

**Mitura v Szymckzakowski**

2018 NY Slip Op 33721(U)

September 27, 2018

Supreme Court, Westchester County

Docket Number: Index No. 55123/2016

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
STEPHANIE MITURA,

Plaintiff,

-against-

STACEY SZYMCKZAKOWSKI and ALL TEMP  
MECHANICAL CORP.,

Defendant.

-----X  
RUDERMAN, J.

DECISION AND ORDER

Index No. 55123/2016  
Sequence Nos. 1 & 2

The Court has considered the following papers on (1) the motion by defendant All Temp Mechanical Corp. (hereinafter "All Temp") for an order granting it summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims against it (sequence 1), and (2) plaintiff Stephanie Mitura's cross-motion for an order granting her summary judgment pursuant to CPLR 3212 on the issue of liability against both defendants (sequence 2):

<u>Papers</u>	<u>Numbered</u>
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BACKGROUND/FACTUAL ALLEGATIONS

This is an action for personal injuries allegedly sustained by plaintiff, Stephanie Mitura as a result of carbon monoxide exposure on or before December 29, 2015, while she was a tenant at premises located at 232 Warren Avenue, Hawthorne, New York owned by the defendant, Stacey

Szymckzakowski.

Plaintiff commenced this action by filing a summons and complaint on April 19, 2016, naming Szymckzakowski as the defendant. Szymckzakowski served an answer dated August 9, 2016. On July 6, 2017, plaintiff served an amended summons and complaint adding All Temp Mechanical Corp. as a defendant. All Temp filed an answer on August 3, 2017, denying the material allegations of the amended complaint and asserting a cross-claim against Szymckzakowski. Szymckzakowski answered the Amended Complaint on August 14, 2017, denying plaintiff's material allegations and asserting a cross-claim against All Temp.

Plaintiff's amended complaint contains four causes of action. The first cause of action sounds in negligence against Szymckzakowski; the second cause of action alleges that Szymckzakowski breached the implied warranty of habitability with respect to the premises; the third cause of action asserts the doctrine of *res ipsa loquitur*; the fourth cause of action sounds in negligence against All Temp. Plaintiff's motion addresses solely the causes of action sounding in negligence against defendants All Temp and Szymckzakowski and does not address either the breach of habitability claim or the claim sounding in *res ipsa loquitur*. Accordingly, the Court will not address those claims.

The amended complaint asserts that Szymckzakowski, as the owner of 232 Warren Avenue, Hawthorne, New York, entered into a lease agreement with plaintiff on or about May 1, 2014. The complaint states that prior to December 29, 2015, Szymckzakowski (by her employees, agents or assigns) made improvements to the basement of the premises where the heating system and water tank are located and where plaintiff (ultimately) maintained her bedroom, in an area adjacent to the heating and hot water tank. As a result of the improvements

to the heating system and hot water tank on or before December 29, 2015, carbon monoxide fumes allegedly accumulated in plaintiff's bedroom causing serious personal injury from carbon monoxide poisoning.

Plaintiff seeks summary judgment against both defendants on the issue of liability. With respect to defendant Szymckzakowski, plaintiff asserts she is liable for plaintiff's injuries because she was aware that the water heater at the premises was in a defective condition. As to All Temp, plaintiff asserts that the company breached its duty to plaintiff by negligently performing its work in installing a water heater on March 5, 2015.

#### EBT Testimony of Plaintiff Stephanie Mitura

Plaintiff, Stephanie Mitura, testified at her deposition that she moved to the premises at 232 Warren Avenue, Hawthorne, New York in May, 2014 with her husband, Edward, and her three daughters Celeste, Taylor and Haley, and remained there until March 2016; in September 2014 her husband vacated the premises due to their separation. Neither she nor her husband repaired any of the appliances or equipment in the premises.

Plaintiff testified that at some point subsequent to her husband's departure, the hot water heater needed repair, although she could not recall the date. She explained that the hot water heater and boiler were in a utility room off of the finished basement, and that the hot water heater had begun to hiss, leak and flood the room. Upon discovering the leak, she immediately turned off the emergency valve, which stopped the leaking, and called Szymckzakowski. After a discussion about the leak, it was agreed that both Plaintiff and Szymckzakowski would make efforts to find a plumber to make the repair the next morning, as it was already late in the day.

According to plaintiff's testimony, the next day she telephoned Szymckzakowski with the name of a plumber, to whom she had been referred by a patient in the office where she worked. She stated that while she did not recollect the plumber's name or company name, she was certain that he performed the work. Plaintiff testified she had no conversations with Mr. Sorino after the installation of the new water heater and that it "worked fine ..." (i.e., produced hot water).

Plaintiff was shown an invoice dated March 5, 2015 from All Temp. She indicated that the invoice did not refresh her recollection as to the name of the company or the date of service. She stated she was not present at the time of the repair, but that her daughter, Celeste, was at home. She testified that when she returned home she saw that a new hot water heater had been installed.

Plaintiff testified she was first made aware of her exposure to carbon monoxide when she went to the hospital after an inspection was performed by Con Edison on December 27, 2015, nine months after the installation of the new water heater. She stated that a representative from Con Edison told her that a valve was leaking and that they needed to check the other equipment in the basement adjacent to her bedroom. The Con Edison representative told plaintiff that the house had to be "shut down" and that she should go to the hospital to be evaluated for carbon monoxide exposure. Plaintiff testified that her daughter, Celeste, took her to the Westchester County Medical Center. Plaintiff's husband picked up the parties' younger children and removed them from the Hawthorne premises. Plaintiff was admitted to the hospital for treatment for three days; she was given oxygen and placed in a hyperbaric chamber. Her children, who did not sleep in the basement, experienced no discomfort and received no treatment.

Plaintiff recalled having had "flu like" symptoms in November, 2015. She did not see a

doctor until she went to the hospital on December 27, 2015 at the direction of Con Edison.

Plaintiff testified that for a period of time after her injuries she was unable to work; she estimated the period to be from January 2016 to April 2016.

After plaintiff's release from the hospital, Con Edison returned to the property to restore services; additionally, "Rob" from R & R Heating & Cooling, Inc. (hereinafter "R & R") was hired to address a lack of heat.

#### EBT Testimony of Defendant Stacey Szymckzakowski

Defendant Szymckzakowski testified at her deposition that she purchased the premises of 232 Warren Avenue, Hawthorne, New York in October 2006. At the time she purchased the property, the basement was not finished, but rather, was an open space containing a washer, dryer, toilet and heating equipment. Szymckzakowski explained that she modified the basement by installing insulation, waterproofing, a shower, replacing the sink, changing light fixtures, putting up walls to divide the space, painting, and installing a closet organizer. She did much of the work herself and used friends and family to perform work in order to save money. She did not obtain approval from the Town with respect to the work. Prior to Plaintiff's tenancy, Szymckzakowski replaced the hot water heater without first obtaining a plumbing permit.

Prior to plaintiff's tenancy, Szymckzakowski had a conversation with Rob LaScalia of R & R Heating and Cooling, Inc. regarding the ventilation system, and that he told her that "the guy who did it didn't do it to code but that I didn't have anything to worry about. . . . He told me that when his work dried up and he needed money he would call me and he would make it to code." However, she did not take any steps to bring the ventilation system up to code, but rather,

left it the way it was for years, believing that the problem was “not a big deal.”

With respect to the installation of the new hot water heater by All Temp after a complaint from plaintiff of a leak, Szymckzakowski testified that before All Temp did any work they spoke to her for authorization. She testified that Mr. Mitura, plaintiff’s husband, paid All Temp’s bill and deducted the sum for the work from the rent owed to Szymckzakowski. Thereafter, Szymckzakowski received an invoice from All Temp with the following notation, although she stated she does not recall if she read it:

“Note: Direct venting controls were never operational when was installed as previous, we will send additional proposal for field control assembly and installation.”

Szymckzakowski did not follow up with respect to the note on the invoice and did not receive anything further from All Temp.

Szymckzakowski testified that shortly after Christmas, plaintiff informed her that Con Edison employees were at the house to address a leak and that they required access to the meters behind the basement wall. She was informed that plaintiff needed to go to the hospital to be checked for carbon monoxide exposure. Thereafter, the Town of Mt. Pleasant issued violations, and ultimately R&R was hired to correct the problem. On January 3, 2016, R&R replaced the power venter for the boiler and water heater, and relocated the new power venter outlet to discharge out the side of the house, instead of under the deck.

EBT Testimony of Luigi Christopher Serino of All Temp Mechanical Corp.

Luigi Serino, the President of All Temp, a heating, ventilation and air conditioning business, testified that All Temp was contacted regarding the water heater for the premises at 232

Warren Avenue in February or March, 2015. He testified that there were no controls on the power venter hooked up to the old water heater, that the power venter was inoperable, and the wires were dangling. A power venter removes carbon monoxide to the outdoors, via a fan.

Serino testified he informed plaintiff of the condition and that it could cause a back up of carbon monoxide. Plaintiff stated she would speak to Szymckzakowski. Serino testified he was unable to hook up the controls for the power venter, stating:

“There’s no way to get field controls in that time frame, everything was closed and you have to get approval from the landlord or whatever, plus everything was closed that day.”

Serino stated that plaintiff, and not Szyckzakowski, authorized the work and paid him. He installed a new hot water heater, made it operational, and acknowledged not connecting it to a power venter. He was aware that the failure to connect the hot water heater to an operable power venter could cause carbon monoxide to back up into the living space. He testified he alerted plaintiff that the power venter was not working and that as a result, carbon monoxide could back up into her bedroom.

Serino identified the invoice that he prepared the next day relating to the work. He pointed out that the invoice contained a note indicating that the direct venting controls were not operational and that a proposal would be forthcoming. He stated he sent a proposal to plaintiff, but does not have a copy because he discards them after a year.

Affidavit of David Caggiano, Professional Engineer

In opposition to the motion by All Temp for summary judgment, and in support of her motion for summary judgment against defendants on liability, plaintiff submitted an affidavit of



David Caggiano, a licensed mechanical engineer, registered in the State of New York as a Professional Engineer. He holds a Bachelors degree in Electrical Engineering from SUNY Maritime College and has worked as an engineer for two boiler manufacturers, in the design, testing, operation and installation of natural gas appliances including water heaters and boilers.

Caggiano reviewed various documents in connection with the repair of the water heater at the premises including, *inter alia*, the deposition testimony of Luigi Serino and All Temp's invoice for work performed on March 5, 2015. Upon review of the documents and a recitation of industry standards, Caggiano provided certain findings, made to a reasonable degree of engineering certainty, that:

- a) All Temp departed from good and accepted engineering practices by locating the hot water heater in a confined space which resulted in incomplete combustion and increased the amount of carbon monoxide produced.
- b) All Temp departed from good and accepted engineering practices by improperly venting the hot water heater which increased the risk of discharging the carbon monoxide into a living space.
- c) An improperly vented gas fired appliance with insufficient combustion is a dangerous condition.
- d) All Temp departed from good and accepted engineering practices by creating a dangerous condition by installing and placing into operation a water heater that was not connected to a safe and code compliant venting system.
- e) All Temp knew or should have known the venting system for the water heater and boiler was unsafe without the power venter operational and could cause exhaust gas containing carbon monoxide to enter the house.
- f) All Temp knew or should have known that not having an operational power venter in the venting system was a code violation and created a dangerous condition.
- g) All Temp knew or should have known that the boiler and water heater were located in a confined space and should have had openings in the space to connect

either to the outside and/or the basement area to provide sufficient combustion air to satisfy the code and safety standards.

- h) All Temp departed from good and accepted engineering practices by failing to "Red tag" the water heater and boiler until the power venter could be replaced and made operational and properly sized combustion air openings in the mechanical closet could be installed.
- i) All Temp knew or should have known a plumbing permit from the Town of Mount Pleasant was required to install a gas water heater.
- j) All Temp knew or should have known a plumbing license was required to install a gas water heater within the Town of Mount Pleasant.
- k) All Temp departed from good and accepted engineering practices by failing to obtain a permit to install the water heater.
- l) All Temp departed from good and accepted engineering practices by installing a water heater without a permit or a plumbing license.
- m) Failure to obtain a permit denied Mitura the protection afforded from the inspection by the code official.
- n) The departures from good and accepted engineering practices and the above cited failures by All Temp are the proximate cause of Plaintiff's injuries.

#### ANALYSIS

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court to direct judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003] [citing *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]]). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers (*Lacagnino v Gonzalez*, 306 AD2d 250 [2d Dept 2003]). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in

admissible form demonstrating material questions of fact requiring trial (*Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124 [2000]).

Plaintiff has made a prima facie showing of entitlement to judgment against the defendants on the issue of liability as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. It is well established that a landlord has a duty to exercise reasonable care to maintain his or her property in a safe condition (*Kush v City of Buffalo*, 59 NY2d 26, 29-30 [1983]; *Basso v Miller*, 40 NY2d 233 [1976]). As the owner of the premises, Szyckzakowski owed plaintiff a duty of reasonable care. She does not dispute that the ventilation system for the property leased to plaintiff and her family was defective, and there is also no dispute that the defective ventilation system was the proximate cause of plaintiff's carbon monoxide exposure.

Szyckzkowski cannot effectively dispute having notice of a hazardous condition from two separate sources prior to the incident which gave rise to plaintiff's injuries and, yet, failed to act to remediate the situation. Specifically, Szyckzakowski admitted that she refinished the basement of the premises leased to plaintiff and her family without obtaining any approvals for the work, and by performing the work herself and with the help of family and friends. Prior to plaintiff's tenancy, Szyckzakowski had notice of a defective condition with respect to the ventilation system. She first received notice of the defect as a result of her conversation with Rob LaScalia of R&R Plumbing during which he informed her that the ventilation system was not up to code.

Szyckzakowski next received notice of the defective ventilation system when All Temp replaced the hot water heater. Regardless of whether she learned of it from a brief conversation

with Serino of All Temp after he did the work or from plaintiff conveying the problem to her after speaking with Serino, it is established that Szyckzakowski was on notice that the new water heater was not hooked up to a power venter to prevent carbon monoxide build up. Furthermore, the fact was conveyed to Szyckzakowski on the invoice she received from All Temp.

Szyckzakowski nevertheless took no steps to address the condition prior to plaintiff sustaining injuries in December 2015. Having actual notice of the condition, Szyckzakowski breached her duty to exercise reasonable care to maintain her property in a safe condition and to prevent carbon monoxide from accumulating in the basement where plaintiff maintained her bedroom.

In response, Szyckzakowski failed to meet her burden of opposing the motion with evidentiary proof in admissible form demonstrating material questions of fact requiring a trial. She cannot validly claim that she had no notice of the defective condition of the ventilation system, and there is no merit to the argument that she has no liability because it was plaintiff who was financially responsible to repair, maintain, and/or replace Szyckzakowski's ventilation system. The latter argument improperly seeks to shift to plaintiff the obligation to maintain reasonably safe premises.

Defendant All Temp similarly failed to meet its burden in opposing plaintiff's motion. Serino, President of All Temp, testified he received authorization to install a new hot water heater at the premises and that the water heater, together with the boiler, was vented through the use of a power venter which was inoperable. Nevertheless, Serino installed the new water heater, rendered it operational, and acknowledged he did not connect it to a working power venter. Serino was aware that the failure to connect the hot water heater to an operable power venter could cause carbon monoxide to back up into the living space, and asserts that he alerted plaintiff

that carbon monoxide could back up into her bedroom.

Significantly, All Temp did not refute any of the allegations of plaintiff's expert, David Caggiano, detailing, with the requisite certainty for his opinions to be admissible, numerous failures and departures from good and accepted engineering practices with which All Temp was obligated to comply but did not. Consequently, All Temp is liable to plaintiff for negligence.

All Temp's motion for summary judgment dismissing all claims against it relies solely on *Espinal v Melville Snow Contrs.* (98 NY2d 136 [2002]), in which the Court articulated a framework for determining how far a contractor's duty extends to third parties when the contractor is negligent in the performance of a contractual obligation. The *Espinal* Court held that contractors, when performing contracts negligently, do not have a duty to an unlimited and unknown number of potential third party plaintiffs. Rather, if plaintiff is neither the contracting party nor a third party beneficiary of the contract, liability will be imposed only under certain conditions.

However, the *Espinal* case is inapposite. Either All Temp contracted directly with plaintiff to replace the hot water heater, or, alternatively, at a minimum, plaintiff was the known third-party beneficiary of the contract whose sole purpose was to provide hot water to the plaintiff and her family (*see Kotchina v Luna Park Hous. Corp.*, 27 AD3d 696, 696 [2d Dept 2006]). The nature and type of services provided by All Temp, purportedly professionals in the field of ventilation and heating, created a duty to all intended occupants of the premises. Accordingly, *Espinal* does not apply, and as a matter of law All Temp is responsible to plaintiff for its negligence in its defective installation of the water heater.

In light of the foregoing, it is hereby

ORDERED, that All-Temp's motion (sequence 1) to dismiss the complaint pursuant to CPLR 3212 and dismissing all cross claims as against All Temp is denied; and it is further

ORDERED, that plaintiff's cross-motion (sequence 2) for summary judgment pursuant to CPLR 3212 on the issue of liability against Defendants is granted, with any issues of apportionment between the liable defendants to be tried prior to any damages trial; and it is further

ORDERED that the parties are directed to appear on Tuesday, November 20, 2018 at 9:15 a.m., in the Settlement Conference Part, room 1600 of the Westchester County Courthouse located at 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
September 27, 2018

  
HON. TERRY JANE RUDERMAN, JSC