SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

X

JOSHUA MARTE,

Plaintiff,

-against-

URSULA AGOSTA and URSULA R. AGOSTA TRUST, dated March 22, 2012,

Defendants.

X

DECISION/ORDER

Index No. 507278/2019
Motion Seq. No. 2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion for summary judgment dismissing the complaint

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed……	38-50
Affirmation in Opposition and Exhibits Annexed.....	51
Reply Affirmation.....	53

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Defendants move, in motion sequence #2, for summary judgment dismissing the plaintiff's complaint pursuant to CPLR 3212.

This is an action for personal injury. Plaintiff claims he was employed by non-party NY Boiler & Air Conditioning Repair Corp. and on December 12, 2018 was lawfully upon the premises known as 226 Court Street, Brooklyn, NY, which was owned by defendants, when he was injured. He claims that defendants violated Labor Law §§ 240 (1), 241 (6), 200, and were also negligent under the common law in New York. In his Bill of Particulars, plaintiff claims he sustained injuries to both of his shoulders from this accident, as well as injuries to his lumbar spine, his thoracic spine, his cervical spine, his left leg/foot, and his right knee, as well as other injuries, including a burn, tinnitus, headaches and dizziness.

Defendants support their motion with the pleadings, counsel's affirmation in support, a memorandum of law, the EBT transcripts for the depositions of plaintiff and defendant Agosta's son, photographs, and a copy of the deed to the property, which indicates that it was recorded in Kings County, and that on April 26, 2012, Ursula Agosta transferred the title to the premises to "URSULA R. AGOSTA, Trustee, or her successors in trust, under the URSULA R. AGOSTA TRUST, dated March 22, 2012, and any amendments thereto." Defendants do not provide the court with a copy of the trust agreement.

On May 4, 2021, plaintiff was deposed virtually. He grew up in Queens and lives in the Bronx. When he finished high school, he went to Apex trade school for plumbing. Then he commenced his employment. At the time of the accident, he was employed by NY Boiler Repair. He was hired as a helper in the fall of 2018 [Doc 45 Page 29]. He was assigned to work with a mechanic named David. He would get the tools, clean, do whatever was needed to be his helper. Almost all of the buildings they serviced were residential.

On the day of the accident, they arrived at the premises at around 6:00 p.m. They were given their assignments on a cell phone app, which David would then be able to enter information into when they finished the job so their boss could generate a bill. This assignment was to clean the boiler. Plaintiff said that means "you get a brush, get a vacuum and you pretty much take the dust from inside the boiler" [*id.* Page 37]. Plaintiff and David went to the boiler room, then David told him what tools to get. He went upstairs to get them. He got the vacuum and brush from the truck and came back to the basement. David had forgotten something and had gone back upstairs. He did not get to the work site before the accident happened. He was walking in the basement to get to the boiler [*id.*

Page 59]. They had not started to work, and so had not turned off the boiler as yet. He did not know which of the two boilers they were going to work on. David was still upstairs. Plaintiff proceeded along and testified that a "corroded valve, it popped and I got burned" [*id.* Page 60]. He testified that he knew it was corroded because "it was like having a small leak in the bottom" [*id.* Page 84]. He was shown photos, but could not identify the location of the valve that he said had "popped". He said his eyeglasses were too scratched and he could not see the photos clearly. The attorneys tried enlarging the photos but it did not help. He said "I have to get new glasses" [*id.* Page 67]. Ultimately, he said that Exhibit C shown to him showed the location of his accident, but he could not identify the location of the valve that "popped" except to said it was at a height lower than his belly button. Then, he said the valve was visible on Exhibit E. Plaintiff said that he had learned that after his boss took him to the hospital, he had returned to the store and replaced this valve. He was burned by the hot water that came out of the valve. He testified that "When I got burned I jumped out of the way to get out from the burning hot water and as I was trying to go back, there was steam everywhere and I tripped over something and I fell to the wall" [*id.* Page 98].

On June 23, 2022, a deposition was held of Salvatore V. Agosta, Jr., by Zoom. The transcript is at Document 47. Plaintiff's attorney objected to his being produced, as the deposition was supposed to be of defendant Ursula Agosta. The deposition continued anyway. It does not appear that Ursula Agosta was ever deposed, as the note of issue has been filed.

Mr. Agosta testified that his mother is of sound mind, but he was more involved "in the operations of the building" [Document 47 Page 16]. He testified that he owns and

operates the business known as the Cobble Hill Cleaners and Laundry, located at the premises, which has been at that location since 2002. He testified that Ursula Agosta is his mother, and that she does not have an ownership interest in his business. The premises is a two-family mixed use property, and the cleaners and laundromat occupy the ground floor and the basement, with two apartments above. She transferred title to the Trust in 2012, and he does not know the reason she did so. He is at the premises five or six days a week to operate his business.

Mr. Agosta testified that the building has two boilers, one for the store and one for the apartments. They are both located in the basement. In 2018, the boiler for the apartments needed to be serviced, and his mother hired a company to do it. Asked why they were called, he said "there was an odor in the building because of something to do with the boiler" [*id.* Page 17]. His understanding was that the boiler needed to be "decarbonized." He did not witness the accident. He spoke to plaintiff after the accident while plaintiff was sitting in the van. He told Mr. Agosta he had been burned. Mr. Agosta asked him if he wanted to go to the emergency room or the urgent care center located next door to the store. Plaintiff said no.

Plaintiff commenced this action on April 2, 2019. The note of issue was filed on March 30, 2023. This motion timely followed.

Defendant Ursula Agosta's request that the action be dismissed against her

The first branch of the motion seeks an order dismissing the complaint against Ursula Agosta individually, on the grounds that she is not the property owner. Counsel does not provide one case in her memo of law which found that the settlor of a trust was entitled to this relief regardless of the type of trust she had transferred her real estate to.

Here, as the court cannot determine if the trust is revocable or not, or if it is a grantor trust or a nongrantor trust, this branch of the motion cannot be granted. Generally, a nongrantor trust is an irrevocable trust where the grantor does not retain any rights or benefits or dominion or control over the trust. A grantor trust, for U.S. income tax purposes, is a trust where the grantor does retain rights or benefits. In such trusts, which are also referred to as "pass through" trusts, the trust does not have its own taxpayer identification number and the income and deductions are taken by the grantor on his or her personal income tax return. As the trust is called the Ursula R. Agosta Trust, it certainly raises the question of whether the grantor has retained dominion and control over the trust such that it is not in fact a different owner of the property.

Further, the trust was not named correctly in the caption. The court has amended the caption below to reflect the name as recited on the deed. A trust has no capacity to sue or be sued. It cannot defend an action. The real party in interest in litigation is always the trustee (see 90A CJS Trusts § 575). This is because a trust is considered a legal fiction, and cannot sue or be sued itself (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127, 132, 50 NYS3d 13 [1st Dept 2017]). Instead, trustees, as representatives of the trust, act on behalf of the trust to bring a legal action, and can also be sued in situations where the trust may be liable (*Liveo v Hausman*, 61 Misc 3d 1043, 1044-1045 [Sup Ct, Kings County 2018] citing *Raymond Loubier Irrevocable Trust v Loubier*, 858 F3d 719, 722, 730 [2d Cir 2017]; *Natixis*, 149 AD3d at 132; and *Ronald Henry Land Trust v Sasmor*, 44 Misc 3d 51, 52, 990 NYS2d 767 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2014]).

Defendants' request to dismiss the complaint

The next branch of the motion seeks an order granting defendants summary judgment and dismissing the four causes of action asserted against them. First, defendants move to dismiss plaintiff's claim under Labor Law § 240 (1) as "the routine maintenance on the subject boiler in this case did not fall within the activities protected under §240(1)" [Doc 39 Page 10].

Labor Law § 240 (1) states, in relevant part, that:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed . . ."

The purpose of Labor Law § 240 (1) is to protect workers "from the pronounced risks arising from construction work site elevation differentials" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Consequently, Labor Law § 240 (1) applies to accidents and injuries that directly flow from the application of the force of gravity to an object or to the injured worker performing a protected task (*Gasques v State of New York*, 15 NY3d 869 [2010]; *Vislocky v City of New York*, 62 AD3d 785, 786 [2009], *lv dismissed* 13 NY3d 857 [2009]; *see also Ienco v RFD Second Ave., LLC*, 41 AD3d 537 [2007]; *Ortiz v Turner Constr. Co.*, 28 AD3d 627 [2006]; *Lacey v Turner Constr. Co.*, 275 AD2d 734, 735 [2000]; *Smith v Artco Indus. Laundries*, 222 AD2d 1028 [1995]). "Labor Law § 240 (1) provides special protection to those engaged in the 'erection, demolition, repairing, altering, painting, cleaning or pointing of a building

or structure'" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 880 [2003], quoting Labor Law § 240 [1]). Labor Law § 240 (1) applies where there is a "significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). The duty to provide the required "proper protection" against elevation-related risks is nondelegable; therefore, owners, contractors and their agents are liable for the violations even if they have not exercised supervision and control over either the subject work or the injured worker (*Zimmer v Chemung County Performing Arts, Inc.*, 65 NY2d 513, 521 [1985] [holding that owner or contractor is liable under Labor Law § 240 (1) "without regard to . . . care or lack of it"]).

Here, Labor Law § 240 (1) does not apply. Plaintiff was not engaged in any work where there was a "significant risk inherent in the particular task because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Nor was he involved in the "the erection, demolition, repairing, painting, cleaning or pointing of a building or structure" (*see Nicometi*, 25 NY3d at 99; *Schutt v Dynasty Transp. of Ohio, Inc.*, 203 AD3d 858, 861 [2d Dept 2022]). Thus, plaintiff cannot bring a claim under Labor Law § 240 (1) for this accident. Accordingly, the branch of defendants' motion which seeks to dismiss plaintiff's Labor Law § 240 (1) claim is granted, and this claim is dismissed.

Next, defendants move to dismiss plaintiff's claim under Labor Law § 241 (6). Labor Law § 241 states, in applicable part, as follows:

> "All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements: . . .

> "6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The commissioner may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith."

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to comply with the specific safety rules and regulations set forth in the Industrial Code in connection with construction, demolition or excavation work (*Ascencio v Briarcrest at Macy Manor, LLC*, 60 AD3d 606, 607 [2009], citing *Rizzuto,* 91 NY2d at 348; *Ross,*81 NY2d 5044, 501-502 [1993]; *Nagel v D & R Realty Corp.*, 99 NY2d 98, 102 [2002]; *Valdivia v Consolidated Resistance Co. of Am., Inc*., 54 AD3d 753, 754 [2008]).

Labor Law §§ 240 (1) and 241 (6) do not cover workers engaged in routine maintenance (*Esposito v NY City Indus. Dev. Agency*, 1 NY3d 526 [2003]). Here, plaintiff testified that the job was to clean the boiler. He was not engaged in any construction, excavation or demolition work. The protections of Labor Law 241 (6) are inapplicable outside of the context of construction, demolition or excavation (*Shea v Bloomberg, L.P.*, 124 AD3d 621 [2d Dept 2015]). Defendants make a prima facie case that the plaintiff was not a covered worker under this statute, and plaintiff does not overcome the motion and raise a triable issue of fact to the contrary. Therefore, the branch of defendants' motion which seeks to dismiss plaintiff's Labor Law § 241 (6) claim is granted, and this claim is dismissed.

Next, defendants move to dismiss plaintiff's claims under Labor Law § 200 and common law negligence. Defendants' counsel then asks "Alternatively, if the Court does

not dismiss the negligence and Labor Law §200 claims, Defendants are entitled to an Order granting them partial summary judgment on the issue of Plaintiff's negligence." This is because, counsel argues, "the sole proximate cause for plaintiff's injuries was his own negligence" [Doc 39 Page 3]. Specifically, counsel avers that "prior to his accident, the Plaintiff was aware that water was leaking from a valve on the boiler and that the valve was corroded. Despite this, he deliberately walked right past the leaking, corroded valve, choosing to ignore that there was a problem with the valve. As such, Plaintiff's negligence in deliberately ignoring this red flag, and passing by the valve," was the sole proximate cause of his injuries, and "not the valve itself" [Doc 39 Page 19].

Labor Law § 200 states, in applicable part:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment and devices in such places shall be so placed, operated, guarded and lighted as to provide reasonable and adequate protections to such persons."

Labor Law § 200 codifies the common-law duty of an owner, general contractor and their agents to provide workers with a safe place to work (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847, 850 [2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [1999]). This duty "applies to owners, contractors, or their agents who exercise control or supervision over the work, or either created the allegedly dangerous condition or had actual or constructive notice of it" (*Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000], citing *Russin v Picciano & Son*, 54 NY2d 311 [1981]; *Lombardi*, 80 NY2d at

294-295; *Jehle v Adams Hotel Assocs.*, 264 AD2d 354 [1999]; *Raposo v WAM Great Neck Assn. II*, 251 AD2d 392 [1998]; *Haghighi v Bailer*, 240 AD2d 368 [1997]). "An implicit precondition to this duty 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury'" (*Giambalvo v Chemical Bank*, 260 AD2d 432, 433 [1999], quoting *Comes*, 82 NY2d at 877 and *Russin*, 54 NY2d at 317). Labor Law § 200 and common-law negligence liability "will attach when the injury sustained was a result of an actual dangerous condition, and then only if the defendant exercised supervisory control over the work performed on the premises or had notice of the dangerous condition which produced the injury" (*Sprague v Peckham Materials Corp.*, 240 AD2d 392, 394 [1997], citing *Seaman v Chance Co.*, 197 AD2d 612 [1993]).

"Cases involving Labor Law § 200 generally fall into two categories: those where workers were injured as a result of dangerous or defective conditions at a worksite and those involving the manner in which the work was performed" (*Villada v 452 Fifth Owners, LLC*, 188 AD3d 1292, 1293 [2020], citing *Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008] and *Ortega v Puccia*, 57 AD3d 54, 61 [2008]). Under the "manner of work" analysis, "[l]iability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the work" that either was performed by plaintiff or which produced the injury (*Aranda v Park East Constr.*, 4 AD3d 315, 316 [2004], citing *Lombardi v Stout*, 80 NY2d 290, 295 [1992]).

The second category mirrors ordinary premises liability principles with respect to hazards "(w)here a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, an owner (or its agent) may be held liable in common-law negligence and under Labor Law § 200 if it had control

over the work site and either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" [*id.*].

Here, the accident arose from a hazardous premises condition, not from the means and methods of the plaintiff's work, which he had not even started. The court finds that defendants have not made out a prima facie case for summary judgment on these claims. Further, there is no merit to their sole proximate cause argument.

Where a premises condition is at issue, a property owner is liable under Labor Law § 200 when the owner either created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice. *Reyes v Arco Wentworth Mgt. Corp.,* 83 AD3d 47 [2011]; *Chowdhury,* 57 AD3d at 128; *Ortega*, 57 AD3d at 61; *Azad v 270 5th Realty Corp*., 46 AD3d 728, 730 [2007]; *see Slikas v Cyclone Realty LLC* , 78 AD3d 144, 147 [2010]; *Fusca v A & S Const., LLC*, 84 AD3d 1155 [2011]; *Barillaro v Beechwood RB Shorehaven, LLC*, 69 AD3d 543, 544 [2010]; *Colon v Bet Torah, Inc.*, 66 AD3d 731, 732 [2009]; *Aguilera*, 63 AD3d at 764; *Fuchs v Austin Mall Assoc., LLC*, 62 AD3d 746, 747 [2009]. "Moreover, if a reasonable inspection would have disclosed the dangerous condition, the failure to make such an inspection constitutes negligence and may make the owner liable for injuries proximately caused by the condition." *Colon*, 66 AD3d at 732; *White v Village of Port Chester*, 84 AD3d 946, 946 [2011]; *Astarita v Flintlock Constr. Servs., LLC*, 69 AD3d 888, 889 [2010]).

To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the owner to discover and remedy it. *Gordon v American Museum of Natural History,* 67 NY2d 836, 837; *Ruggiero v*

Waldbaums Supermarkets, 242 AD2d 268. Here, the valve was visibly leaking. Whether this should have been an indication that the valve might break off and cause scalding hot water to shoot out is not a question of law. It is for the finder of fact to decide, and for experts to opine on at the trial.

To be entitled to summary judgment in a case like the instant matter, a defendant is required to show that he or she maintained the premises in a reasonably safe condition and she did not have notice of, or create, a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises. *Villano v Strathmore Terrace Homeowners Assn., Inc.*, 76 AD3d 1061 [2d Dept 2010]. A property owner has no duty, however, to warn of a condition that is not inherently dangerous and/or is readily observable by the use of one's senses **(***Neiderbach v 7-Eleven, Inc.*, 56 AD3d 632, 633 [2d Dept 2008]). This condition was neither of these things. Nor was plaintiff's employer contacted to repair this condition. It is not clear whether the valve that "popped" was on the residential boiler they were going to clean, or on the boiler for the laundry.

It is black letter law that a property owner is subject to the common-law duty to take minimal precautions to protect visitors from foreseeable harm (See, *Jacqueline S. v City of New York*, 81 NY2d 288, 293-94 [1993]; *Feiner v Calvin Klein, Ltd*., 157 AD2d 501 [1st Dept 1990]; *Mercogliano v Sears, Roebuck & Co*., 303 AD2d 566 [2d Dept 2003]; *Duncan v Corbetta*, 178 AD2d 459 [2d Dept 1991]). "A property owner has a duty to keep the property 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 the risk' " (*Craig v Meadowbrook Pointe Homeowner's Assn., Inc.*, 158 AD3d 601, 602, 70 NYS3d 557 [2d Dept 2018], quoting *Basso v Miller*, 40 NY2d 233, 241, 352 NE2d 868, 386

NYS2d 564 [1976]).

Defendants here have not provided any evidence which proves, as a matter of law, that they were not negligent herein. As such, defendants have failed to make out a prima facie case for dismissal of the Labor Law 200 and common law negligence claims (see *Reyes v Arco Wentworth Management Corp.,* 83 AD3d 47, 52-53 [2d Dept 2011]; *Reilly-Geiger v Dougherty,* 85 AD3d 1000, 1000-1001 [2d Dept 2011]; *Slikas v Cyclone Realty, LLC,* 78 AD3d 144, 149-150 [2d Dept 2010]). Specifically, defendants do not provide any evidence about when the accident site or the boiler was last cleaned or inspected prior to the accident (*Mavis v Rexcorp Realty, LLC*, 143 AD3d 678, 679, 39 NYS3d 190 [2d Dept 2016]). Thus, the court need not address the plaintiff's papers in opposition. In any event, the only opposition provided is an attorneys' affirmation.

In conclusion, the defendants have not established that there are no triable issues of fact regarding the question of whether defendants were negligent. *Mooney v Petro Inc*., 51 AD3d 746, 747 [2d Dept 2008]; *Barberio v Agramunt*, 45 AD3d 514, 515 [2d Dept 2007]. As a result, summary judgment is not warranted (see *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

With regard to defendants' claim that these causes of action should be dismissed as plaintiff was the sole proximate cause of his injuries, this claim lacks merit. When a defendant seeks such relief, it must be established that the defendant does not bear even one percent of fault for the happening of the accident. The court cannot make that finding here (see *Zong Wang Yang v City of NY*, 207 AD3d 791 [2d Dept 2022]; *Tukshaitov v Young Men's & Women's Hebrew Assn.*, 180 AD3d 1101 [2d Dept 2020]).

Accordingly, it is

ORDERED that defendants' motion for summary judgment dismissing the complaint as against Ursula Agosta individually is denied; and it is further

ORDERED that defendants' motion for summary judgment dismissing plaintiff's Labor Law § 240 (1) and 241 (6) claims against defendants is granted; and it is further

ORDERED that defendants' motion for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims against defendants is denied; and it is further

ORDERED that the caption is amended to reflect the proper manner to name a trustee as a defendant, as follows:

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JOSHUA MARTE,

Plaintiff,

-against-

URSULA AGOSTA and URSULA R. AGOSTA, Trustee, under the URSULA R. AGOSTA TRUST, dated March 22, 2012, and any amendments thereto,

Defendants.

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This constitutes the decision and order of the court.

Dated: December 11, 2023

ENTER:

Hon. Debra Silber, J.S.C.