To commence the statutory time period 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.

Disp _x__ Dec ___ Seq. Nos. __2-3__ Type _SJ__

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

EDWIN FLORES and BRENDA TORRES,

Plaintiffs,

-against-

COMMUNITY HOUSING MANAGEMENT CORP.,

Defendant.

----------x

COMMUNITY HOUSING MANAGEMENT CORP.

Third-Party Plaintiff,

-against-

PEAK PERFORMANCE AND SERVICE, INC.,

Third-Party Defendant.

----------x

Index No. 51288/2017

DECISION AND ORDER

The following papers numbered 1 to 5 were read on these motions:

Paper	Number
Notice of Motion, Affirmation and Exhibits	1
Notice of Motion, Affirmation and Exhibits	2
Affirmation in Opposition	3
Reply Affirmation	4
Reply Affirmation	5

There are two motions for summary judgment in this Labor Law and negligence case. The first motion was filed by Community Housing Management Corp. ("Community"). The second is filed by Peak Performance and Service, Inc. ("Peak"). At the outset, the

Court points out that plaintiffs do not object to the dismissal of the claims arising under Labor Law §§ 200 and 241(6). Those causes of action are thus dismissed. That leaves only the negligence and Labor Law § 240 claims.

The Facts

The facts are undisputed. Plaintiff Flores was the superintendent of a residential property owned by non-party Stuhr Gardens, LLC ("Stuhr"). Defendant Community manages the property. The president and sole owner of Community, Eugene Conroy, and Cynthia Apicella, an employee of Community and the property manager for Stuhr, hired plaintiff to work as the superintendent. Plaintiff reported to Apicella, but he was paid by Stuhr.

Community and Peak had a contract in which Peak, a boiler service and repair contractor, was to maintain and repair the boilers at Stuhr. It was a flat-fee contract, meaning that if plaintiff called Peak for a repair, the only charge would be for the cost if a part was needed.

On the day of the accident, Apicella told plaintiff that there was a problem in a boiler room, and told him to fix it. There is no dispute that plaintiff did not call Peak (although it is unclear as to whether this was because Apicella told him not to, or because plaintiff chose not to). When he got to the boiler room, plaintiff saw that there was water on the floor, and

that the hot water pump was leaking. He took the materials he needed, including a ladder, and proceeded to replace the part. Plaintiff testified at his deposition that he slipped on the ladder, and fell. He did not know what caused the fall. Although asked repeatedly, plaintiff was quite sure that he did not know what caused him to slip and fall. He had been up and down the ladder several times, removing the old pump and getting the new one. Plaintiff testified that he did not notice the ladder shaking or wobbling, but that since there was water on the floor, there could have been water on the ladder. Plaintiff also testified that he had to lean off the ladder in an awkward position in order to reach the area of the pipes.

This was not the first time that plaintiff had done this sort of work. Plaintiff testified that he had replaced this sort of equipment probably more than five times. Plaintiff further testified that replacement of the pump would be routine maintenance. Plaintiff also testified that there was no construction going on at the premises at the time of his accident.

Analysis

It is well-settled that

> 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the

> motion, regardless of the sufficiency of the opposing papers. 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.

Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986).

The Court begins with the claims arising under Labor Law § 240(1).

This section provides, in relevant part, that

> All contractors and owners and their agents . . . in the erection, demolition, repairing . . . 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.

As the Court of Appeals has held, "Throughout our section 240(1) jurisprudence we have stressed two points in applying the doctrine of strict (or absolute) liability. First, that liability is contingent on a statutory violation and proximate cause . . . violation of the statute alone is not enough; plaintiff is obligated to show that the violation was a contributing cause of his fall, and second, that when those elements are established, contributory negligence cannot defeat the plaintiff's claim." *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003) (quotations and citation omitted). The Court went on to note that "an accident

alone does not establish a Labor Law § 240(1) violation or causation" because some times "the plaintiff is solely to blame for the injury."

In this case, the Court first examines whether what plaintiff was doing at the time of his accident constitutes "repairing" as set forth above. This is a paramount consideration, because while repairs are covered by the statute, "routine maintenance" is not. *Tserpelis v. Tamares Real Estate Holdings, Inc.*, 147 A.D.3d 1001, 1002, 47 N.Y.S.3d 131, 132 (2d Dept. 2017). "In determining whether a particular activity constitutes 'repairing,' courts are careful to distinguish between repairs and routine maintenance, the latter falling outside the scope of section 240(1). Generally, courts have held that work constitutes routine maintenance where the work involves **replacing components that require replacement in the course of normal wear and tear.**" *Ferrigno v. Jaghab, Jaghab & Jaghab, P.C.*, 152 A.D.3d 650 (2d Dept. 2017) (Emphasis added).

The key distinction here is whether the boiler was still functioning at the time of the replacement of the part. As the Second Department has explained, "The replacement of a worn-out component in an operable piece of machinery constitutes "routine maintenance" rather than "repair" or "alteration," and thus falls outside the protective scope of Labor Law § 240(1). *Gonzalez v. Woodbourne Arboretum, Inc.*, 100 A.D.3d 694, 697, 954

N.Y.S.2d 113, 116 (2d Dept. 2012). This is precisely what occurred in this case. Although it was leaking, the boiler was still working at the time; indeed, plaintiff testified that it was very hot in the room at the time of the accident. All that plaintiff did was determine that a part had to be replaced, and proceed to do it (until he had the accident). This is simply routine maintenance, as the Court of Appeals has defined it. *See, e.g., Abbatiello v. Lancaster Studio Assocs.*, 3 N.Y.3d 46, 53 (2004) ("plaintiff determined that the cause of the defective signal was water in the tap, a common problem caused by rainwater accumulating in junction boxes affixed to building exteriors. The remedy would have been to loosen a few screws and drain the water from the tap and, if worn out, replace the tap. These activities constitute routine maintenance and not repair as contemplated by Labor Law § 240(1)."); *Esposito v. New York City Indus. Dev. Agency*, 1 N.Y.3d 526, 528 (2003) ("When checking the 22nd floor unit, plaintiff discovered a low amperage reading and heavy vibrations. The motor appeared worn and loose, and the belts were chewed up. He left and returned with tools and parts needed to fix the machine. As he climbed a ladder and began to remove the unit's cover a second time, the bottom of the ladder 'kicked out' and he fell.").

Even if plaintiff were engaged in covered repair work, he would still not have a Labor Law § 240(1) claim. Plaintiff has

not established, and cannot establish, that any problem with the adequacy of the ladder or a missing safety device caused his fall. This is because plaintiff has no idea what caused him to fall from the ladder; it is entirely possible that plaintiff caused the fall himself, either from his unusual position on the ladder or because his shoes and the ladder were wet. "To sustain a cause of action under section 240(1), the plaintiff must establish that the defendant breached the statutory duty to provide a worker with adequate safety devices, and this breach must proximately cause the worker's injuries." *Kipp v. Marinus Homes, Inc.*, 162 A.D.3d 1673, 1674-75, 79 N.Y.S.3d 800, 802 (4th Dept.), *lv. to app. den.*, 32 N.Y.3d 911 (2018). Since here plaintiff does not know what caused him to fall, he cannot establish the proximate cause, as a matter of law. Accordingly, the Court finds that plaintiff's claims are thus not covered by Labor Law § 240(1). This cause of action is thus dismissed.

Turning next to Peak's motion, Peak establishes, without contradiction, that it did not create any dangerous condition in the boiler room, or have actual or constructive knowledge of any hazard in the boiler room. *Cruceta v. Funnel Equities, Inc.*, 18 A.D.3d 693, 694, 795 N.Y.S.2d 728, 729 (2 Dept. 2005) (to establish liability, "plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the

condition.). Peak's motion is thus granted in its entirety, and the third-party complaint is dismissed.

Similarly, to the extent that the first cause of action purports to assert a negligence claim against Community, it also must be dismissed. Plaintiff cannot establish that Community created any dangerous condition or had any knowledge, actual or constructive, of any dangerous condition. *Fink v. Bd. of Educ. of City of N.Y.*, 117 A.D.2d 704, 705, 498 N.Y.S.2d 440, 441 (2d Dept. 1986) ("The plaintiffs failed to show that the defendant created the condition, therefore they had to establish actual or constructive notice as an element of their prima facie case. The plaintiffs failed to present probative evidence as to the defendant's actual or constructive notice of the allegedly dangerous condition; therefore the dismissal of the complaint was proper.").

Community also argues that plaintiff's claims against it are barred because of the Worker's Compensation award he received. Community asserts that although he was employed by Stuhr, Community was a "special employer" because it was the one that controlled all of his work, and that as a result, plaintiff may not seek damages from it. "When an employee elects to receive workers' compensation benefits from his general employer, a special employer is shielded from an action at law commenced by the employee. A special employee is described as 'one who is

transferred for a limited time of whatever duration to the service of another. Principal factors in determining the existence of a special employment relationship include who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business. The key to the determination is who controls and directs the manner, details and ultimate result of the employee's work." *Ugijanin v. 2 W. 45th St. Joint Venture*, 43 A.D.3d 911, 912-13, 841 N.Y.S.2d 611, 613 (2d Dept. 2007). Here, it appears that plaintiff was a special employee of Community, which appears to have controlled everything that occurred at Stuhr. In any event, as the Court has dismissed all of plaintiff's claims for other reasons, the action must be dismissed in its entirety.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
May 21, 2019

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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