unclear whether Commercial Combustion Services, the maintenance provider for the boiler, would require a work order to do work on the boiler, which would explain the absence of such documents. *See* NYSCEF doc. no. 54, Matos deposition tr at lines 8-17. Therefore, plaintiff argues that defendant could have had notice of issues with the boiler or hot water at the subject premises through Commercial Combustion Services.

Failure to demonstrate the lack of notice precludes granting summary judgement. For example, in *Clindinin v New York City Housing Authority*, 117 AD3d 628, 628 (1st Dept 2014), where the plaintiff sustained second and third- degree burns while showering, the Court denied defendant's motion for summary judgment to dismiss the complaint because the defendant failed to submit evidence establishing lack of notice, even though no work orders were submitted in the year before the incident and there was evidence the hot water system was regular maintained. As *Clindinin v New York City Housing Authority* is an Appellate Division, First Department case, it is binding precedent on this analogous matter, and defendant has failed to demonstrate lack of notice of any water temperature malfunction.

## **B. Water Temperature**

Defendant also argues that it demonstrates that it kept the water temperature at 120 to about 140 degrees in individual apartments, which would absolve defendant of liability for injuries sustained due to hot water. Defendant primarily relies on two cases for this proposition. *See Williams v Jeffmar Mft. Corp.*, *supra*, 31 AD3d 344, 820NYS2d 212 (1st Dept, 2006) *lv. denied*, 7 NY3d 718 (2006); *see also Morales v. NEP West 119th Street L.P.*, 2016 NY Slip Op. 31097(U) 2016 (Sup Ct NY County 2016) (holding that

that if the defendant establishes that the water temperature in the boiler is set below 140 degrees and that there is no evidence that on the day of the incident that the water temperature rose above that temperature, summary judgment dismissing the complaint is warranted).

However, these cases are distinguishable from the instant matter. In both *Williams* (31 AD3d 344) and *Morales* (2016 NY Slip Op. 31097[U]), defendants demonstrated through admissible evidence that they had no notice of any possible issues with the boiler or hot water systems. In the instant matter, the evidence submitted thus far by both parties indicates that it is unclear if defendant was on notice of the issue. The record provides, through Mr. Matos' deposition testimony and defendant's concession that Commercial Combustion Services was responsible for the boiler's maintenance and that there would not necessarily be a work order to track their maintenance work. Further, Mr. Matos does not recall if complaints were made, cannot recall the last time he checked the hot water with a thermometer in the three years before the accident, and had no procedure in place to ensure that the water coming into the residential apartments were within the 120 to 140 degree range.

Most significantly, plaintiffs' own deposition testimony and hospital records reflect that she suffered extreme burns as a result of the hot running water, which caused her pain and required various hospitalizations and a skin graft. Defendants have not provided evidence that such burns could result from hot water that was set to the correct temperature, nor have they provided evidence which conclusively proves that the temperature was set at 140 degrees, with small fluctuations. Rather, defendants provide the deposition testimony of a site manager, not from someone at Commercial Combustion Services or the superintendent, that he did not regularly check the temperature and had no procedure in place to ensure that the hot water temperature was properly set to comply with the administrative code. Mr. Matos' testimony that he does not recall complaints being made as to the hot water at the subject premises is insufficient to foreclose that complaints may have been made.

For all of the foregoing reasons, the Court finds that issues of fact remain as to the temperature setting of the boiler, whether Commercial Combustion Services or the building superintendent had notice of any problems or malfunction of the water temperature settings, whether any complaints were made by neighbors, and whether defendant is thereby liable for plaintiff's injuries.

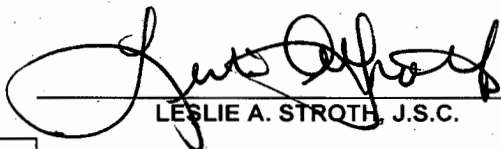
**III. Conclusion**

Accordingly, it is hereby

ORDERED that the motion of defendant 162 Broadway Associates, L.L.C. for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.

10/12/2023  
DATE

  
LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: